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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

BOSNIA AND HERZEGOVINA

OPINION

ON THE DRAFT LAW ON THE PREVENTION OF CONFLICT OF INTEREST IN THE INSTITUTIONS OF BOSNIA AND HERZEGOVINA

Adopted by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021)

On the basis of comments by

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Contents

I. Introduction

1. By letter of 27 April 2021, the Minister of Justice of Bosnia and Herzegovina, Mr Josip Grubeša, requested an opinion of the Venice Commission on the draft Law on the prevention of conflict of interest in the institutions of Bosnia and Herzegovina (CDL-REF(2021)041, hereinafter the "draft Law").

2. Mr Oliver Kask (member, Estonia), Mr Kaarlo Tuori (member, Finland), and Mr Quentin Reed (expert) acted as rapporteurs for this Opinion. On 25 and 26 May 2021, the rapporteurs accompanied by Mr Dikov from the Secretariat held online meetings with the Ministry of Justice, with the representatives of the majority and the opposition parties in the Parliamentary Assembly of Bosnia and Herzegovina, with the Agency for Prevention of Corruption, with the Commission on Conflicts of Interest, as well as with representatives of civil society and of the international community and international organisations present in Bosnia and Herzegovina. The Commission is grateful to the Council of Europe office in Bosnia and Herzegovina for the excellent organisation of this virtual visit.

3. This Opinion was prepared in reliance on an unofficial English translation of the draft Law. The translation may not accurately reflect the original version on all points.

4. This Opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings with the authorities of Bosnia and Herzegovina and other stakeholders, and the written comments on the draft Opinion submitted by the Ministry of Justice of Bosnia and Herzegovina. Following an exchange of views with Ms Ines Krtalić, the Head of the Cabinet of the Minister of Justice of Bosnia and Herzegovina, it was adopted by the Venice Commission at its 127th Plenary Session (Venice and online, 2-3 July 2021).

II. Background

5. The original Law on the conflict of interest (CoI) was imposed by the UN High Representative in Bosnia and Herzegovina in 2002,[1] and adopted by the Parliamentary Assembly of Bosnia and Herzegovina in 2002. The original law covered all levels of public administration and was applicable to the officials working at the State level, at the level of the two Entities,[2] the Brčko District, and the cantonal level. The enforcement of the law was entrusted to the Central Electoral Commission (the CEC). In the following years the 2002 law was amended several times. In 2008 and 2010 the Venice Commission assessed previous versions of this law.[3]

6. The last major reform of the law dates back to 2013, when the Parliamentary Assembly adopted the amendments which are currently in force (hereinafter – the current law).[4] The previously existing system was decentralized: the law is henceforth applicable only to the officials of the State-level institutions (both elected officials and appointed officials of high rank). As to the officials working in the administrations of the Entities, the Brčko District or the cantons, or elected officials of these levels, they are governed by separate legislation adopted respectively by the

[1] See http://www.ohr.int/about-ohr/general-information/
[2] The Republika Srpska and the Federation of Bosnia and Herzegovina
[3] See CDL-AD(2008)014, Opinion on the Law on conflict of interest in Governmental Institutions of Bosnia and Herzegovina and CDL-AD(2010)018, Opinion on the Draft Law on the Prevention of Conflict of Interest in the Institutions of Bosnia and Herzegovina. More recently, the VC addressed the question of the conflict of interests regarding judges and prosecutors in CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, see also references to the earlier opinions on this matter.
[4] The current law underwent some changes in the following years, and was last amended in 2016.

Entities, the Brčko District, or cantons. Such laws have been adopted in the Republika Srpska and in the Brčko District, as well as in the Sarajevo canton, but not in the Federation of Bosnia and Herzegovina.[5]

7. The title of the current law refers to the prevention of conflict of interest, but its substantive scope is much wider. In addition to the prevention of conflicts of interest which may appear in concrete cases, the law regulates a broader array of issues, including the incompatibility of certain permanently existing occupations or engagements with public office, the restrictions on private employment for officials, the acceptance of gifts, financial statements by public officials, as well as the mandate and composition of the commission dealing with those matters, the procedures before it and the sanctions it may impose. In sum, the current law is more a law about the integrity of public office than merely a law on conflict of interest.

8. As a result of the 2013 reform, the task of enforcing the substantive provisions of the law was transferred from the CEC to the Conflict of Interests Commission (CoIC). Under the current law the CoIC is composed of nine members: six are MPs (three from the House of Representatives and three from the House of Peoples), and three are members *ex officio*: the Director of the Agency for Prevention of Corruption and Coordination of the Fight against Corruption, and his/her two deputy directors.[6] At least one-third of the CoIC members should come from the opposition parties, and the President of the CoIC should be an MP from the opposition. Under Article 17a (2) of the current law, the CoIC decides by a majority of votes of all its members, which should include the votes of at least two members from each of the three "constituent peoples" of Bosnia and Herzegovina. In other words, to be adopted any decision of the CoIC should have support of two Serbs, two Croats and two Bosniacs.

