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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON CONFLICT OF INTEREST

IN MOLDOVA

Adopted by the Venice Commission
At its 73rd Plenary Session
(Venice, 14-15 December 2007)

on the basis of comments by

Mr Oliver KASK (Member, Estonia)
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I. Introduction

1. On 28 September 2007, the Chairman of the Parliament of the Republic of Moldova requested an expert assessment by the Council of Europe of the draft law on the conflict of interest (CDL(2007)115).

2. Both the Venice Commission and the Council of Europe (Project against Corruption, Money Laundering and Terrorism Financing in the Republic of Moldova (MOLICO)) provided their assistance in co-operation with each other.

3. Messrs Kaarlo Tuori and Oliver Kask acted as rapporteurs. The present opinion, which is based on their individual comments (CDL(2007) 116 and 117 respectively), was adopted by the Venice Commission at its 73rd Plenary Session (Venice, 14-15 December 2007).

II. Definition of conflict of interest

4. In Article 2 of the draft law, a "conflict of interest" is defined as a situation where a person holding a public office is in his/her duties influenced of may be influenced by his/her personal interests or those of his/her close relatives. Article 2 defines also close relatives. Such regulation may not avoid all kind of situations where person holding public office should not fulfil his/her duties. Such situations might be where a close friend or spouse of a non-married couple has personal interests in the matter.

III. Substantive distinctions

5. When drafting a law on conflict of interests, one should be very careful about the scope of application of the law and its individual provisions. Distinctions should be made in the substantive, personal and temporal dimensions.

6. 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).

7. 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.

8. 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.

9. 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.

10. According to Art. 8(4), the administrative acts issued/passed or legal documents concluded by civil servants in violation of paragraph 1 shall become null and void. Although the provision might be appropriate to guarantee the lawfulness of administrative acts, it has negative impacts on legal certainty. The level of violation is not considered and persons to whom an administrative act is addressed do not know about the violation. The violation of obligation to

inform may not have effects on the lawfulness of the document or administrative act itself, if the person holding public office has avoided to take into account his/her personal interests. It could be suggested to leave the nullification to be decided by courts case-by-case.

11. 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, overlaps with administrative and procedural law regulations are possible, even probable. The present draft seems to have chosen the latter approach.

IV. Person-related distinctions

12. 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.

13. 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).

14. 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.

15. Chapter II of the draft law provides different obligations for persons holding public office. It seems that many of those obligations are not applicable to political offices such as members of parliament, president of the republic or ministers, as they usually do not have superiors or higher agencies. In some cases, constitutional institutions, independent administrative entities and enterprises where state is major shareholder, such immediate superiors or higher agencies are missing.

16. 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.

V. Temporal distinctions

17. 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 regarding 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.

18. 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.

19. 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.

20. Consequences of the violation of provisions on general incompatibilities, falling in the group c), 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.

VI. Organizational and procedural issues

21. 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. For judges for example, the regulation is likely to be already set out in other legislation - court procedure laws in that case - so that further regulation is needed only concerning submitting and publication of their statements of personal interests and prohibition of taking gifts.

22. If the regulation in question is contained in other legislation, the law on conflicts of interest should involve express references to the provisions in question.

23. 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.

24. According to Article 17 paragraph 1, candidates have to identify and state the relevant personal interests that could come into conflict with their official duties. It is not clear whether such duty is additional to the duty to submit statements on personal interest within 15 days of the validation of their mandates according to Article 18 paragraph 1. There would be no reason to declare the interest twice in nomination or election procedure.

25. 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.

26. According to Art. 21(2), “the leadership 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.

27. Article 22 provides that the information given in statements on personal interest shall be public. The Act does not provide how the publicity should be guaranteed (via webpage, in official publications, newspaper of on demand). Such regulation could better guarantee the enforcement mechanism.

28. The Act does not provide the sanctions for violation of duties stated by the Act. Disciplinary sanctions are not available for political offices (members of parliament or government or president of the republic, probably also for judges). Violation of the duty to submit the statement of personal interests in time should not be sanctioned by criminal law as well.

29. Articles 21 and 23 regulate the control mechanism for the act. The main duties have been entrusted to the Main Ethics Committee. 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 regulate the composition and procedure of the committee in a form other than a law.

30. It is not clear whether the rules of procedure regulate also the rights of the Main Ethics Committee to collect person-related data and how it can get information on the interests of persons holding public office. Those provisions should be regulated by law. Similar duties have been put on the leadership of public authorities. It is not clear from the law who is considered among the leadership and what are the means of public authorities to collect information on conflict of interests.

VII. Additional detailed comments

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

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

33. 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).

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

35. Under Article 14 paragraph 2, a person that holds a public office shall be prohibited to have any relations with a person that worked before within a public authority in cases provided in paragraph 1. It remains unclear why such a far reaching and very strict prohibition is foreseen. The scope of that article is unclear as well.

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

VIII. Conclusions

37. The draft law under consideration requires substantial amendments, notably as regards the scope of application of the law and its individual provisions. Distinctions should be made in the substantive, personal and temporal dimensions.

38. The present opinion contains suggestions for improving the draft law. The Commission is ready to further assist the authorities of Moldova in relation to this matter.