



## Prevention of Conflict of Interest Situations in Public Administration

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### Abstract

*In the last two decades in our country have been undertaken a series of policies to draft the necessary legislation to prevent and combat the phenomenon of conflict of interest as a tool to fight corruption and strengthen the integrity of institutions in the country. These policies for drafting the necessary legislation to address the conflict of interest are a requirement for the challenges of building the rule of law, an efficient and professional administration in the service of citizens and our country's obligations to the European integration process and membership in international organizations such as Council of Europe and United Nations. Legislation has changed continuously in recent years in an effort to adapt to the problems that have arisen during its implementation in practice. These efforts have materialized with the adoption of an entire legal and procedural framework. A comprehensive reform has also been made in the training and preparation of professional human capacities, for the responsible implementation of the law in this stage. The concept of continuous conflict of interest is the situation in which a conflict of interest may recur repeatedly and/or frequently in the future. Legislation for the prevention of conflict of interest has provided the obligation of every official to take active and effective measures, at the most effective time to avoid conflict of interest situations. However, the impact of all these efforts has not been sufficient and effective and the conflict of interest remains a complex challenge and issue to be addressed and resolved.*

**Keywords:** conflict of interest, continuous, administration, public, prevention

## 1. Introduction

### 1.1 Addressing the conflict of interest in Albania, a condition of the rule of law

In the reports of the European Union Commission for the fulfillment of the obligations of the Stabilization and Association Agreement (SAA) for Albania, various problems arose for Albanian state in practice and in the legal framework, as well as the reforms to be taken are recommended by institutional actors for their implementation. One of the shortcomings identified in relation to public administration was the phenomenon of political appointments and cases of nepotism in many segments of central and local administration, at all levels. It was also been ascertained that the impact of pressure exerted by civil society and other national and international institutional actors continued to be weak and the government's efforts to support its development were insufficient for the required results.

The reports assess some efforts by the Albanian state to strengthen its public administration, but nevertheless they remain weak, in part due to insufficient implementation of the legislative framework related to public administration, cases of political corruption, interference and difficulties by central institutions of public administration to defend positions from

the government<sup>30</sup>.

### 1.2 The notion of conflict of interest in current legislation

The definition of the notion of "conflict of interest" in the current Albanian legislation is provided in Law No. 9637 dated 07.04.2005 "On the prevention of conflict of interest in the exercise of public functions (amended), Article 3/1 of which provides as a situation of conflict between public duty and private interests of an official, in which he has private interests, direct or indirect, that affect, may influence or appear to influence the improper performance of his or her public duties and responsibilities<sup>31</sup>.

So, in relation to the definition given for this notion in the previous law analyzed in the above point, there is an extension of it, where it stands out:

Increasing the definition of conflict of interest, in addition to having direct personal interests, also having indirect personal interests.

In order to be involved in a conflict of personal interest, circumstances must be verified that link a public official's interest to the situation in which he or she is to exercise his or her official functions, which may or not be final decision-making, and which may affect the unjust performance of his official duties and responsibilities.

In this provision is considered as cases of conflict of interest also the existence of an indirect interest, but such that it can have an impact on the exercise of public duty. Such cases are those when private interests, which may be of economic-financial, political, religious nature, etc., are not directly related to the official himself but to his relatives.

These cases are related to the notion of factual conflict of interest as the situation in which the private interests of the official affect, have influenced or may have influenced the improper performance of his official duties and responsibilities<sup>32</sup>. So we refer to cases where the situation of conflict of interest exists and is proven, or from the circumstances of the fact could be verified.

The law also recognizes the notion of potential conflict of interest, and links it to the situation in which the official interests may cause, in the future, the emergence of factual or apparent conflict of interest, if the official were to be involved in duties or certain responsibilities<sup>33</sup>.