9. The legislation on the conflict of interest in Bosnia and Herzegovina remains quite differentiated. Differentiation as such is not necessarily a problem if it is about providing different rules for different categories of officials (on this see more below, Section C). However, it is important that rules for different categories of public officials are mutually consistent, that there are no gaps or overlapping provisions creating legal uncertainty. In Bosnia and Herzegovina judges and prosecutors are governed by special rules and are subjected to the oversight by the High Judicial and Prosecutorial Council (HJPC).[7] Some conflicts of interests of the MPs are regulated by the parliamentary Code of Conduct, and it appears (although the draft Law is not explicit on that) that the situation of MPs is regulated by the law (and the draft Law) and by the provisions of the Code of Conduct in parallel. The CEC continues to collect and publish asset declarations of the MPs, as required by the electoral legislation. The civil servants of a lower rank are governed by the provisions of the general legislation on the civil service and by the labor law. Enforcement of these provisions is entrusted to the managers of the respective administrative entities. Most importantly, as noted above, some Entities, the Brčko District and cantons have their own legislation and the enforcement bodies.

10. Some of the matters regulated by the current law also fall within the competence of the State-level Agency for the Prevention of Corruption and Co-ordination of the Fight Against Corruption (hereinafter "the Agency"). The Agency is entitled by law[8] to coordinate anti-corruption policies of

[5] Reportedly, the Federation legislation still designates the CEC as the responsible body, while the State-level legislation does not give the CEC those functions.

[6] The Director of the Agency and his/her two deputies is appointed by the Parliamentary Assembly, at the proposal of the Selection and Operational Monitoring Committee, composed of nine members: three representatives on behalf of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, three representative on behalf of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, two representatives of the academic community and one representative of the non-governmental sector.

[7] See in this regard CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council.

[8] Law no. 464/09 of 30 December 2009, with further amendments

other State bodies and to "monitor the instances of conflict of interest". The functions of the Agency are mostly advisory: to collect and analyse information, monitor implementation of the laws by other State bodies, coordinate their efforts, provide recommendations on anti-corruption policies, etc. Unlike the CoIC, the Agency has no formal power to examine specific cases, collect evidence, start legal proceedings, impose sanctions, etc. However, the Agency provides the administrative support to the CoIC and defines the number of employees working in the CoIC secretariat. Decisions of the CoIC are certified by the seal of the Agency. As explained to the rapporteurs, in practice that means that the CoIC is fully dependent on the Agency in budgetary and administrative matters.

11. As voiced by various stakeholders the rapporteurs met, the current Law has not been implemented effectively. The Group of States against Corruption (GRECO) noted that while the anti-corruption legal framework "is mostly in place, its implementation is weak and inconsistent".[9] The GRECO report also expressed doubt in the political neutrality of the CoIC, and the potential overlap of functions between the CoIC and the Agency. The EU Commission noted that the composition of the CoIC and its decision-making procedures requiring special majority based on ethnic representation prevent it from functioning efficiently.[10]

12. In fact, in the past years the CoIC has hardly functioned. The CoIC was not operational from November 2017 until general elections in October 2018, reportedly due to the lack of necessary ethnic quorum requirements. Following general elections in October 2018, the appointment of the new CoIC was delayed. The new CoIC was appointed by the Parliamentary Assembly only in July 2020. From July 2020 to February 2021 the CoIC met twice, but no decisions as to sanctions were taken. Ultimately, the CoIC met in March 2021 and decided to sanction one MP with a reduction of his parliamentary salary. Many State-level officials failed to submit their financial statements, without any legal consequences. The situation at the level of the Entities is broadly similar.[11] In 2020 the EU Commission concluded that "corruption remained widespread and all levels of government show signs of political capture".[12]

13. The proposed draft Law responds to the European Commission's Opinion on the EU membership application of Bosnia and Herzegovina, and the relevant key priority therein to revise and implement the legislation on the conflict of interest.[13] Currently, there are two parallel proposals to amend the 2013 law. The first is a draft law developed by a group of opposition MPs, reportedly in coordination with international donors and the NGOs. It was submitted to the Parliament where it underwent significant changes; it was adopted by the House of Representatives and is now pending before the House of Peoples. The second draft Law was developed by a working group created by the Ministry of Justice. This draft Law has not yet reached the Parliament. It has been recently assessed by the experts of the European Union, revised, and submitted to the Venice Commission for examination.

14. Not every aspect of the draft Law will be taken up in this Opinion. The Venice Commission will concentrate on several key questions which should be resolved in the first place, before the legislative procedure could proceed further. Absence of remarks on other aspects of the draft Law does not mean that the Venice Commission approves them.

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[9] See the Fourth Evaluation Report on Bosnia and Herzegovina, para. 15, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c4999

[10] See the 2019 report by the EU Commission available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-analytical-report.pdf

[11] See the EU report on Bosnia and Herzegovina for 2020, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/bosnia_and_herzegovina_report_2020.pdf

[12] See the EU report for 2020, cited above, p. 103

[13] See the EU report for 2020, cited above, which recommended to "adopt the law on the prevention of conflict of interest at state level", p. 22.

III. Analysis

A. The problem of fragmentation

15. The EU Commission and GRECO have underlined that "if separate structures and regimes coexist, they need to be coupled with appropriate coordination channels and a holistic vision".[14] The Venice Commission itself previously stressed the need to harmonize the Entities' laws with the State legislation in this area, "as there are no divergent local circumstances to justify divergent solutions."[15]

16. However, the draft Law is not different from the current law in that it does not regulate the behavior of the officials at the sub-State level. The Venice Commission is aware that under the Constitution of Bosnia and Herzegovina such matters fall within the competence of the Entities, while the State may introduce rules only in respect of the State-level officials. However, nothing in the Constitution prevents the Entities from *delegating* this competence to the central government and accepting a harmonised system of regulation and enforcement of the conflict of interest rules, which would cover the public officials at all levels.

17. Already in its 2008 opinion[16] the Venice Commission suggested several ways in which such harmonisation could be achieved: to transfer the competence to regulate such issues by the Entities to the State level, to transfer the competency to enforce Entity-level legislation to a central body created at the State level, or to keep the enforcement of the Entity-level legislation in the hands of an Entity-level body, but to provide for a right of appeal to a State-level body. Whatever model is chosen, the Entities and the Brčko District should ensure that their laws on conflicts of interest mirror the equivalent law at the State level, and that they are consistent with each other insofar as possible, in terms of both substantive provisions and procedural/institutional arrangements.

B. The personal scope of the draft Law: distinction between appointed and elected officials

18. The draft Law aims to cover two main categories of office holders: MPs (there are 57 MPs in the two chambers of the Parliamentary Assembly of Bosnia and Herzegovina) and some top political appointees (elected and appointed public officials of a certain rank).[17]

19. As explained to the rapporteurs, the draft Law does not apply to judges and prosecutors, who are governed by the rules of the Law on the HJPC,[18] and does not apply to ordinary civil servants, who are not political appointees. The distinction between political appointees (ministers, heads of agencies, advisors, etc.) and career civil servants may be clear in the legislation of Bosnia and Herzegovina, but the draft Law would benefit from a more precise formula defining its personal scope.

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[14] See GRECO Evaluation Report (Fourth Evaluation Round), para. 44, with further references. See also the EU 2019 analytical report, cited above.
[15] CDL-AD(2008)014, Opinion on the Law on conflict of interest in Governmental Institutions of Bosnia and Herzegovina
[16] Ibid.
[17] See Article 4 (a) of the draft Law. Reportedly, it covers a relatively small group of office holders (slightly below 600 *in toto*).
[18] See CDL-REF(2021)001, Bosnia and Herzegovina - Draft Law on Amendments to the Law on High Judicial and Prosecutorial Council of Bosnia and Herzegovina, and CDL-REF(2021)007, Bosnia and Herzegovina - Law on the High Judicial and Prosecutorial Council.

20. The draft Law regulates conflicts of interest in the same way for elected and for appointed officials (see Article 4 (a)).The question arises of whether the same legal regime should be applicable to all holders of public office, or whether distinctions should be made. The Venice Commission notes that in many established democracies elected officials are not subject to the same rules as civil servants, military personnel, etc. It is noteworthy that the definition of "public official" in Recommendation No. R(2000)6 of the Committee of Ministers on the status of public officials in Europe excludes elected officials.[19] Recommendation No. R(2000)10 of the Committee of Ministers on codes of conduct for public officials does not cover MPs, members of local or regional assemblies, or members of the Government.[20] As noted by the World Bank experts, "elected officials such as members of parliament, political advisers, ministers […] are often covered by separate procedures and asset and interest disclosure requirements. In addition, elected officials are usually subject to substantially more stringent accountability requirements than regular civil servants."[21]

21. It is true that certain rules can be applied to MPs and appointed officials/civil servants without distinction. For example, asset declaration regime may be seen as common for all office holders, including MPs, ministers, high-ranking political appointees, ordinary career civil servants and even judges and prosecutors. [22]

22. However, other rules such as the definition of incompatibilities, conflicts of interest and the applicable sanctions should be different. MPs may legitimately have connections, for instance, to NGOs, which instead would constitute an incompatibility for appointed officials and civil servants. The list of obligations set out in the draft Law which should not be applicable to the MPs can be continued. Thus, the prohibition for public officials to be on a board of a private company (see Article 7) may not be applicable to certain positions of members of independent bodies who are not full-time but receive some allowance for their work in those bodies. As to MPs, in established democracies it is uncommon to prohibit MPs being on the boards of companies. The prohibition for public officials to take employment in some private companies or represent them (Article 12) after the end of their mandate should not be as strict for MPs as it is for the appointed officials.