So in this case, we would not be in front of a situation already proven, but we refer to the situation where there is not yet a genuine conflict of interest, in the terms that the link between the interest of the person and his function is not yet present, but for due to factual circumstances (which are analyzed case by case) potentially conflict of interest conditions can be created, thus resulting in unfair decision making.

A case of conflict of interest, the appearance as if affects the performance of duties is the situation in which the private interests of the official appear, in appearance or form, as if they have influenced, affect or may affect the improper performance of duties or responsibilities, but in fact, the impact has not happened, does not happen or is not likely to happen<sup>34</sup>.

So, in these cases, the concrete existence of no special interest has been identified that could affect the exercise of duty, but it is simply "possible". These are also the cases that in practice are the most difficult to identify, and consequently to prevent.

Such a provision is included in the law because the exercise of public functions should not only be done in accordance with the law, but should also create the public perception that it is performed in this way, within the principle of transparency, as one of the basic principles of public administration.

To identify situations of such a conflict of interest, it is necessary to conduct a detailed analysis of the situation, in order to verify any suspicion that falls on the person involved in the situation.

### 1.3 Case by case conflict of interest

Conflict of interest in the exercise of duty can occur in any of the types: factual, probable or apparent, and in cases where it occurs in connection with a particular decision-making, the law has determined that will be treated according to the

<sup>30</sup> Raporti i Stabilizim Asociimit për Shqipërië i Komisionit të Komunitetit Europian, [https://www.parlament.al/Files/Integrimi/2003\\_progress\\_report\\_en\\_23382\\_1.pdf](https://www.parlament.al/Files/Integrimi/2003_progress_report_en_23382_1.pdf)

<sup>31</sup> Ligji nr. 9637 datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike (i ndryshuar), neni 3/1

<sup>32</sup> Ligji nr. 9637 datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike (i ndryshuar), neni 3/4/a

<sup>33</sup> Ligji nr. 9637 datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike (i ndryshuar), neni 3/4/c

<sup>34</sup> Ligji nr. 9637 datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike (i ndryshuar), neni 3/4/b

provisions treating case by case conflict of interest<sup>35</sup>.

To be in front of the case of this form of conflict of interest, we have to deal with one or several concrete decisions which the official takes during the exercise of duty.

It is the obligation of the official to take all measures to avoid conflict of interest situations as soon as possible and in the most effective way possible<sup>36</sup>. Failure to comply with this obligation imposes legal liability on the official, a liability which, depending on the consequences caused, the attitude held by the official during the exercise of powers, can range from administrative liability to criminal liability.

Based on the type of conflict of interest before which the official can be found, possible or apparent, the path to be followed is determined in order to prevent conflict of interest.

Conflict of interest situations can arise for any official regardless of position and hierarchical level in office. For this reason, the measures provided by law to prevent conflict of interest situations should be taken by each relevant official and superior.

The person who objectively has the best opportunity to be aware of possible conflict of interest situations is the official himself. For this reason, the law provides obligation for every official to take all necessary measures during the exercise of functional powers, in proportion to the importance of the situation to avoid conflict of interest<sup>37</sup>.

As far as possible according to the concrete case, one of the ways provided by the law for avoiding the conflict situation from the official is the transfer of private interest, which has caused the situation of conflict. The other way is related to self-exclusion from the concrete decision-making procedure<sup>38</sup>. Exceptions to the application of this second method are the cases when the delegation of competencies to another official can not be done, because it is not allowed by law or for other reasons of impossibility.

In cases when the official is in a conflict situation as a member of a collegial body, he is excluded from decision-making in the specific case, if this is possible without compromising the regular activity of the body.

In cases when the official finds that due to the possession of a function or private engagement a situation of conflict of interest is created with the public duty that he exercises, he is obliged to resign from one of the functions: from the private one that prevents him from exercising the public duty, or resignation from public office (this mostly applies in cases of continuous conflict of interest)<sup>39</sup>.