23. The Venice Commission also expresses serious reservations as to the applicability of the sanctions and the sanctioning mechanism provided by the draft Law to MPs. According to the explanatory report to Recommendation No. R(2000)10, conflict of interests of MPs is regulated primarily by the mechanisms of *political* responsibility before the electorate and the party the MP represents. The mechanisms of *administrative and disciplinary* liability, provided by the draft Law, may raise a serious constitutional issue if applied to the MPs. If an MP, under the draft Law, could be sanctioned by the CoIC, let alone removed from the voting process,[23] that may be seen as an interference with parliamentary immunity and with the principle of autonomy of Parliament.[24] In

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[19] See Recommendation No. R(2000)6, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2d3b

[20] See Recommendation No. R(2000)10, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805e2e52

[21] World Bank, OECD and UNODC, Preventing and Managing Conflicts of Interest in the Public Sector - Good Practices Guide (2018), p. 6

[22] See CDL-AD(2020)038, Ukraine - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Legislative Situation regarding anti-corruption mechanisms, following Decision N° 13-R/2020 of the Constitutional Court of Ukraine, para. 47

[23] Or through the fear of those sanctions be incited to withdraw himself or herself from the voting process

[24] The GRECO evaluation report of 2016 stressed that while "parliamentarians have an obligation to adhere to the ethical standards laid out in the Code of Conduct and the relevant internal Rules of Procedure, it is not clear how misconduct could trigger punishment". Probably, this matter should be left to the discretion of Parliament itself: first, a breach of "ethical" rules (contrary to legal rules) does not provide for punishment, and, second, imposition of punishments by an external body may go against the principle of parliamentary autonomy. See GRECO, Fourth Evaluation Round: Corruption prevention

many constitutional systems, only the Parliament can decide on ending/suspending the mandate of an MP, and even in the Parliament a qualified majority would often be needed. Against the background of the constitutional protection of the MPs' mandate, it is questionable whether an ordinary law may establish a system of sanctions which would remove MPs from the voting process, by a decision of an external authority, or require them to recuse themselves. It may be constitutionally problematic even to define incompatibilities of MPs through ordinary legislation. In the specific context of Bosnia and Herzegovina, establishing those rules at the constitutional level could be difficult to achieve. That being said, the Venice Commission stresses that parliamentary immunity does not exempt MPs from criminal liability for ordinary crimes and penal sanctions defined by the Criminal Code.[25] Furthermore, there should be rules on conflict of interest applicable to MPs, but such rules have to be, first, adapted to the constitutional role of the MPs, and, second, adopted and enforced in such a manner as to preserve the constitutional role of MPs and the autonomy of Parliament.

24. In sum, in the opinion of the Venice Commission, the draft Law should clearly distinguish between *rules common to all office holders* and those specific rules and mechanisms which are applicable only to the appointed officials and civil servants. As to the rules applied to the elected officials, such rules may be more or less stringent, depending on the context.

C. Substantive rules: conflict of interests, incompatibilities, gifts, and asset declarations

1. A general definition of the conflict of interest

25. Article 1 (2) of the draft Law states that a "conflict of interest exists in situations where a public official has a private interest against the public interest, which affects or may affect the legality, transparency, objectivity and impartiality as to the exercise of the public office."

26. As stressed in the 2010 opinion[26] the Council of Europe standards require that the conflict of interest be defined broadly, as involving (a) actual conflict of interest, (b) a potential one, and (c) situations which look like a conflict of interest, since even an appearance of such a conflict may undermine public trust. The definition in Article 1 (2) seem to cover actual and potential conflicts but does not mention "appearance" of a conflict of interest. It should be supplemented accordingly.

27. A conflict of interest is not an action but rather a *situation* in which, to use the definition in the Council of Europe's Model Code of Conduct for Public Officials, "the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties." While the definition looks somewhat similar to the one in the draft Law, the phrase "a private interest *against* the public interest" in the draft Law (italics added) implies that the private interest in a particular situation will always be such as to lead an official to decide in such a way that is against the public interest. This is not the case: an official may be in a situation where the decision that is in the public interest also happens to align with a private interest s/he has in the matter. The concept of a conflict of interest is deeper – it is a situation where the official has an interest that in general might influence the impartial and objective performance of duties in a particular matter or area, irrespective of the actual decisions s/he takes. It would therefore appear appropriate to amend the definition in order to ensure that it defines a conflict of interest as a situation (and in no way an act of decision-making or influence thereon) and that the private interest is not necessarily "contrary" to or "against" the public interest

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in respect of members of parliament, judges and prosecutors, 22 February 2016, Greco Eval IV Rep (2015)2.

[25] On the parliamentary immunities see CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities

[26] Cited above

which the official must pursue, but only "relating" to it. Alternatively, the legislature could adopt the definition of conflict of interest proposed by the CoE Model Code of Conduct for Public Officials, cited above in this paragraph.

2. Connected persons and close relatives

28. Article 4 (d) of the draft Law defines a connected person as "a physical person, a close relative referred to in item (c) of this Article who has a political and economic relationship with a public official, which affects objectivity in work of the public official and is conducive to gaining certain economic benefits". This definition is problematic. For a person to be "connected" the draft Law appears to require that person first to be a close relative, second, to have a "political and economic relationship" with the official, and, third, for that relation to *affect in practice* the objectivity of the work of the official. This is a much too complicated definition that sets the bar too high. Since Article 4 (c) already defines who is a "close relative", it would be preferable to define connected person as any person that has a business or economic ties with the official, or any other close relationship such as intimate and longstanding friendship. The condition that the relationship *actually* affects the objectivity of decision-making should be deleted, since it is difficult to prove. Furthermore, close relatives are defined in a manner excluding parents-in-law and siblings-in-law as well as many other close relatives related to whom the objective and neutral decision-making cannot be imagined. Such a narrow definition of a "close relative" may unduly restrict the filed of application of certain articles of the draft Law: thus, for example, a public official would not be prevented from taking a decision favouring a private company owned by his or her father-in-law or a close personal friend (see Article 8 (1) of the draft Law). The definition of connected persons should therefore be widened and include not only close relatives (including siblings-in-law and alike) but also other persons connected to the public official concerned not only by economic or political ties but also by a long- time and intimate friendship.

3. Incompatibilities (Articles 6, 7 and 10)

29. The draft Law does not seem to make a distinction between the conflict of interest and the incompatibility requirements. While in essence those rules pursue the same goal, conflicts of interest arise and are resolved *ad hoc* (on this see below, the next section); as to the incompatibilities, they may permanently prevent an official from holding a public office or being eligible. The Commission reiterates its recommendations of 2008 and 2010 "to clearly keep apart general incompatibilities and specific situations of conflict of interest by, for instance, dividing the law into chapters".[27] In this Opinion the Commission will first deal with the rules on incompatibilities and then with the conflict of interest arising in concrete cases.

30. Articles 6, 7 and 10 set out prohibitions on holding certain positions or interests at the same time as being a public official. Many of these incompatibilities seem reasonable, although not all of them are equally applicable to the elected and appointed officials. For example, under Article 6 (3) "a public official may not have another employment or receive income". It is important to determine whether this is an appropriate restriction for elected public officials, in particular MPs. It is not uncommon in other democracies (for example Canada, Czech Republic, United Kingdom) for MPs to be permitted to hold second jobs, as long as this does not interfere with the performance of their function, and as long as they observe other obligations such as declaring any private interest in a matter before the assembly. MPs also sometimes receive some additional income from their political party.

31. Conversely, as regards certain categories of appointed officials, the incompatibility requirements under the draft Law seem to be insufficient. In particular, Article 6 (3) allows an official working part-time to be employed elsewhere (see Article 6 (3)) or to run a private business (see Article 7). Certain public offices are by their nature part-time, which implies that the office

[27] See paragraph 19 of the 2010 opinion.

holders should have another employment or an income from another source. This is the case for the members of the CoIC, for example. Other positions are in principle full-time, and in this case the prohibition of a parallel employment or a business activity should be nearly absolute.

32. Instead, under the draft Law there seems to be no general prohibition to run a business, provided that this business is not directly connected with the Council of Ministers through "incentives or benefits".[28] Thus, a public official may run a company which benefits from public money indirectly. Similarly, there is no prohibition for a State-level official to run a company having business relations with the Entities' governments or with the cantons. In sum, the draft Law seems to overlook the whole cluster of situations which could reasonably be formulated as an incompatibility.

33. Narrowly formulated exceptions may be defined in the draft Law (or in other laws) for certain categories of public officials. As noted above, MPs or members of institutions which work part-time can be subject to more lenient rules. By contrast, the incompatibility requirement for appointed officials working full time should be rendered stricter. Participation of appointed officials in the supervisory boards of public enterprises, however, may be necessary, in order to control and protect public interests in such enterprises. It follows that a distinction should be made between participation of an appointed public official in a management body of a private business (which should be, as a rule, prohibited), and participation in a company which is partly or entirely owned by the State (which may be allowed).