#### 1.4 Continuous conflict of interest

The law has provided for the concept of continuous conflict of interest as the situation in which a conflict of interest may recur repeatedly and/or frequently in the future.

As analyzed in the above points of this paper, the conflict of interest can appear in several forms, where in the interest of analyzing this point, I will refer to the potential conflict and apparent one. We are faced with a case of potential conflict of interest when the official interests may cause, in the future, the emergence of factual or apparent conflict of interest<sup>40</sup>. Meanwhile, the apparent conflict of interest is the situation in which the private interests of the official appear, in appearance or form, as if they have influenced, influence or may influence the unjust performance of his official duties or responsibilities, but, in fact the impact did not occur<sup>41</sup>.

Referring to the definition given by the law on continuous conflict of interest, it's understandable that in order to explication its concept for the purpose of analysis, I will have to analyze two forms of displaying the situation of conflict of interest.

As in cases of conflict of interest, as well as for the continuous type of its occurrence, the law has provided the obligation of each relevant official and superior to take all necessary and possible measures to prevent and resolve cases of conflict, this provision materialized in Article 6 of the Law on Prevention of Conflict of Interest<sup>42</sup>.

In the analysis of the conflict of interest and continuous of conflict of interest cases, we can say that the first is included in the second, but the difference lies in the type of the sustainability of conflict. So, while in cases of conflict of

<sup>35</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 3

<sup>36</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 6

<sup>37</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 37

<sup>38</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 37

<sup>39</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 3

<sup>40</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 3

<sup>41</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 3

<sup>42</sup> Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 6

interest a concrete decision is analyzed and the examination of the existence or not of the conflict ends there, in the case of continuous conflict of interest a thorough analysis of the duties of the official should be made, how it's influenced in these decisions due to the existence of private interests.

Logically, once the official and his superiors ascertain the existence of a case-by-case conflict of interest, the analysis should not end there, but should continue with the investigation of the situation in order to understand whether the conflict is merely for a concrete decision, or it will have a continuing character, already being configured as continuous conflict of interest. It is exactly the 9th question that distinguishes between these two notions, according to the instructions of HIDAACI, to assess specifically what kind of conflict of interest we are facing.

The regulation made in Article 37 of the Law on Prevention of Conflict of Interest, which provides the basic rules for the treatment and resolution of conflict, as analyzed in the above point, also applies to the continuous type of conflict of interest. So, in their content, these measures have to do either with the alienation of the private interests of the official or with the modification of official duties. In relation to the last case, the law provides an escalation of measures until the transfer of the official to another task.

### *1.5 Conflict of interest for hiring*

The Law on Prevention of Conflict of Interest in the Exercise of Public Functions, specifically in Articles 37 and 38 sets out detailed rules for measures to be taken to avoid any form the occurrence of conflict of interest in the exercise of official functions.

Conflict of interest, in order to be successfully avoided, measures must be taken and proper diligence shown from the genesis. So, before we can talk about the potential existence of a conflict of interest of an official, we must first show the necessary care from the moment of his selection, appointment to office.

For each appointment of officials in public functions, an application / competition procedure is followed, which for special positions are regulated by a special law. The elimination of conflict of interest situations begins exactly at the moment of selection of the official who will exercise a public function, taking all measures to avoid conflict of interest between the selected and the persons who will make the selection.

This means that, before making the final decision on the appointment of a person to a certain position, this person himself, the person making the appointment decision must provide a declaration of interest from the selected candidate and then follow the necessary steps of reasoning with all methodological steps to consider the possibility of falling into the ongoing conflict of interest of the official being appointed. If there is a possibility of an ongoing conflict between the public office in which the appointment will be made and the private interests of the official, that act of appointment to that office should not be performed (unless conflict avoidance is ensured in advance, for example: through alienation of interests, transfer to passive ownership, etc.), otherwise it would lead to violation of the law on conflict of interest<sup>43</sup>.