34. The same recommendation concerns the work of public officials in NGOs. Under Article 10, public officials cannot have managing positions in NGOs receiving funding from the State or the Entities' budget. As to other NGOs, a public official may perform managing functions in such organisations, but not receive a salary. Even if the work in an NGO is not remunerated, it is hard to see how such work, when an NGO has a clear political agenda (as opposed to purely cultural or charity organisations, for example) can be combined with the status of appointed official. By contrast, for an MP such NGO engagement may be seen as legitimate.

35. That being said, how strict the substantive rules on incompatibilities should be for MPs largely depends on the informed assessment of the local situation. The above recommendation should not be read as encouraging a more lenient regime for MPs. The national legislator may equally require an elected person to sever all ties with business entities and non-governmental organisations for the duration of his or her mandate, if the proximity to those business or other interests is seen as endangering the independent exercise of such mandate, provided that such incompatibility rules are either constitutionally entrenched, or established in another regulation which cannot be changed by a simple majority of votes, and on condition that other constitutional principles are respected.

4. Steps to be taken when a public official finds him/herself in a situation of a conflict of interest (Article 8)

36. Besides the rules on incompatibilities, which bar public officials from holding an office, the draft Law describes specific situations which may lead to temporary disqualification of an official from the decision-making. The obligations to deal with specific conflict of interest situations usually consist of two components: duty to declare a conflict of interest, and duty to recuse or be recused.

[28] Article 7 prevents a public official to be a member of the board or own more than 1% in a company which receives "incentives or benefits from the Council of Ministers of BiH … in the amount exceeding 10,000 KM annually". It would also be prohibited to have financial interests in such companies or provide them "personal services".

a. Duty to declare

37. The duty to declare a conflict of interest should be universal – i.e. apply to all categories of officials in all circumstances. The draft Law does not explicitly require officials to declare potential conflict of interest situations which arise during the performance of their duties. Article 8 (1) and (3) provides that the public official should "explain the reasons for the recusal in an open session"[29] or "state the reasons for the referral in writing". However, this seems to be an accessory obligation, which arises only when the public official *has already decided* that there are grounds for recusal/referral of the file to another authority.

38. Instead, it would be useful to provide in the draft Law that a public official who *finds him/herself in a potential conflict of interest situation* must immediately declare the conflict to his/her superior and/or the CoIC (or whichever will be the oversight body for the conflicts of interest – for MPs it may be a special committee, for example). The law should establish the form of such declarations and provide that they should be accessible to the general public.

b. Duty to recuse

39. The duty to recuse is regulated by Article 8. Article 8 (1) is a more specific provision, stating that "a public official may not participate in a decision-making process or vote on any matter that directly affects the private company in which the public official or connected person has a financial interest, or any other issues that directly affect a connected person." Article 8 (3) is more general; it prohibits the "use of public office" which "directly generates financial interest" for the public official/connected person or – as the draft Law puts it – "directly influences" a private company in which the public official/connected person has a financial interest. In the first case the draft Law provides for an obligation of the public official to recuse from the decision-making. In the second case the draft Law obliges the official to "refer the decision-making to another competent authority".[30]

40. These provisions are largely overlapping. Both seem to prevent public officials from participating in decision-making; however, Article 8 (1) and (2) provide for the recusal, while Article 8 (3) provides for the referral of the file to another authority. For the sake of clarity, Article 8 should be redrafted, and overlapping obligations removed. It is furthermore doubtful with regard to international standards that the person in conflict of interest could refer the decision-making to a person selected by him/herself. Such decision should be taken by an impartial body or an official not having such a conflict.

41. Furthermore, Article 8 is too narrowly formulated. First of all, it does not cover situations where the decision of the public official may benefit a company *indirectly*. For example, a decision may impose restrictions on the business of the main competitor of the company in which the public official has a stake, or may benefit a company which is not owned by the public official directly but through a mother-company. Such situations should also qualify as a conflict of interest.[31] It would be more appropriate to formulate this situation as being "such as to affect the interests of" the official concerned or the connected persons. Second, Article 8 (1) only concerns one particular type of a conflict of interest – where the decision concerns a company in which the

[29] It is unclear why the draft Law refers to an "open session" – in many situations administrative decision-making does not take place in "open sessions" and holding one just to declare the reasons for withdrawal may appear excessively complicated.

[30] The reference to the "competent authority of the private company" does not make sense and seems to be an error of translation.

[31] Indeed, the nexus between the decision and the potential gain for the public official should not be too remote: almost every administrative decision may have economic repercussions, and not all of them would qualify as a conflict of interest. It belongs to the competent bodies to develop jurisprudence clarifying the boundaries of the "indirect" benefits which a public official may obtain from a decision.

official has a stake. The draft Law must make it clear that a public official must withdraw from the decision-making not only in such cases, but also where the decision affects broader financial interests of the public official concerned or his/her connected persons (for example, might lead to a substantial increase in the cost of their property or the rental income).

42. Finally, Article 8 should also provide for the recusal of a public official in relation to his/her "personal interests". A public official should be recused not only if his/her decision may lead to a financial gain, but also if he/she may have a personal interest in the outcome of the case or may receive a personal favour of a non-pecuniary character.[32]

c. Procedure of declaration/recusal

43. It is unclear whether the draft Law only provides for a self-recusal in case of conflict of interest, or whether the recusal may also be ordered by a superior administrative authority, the CoIC, or another competent body. Article 8 may need an amendment if a superior makes the decision of recusal, which should be a normal procedure to follow in cases where an official reports a possible conflict of interests. The duty to recuse may be associated with additional limitations – for example, exclusion of the public official concerned from access to relevant documents and other information relating to his/her private interest.[33]

44. For elected officials, and in particular for MPs, consideration should be given to exempting them from the obligation to withdraw from a matter in which they have a conflict of interest. However, softer rules (such as a code of conduct) may contain provisions encouraging MPs to recuse themselves voluntarily from a matter when a conflict of interest situation makes such an action appropriate. In any case, decisions on recusal in such cases should be taken within the Parliament, and not by an external body.

45. In conclusion, the draft Law should stipulate clearly how a declaration of a potential conflict of interest (or even an appearance of such a conflict) may be made, where it is deposited, who must verify and take action on such a declaration, and what sort of action is required (temporary removal of file from the official concerned, permanent exclusion from deciding on certain issues, removal of access to information and documents etc.).

5. "Pantouflage" (Article 12)

46. As in the current law, Article 12 of the draft Law imposes certain restrictions on the migration of public officials from the public to the private sector, a practice characterised by the terms "pantouflage" or "revolving doors". Public officials are prevented from working for private companies or for advocating on their behalf for six months after leaving the public office, if those companies have business ties with the public institution where the official worked, or if he/she had taken decisions in respect of such a company. Those rules are generally reasonable, although the six months' period appears too short and could be extended to one or two years. By contrast, some limitations may appear too strict: thus, after the termination of the office a former official may not even give training for civil servants (Article 12 (1) (c)). Again, rules applicable to the appointed officials should not be applicable to the MPs: in particular, it does not seem possible to prevent an MP from working in or with private companies which "enjoy economic benefits" which result from the laws voted for by that MP (see Article 12 (1) (d)).

[32] A similar recommendation has already been made in the 2010 opinion, cited above (see paragraph 23)

[33] See the "Guidelines for Managing Conflict of Interest in the Public Service" drafted by the Council of the Organisation for Economic Cooperation and Development (OECD guidelines), p. 1.2.2.

6. Prohibited behaviour (Article 13)

47. Article 13 is entitled "Activities that lead to a conflict of interest". However, most of Article 13 is not about "activities that lead to a conflict of interest" but simply about corruption offences (see (a), (c), (d), (e), (g), and (i)). For instance, Article 13 (c) prohibits public officials to "demand, accept or receive a gift or service to vote on any matter". Under Article 30 (8), a breach of this provision is punishable with an administrative penalty – a fine of up to 10,000 KM. In many legal orders such behaviour would qualify as a bribe and would be punishable under the Criminal Code. It is unclear how the crime of bribery is different from the offences regulated by the draft Law in Article 13.

48. In its written comments the Ministry of Justice explained that in Bosnia and Herzegovina a bribe is defined as a gift or a benefit which is received by a public official for doing something he or she should not do, or not doing something which he or she is supposed to do (Article 217 of the Criminal Code). However, this definition as such appears too narrow. A bribe may be provided in return for an official performing the action he or she is supposed to take – facilitation payments are an obvious example. Defining a facilitation payment as an administrative, and not a criminal, offence is a problem in itself, even if, as the Ministry of Justice explained, there is no confusion between the prohibited gifts and bribes.

49. Similarly, some of the actions described in Article 13 are very close to the misappropriation of public funds, which, normally, should be criminally punishable. See, for example, reference to the behaviour of a public official who "influences awarding of … procurements by the State, for the purpose of obtaining material … benefits for himself" (Article 13 (g)). The offence of using "privileged information on the activities of State bodies for personal gain" (Article 13 (h))[34] may be seen as an abuse of office, etc.