The same care should be taken by those responsible for other elements that arise during the exercise of duty, such as assessments for the effect of career development, and of course, special attention should be paid to various disciplinary proceedings or the moment of leaving from duty.

The law, as analyzed in the above points of this paper, has provided many rules on how to coordinate work between the official and superiors, in order to avoid a situation of conflict of interest. In order for this to be feasible, a condition for the existence of successful cooperation is the lack of conflict of interest between the official himself and the superiors (superior instances) with whom he will be obliged to cooperate in order to avoid the situation of conflict of interest. This is in the context of the obligation deriving from Article 37 of the law according to which the ways of handling and resolving the conflict of interest, should be done based on the understanding and cooperation between the official and the superior or the superior institution, aiming together to use preventing and resolving conflict of interest situation<sup>44</sup>.

In addition to the public interest, which is the interest that prevails in any case in of conflict, it is also in the interest of the parties involved, that the relationship between official and the superior is not in conditions of conflict of interest. This is because the law provides the efficiency of taking measures to prevent conflict situations by measuring the result, and not simply measuring the effort made by officials<sup>45</sup>.

### *1.6 Authorities responsible for preventing conflict of interest situations*

<sup>43</sup> *Manuali shpjegues dhe trajnimi mbi parandalimin e konfliktit të interesave, ILDKPKI Dhjetor 2006*

<sup>44</sup> *Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 37*

<sup>45</sup> *Ligji nr. 9367, datë 07.04.2005 "Për parandalimin e konfliktit të interesave në ushtrimin e funksioneve publike", neni 37*

Prevention of conflict of interest requires the official to ascertain and take measures to avoid conflict of interest situations and there is also the obligation and responsibility of the responsible structures and authorities.

Conflict of interest legislation provides as authorities responsible for the prevention, control and resolution of conflict of interest situations:

1. The central authority responsible is the High Inspectorate for Declaration and Audit of Assets and Conflict of Interest;
2. Responsible authorities or structures in public institutions are:
  - a) superiors of officials, according to the hierarchy, within a public institution;
  - b) directorates, human resources units or units specially charged, according to the needs and possibilities of each public institution;
  - c) superior institutions.

These two authorities have continuous and close cooperation with each other in order to ensure the smooth running of each activity, with the ultimate goal of avoiding in the most efficient way possible the creation of conflict of interest situations.

The law on conflict of interest provides for the obligation of the superior (or superior institution) to take all measures to resolve any conflict of interest situation. This role of the direct superior (or the superior institution) is quite important as it is closely related to the moment of starting the employment relationship, as well as to the whole period during which an official exercises a public function at an institution.

The law tends to place the superior directly in a position that enables the prevention and avoidance of conflict situations. The Law creates for the superior all the opportunities to perform any action related to his subordinate official by finding and presenting the balances between the public interest (duty and public function) and the private one (officials of subordinate institutions).

The superior has the obligation when the conflict has occurred and the decision-making has been carried out visibly in the conditions of conflict of interest, to revoke or annul the act before it has begun to produce consequences.

Given that the law attributes a very broad controlling role to the Responsible Authority, starting from the moment of recruitment of the official, monitoring the performance of his duty in accordance with the law and control of the final product of work, even revocations of acts, it is understood that access to information by these structures will be very large.

Against this obligation of the official, there is certainly the obligation of the superior or superior institutions to maintain the confidentiality of the data collected for each official.

## 2. Conclusions

Strengthening the cooperation between institutions at central and local level with HIDAACI in the function of continuous prevention of conflict of interest;

Increase cooperation between HIDAACI and SPAK to improve the follow-up of cases addressed to the prosecution by HIDAACI;

Provide the necessary assistance, including specific guidance, advice and training on the proper implementation of the legal framework for the prevention of conflicts of interest, in particular to increase the capacity of the responsible authorities to record case-by-case statements;

The regulatory framework should be balanced towards the development of institutional integrity and ethical decision-making in addition to enforcement mechanisms and sanctions.

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