50. Punishing a public official concurrently under the law on conflict of interests and under the Criminal Code may come into conflict with the principle *ne bis in idem*. Another risk is that a bribe would be qualified as a prohibited gift, and this would allow the public official to escape criminal liability. The Venice Commission does not think that the notion of a conflict of interest (as a situation which may alter the judgment of the public official) should be put on the same level as a *knowing abuse of office* for personal gain. Article 13 should therefore exclude offences which are quasi undistinguishable from those regulated by the Criminal Code.

7. Gifts (Article 14)

51. Article 14 establishes regulations regarding gifts. These seem reasonable, under condition that the practice of application of Article 14 is combined with the correct interpretation of the definition of gift provided in Article 4 (g): "money, item, right and service given without compensation or any other benefit given to a public official or connected person in relation to the exercise of their public office." It is important that the Rulebook to be established according to Article 14 (9) develops this definition, by explaining that to be a "gift" a benefit does not require an exchange of favours. In other words, the gift is not the same thing as a bribe, although it can become one if there is a *quid pro quo* exchange.

52. The financial threshold below which gifts are permitted (and do not have to be reported at all) is set at 200 BAM (around 100 EUR). Consideration should perhaps be given to lowering this threshold to for example 50 EUR, or at least required gifts to be disclosed from a lower threshold than 200 BAM.

[34] Article 13 (h) should refer to "non-public information", not "privileged information".

8. Asset declarations (Articles 15 and 16)

53. The current law contains one short provision obliging public officials to "submit regular financial reports" and leaves the details to other laws and to the regulations by the CoIC. The draft Law, by contrast, introduces much more detailed rules on the submission of asset declarations by public officials, and for the verification of these declarations. This is welcome since a well-functioning system of asset declarations is a useful tool to combat corruption. However, there is still a room for improvement.

54. First of all, it appears that the obligation of public officials to submit asset declarations under the draft Law is not aligned with the requirements to the content and scope of the declarations which are to be submitted by judges and prosecutors under the draft Law on the High Judicial and Prosecutorial Council.[35] Unless there are specific reasons why certain rules should be applicable only to judges and prosecutors, and not to other public officials, the provisions of the draft Law and of the law of the HJPC in this regard should be similar (while the procedure of verification of such declarations and the sanctioning mechanism could be evidently different). Furthermore, it is unclear whether other civil servants (those of a lower rank who are not covered by the draft Law) are subject to a similar obligation to submit asset declarations and what is the scope of such obligation.

55. Article 15 establishes an obligation to submit a declaration on taking office, an updated declaration by March 31st every year, and a declaration of any change in the assets exceeding about 5,000 EUR within 30 days. It is not clear why the annual updated declaration is needed if there is an obligation to declare significant changes anyway. Consideration should be given to mandating only the annual declaration and subsequent notification of significant changes, as well as the submission of a declaration at some moment after the public official leaves the office (for example, six months later).

56. Article 15 lists the types of assets and income that should be declared. Article 15 (5) provides that the CoIC shall prescribe the forms and establish the precise contents of declarations. It will be important that the CoIC establish a system in which declarations are filed in a format that is electronic and machine-readable, to facilitate efficient processing and verification.

57. However, the list of property to be declared has two notable gaps. First, it does not mention immovable property which is *not subject to registration* (see Article 15 (2) (b)), like cash amounts, jewellery, and similar luxury items. An asset declaration would be incomplete if an official does not indicate how much cash he/she has or whether he/she possesses any luxury items of certain value. Furthermore, it would be useful to require in Article 15 (2) (h) to declare not only the rights to use an official apartment, but any other property which is owned by someone else but is used by the official concerned, such as a private house, car, yacht, etc.

58. Under the draft Law, asset declarations do not include assets of family members, or other closely connected persons. It is important to include such persons in the declarations, thus giving the CoIC a better opportunity to assess the conflict of interest, and, potentially, reveal cases of corruption, where a family member of a public official accepts gifts, bribes or runs a business on behalf of the public official, without being the real beneficiary. That being said, the Venice Commission in the recent Opinion on the HJPC it indicated that it may be excessive to require that judges or prosecutors submit declaration of parents and adult children who do not share joint household with the declarant.[36]

[35] See CDL-AD(2021)015, Bosnia and Herzegovina - Opinion on the draft Law on amendments to the Law on the High Judicial and Prosecutorial Council, paras. 30 et seq.
[36] *Ibid*., para, 42

59. The draft Law should describe more clearly what sort of information contained in the asset declarations should be published. Quite often situations of conflict of interest and even cases of corruption are revealed by the media on the basis of information from the publicly accessible databases on property, shareholding, etc. However, to use it one needs to compare it with the declarations made by the public official about his/her wealth, the property he/she uses, etc. The reference to personal data in Article 15 (8) leaves the issue unclear. The media and the public should have access to the declarations and the law should provide for the publication of declarations (with few, narrowly defined exceptions aimed at protecting "personal data of public officials, their close relatives and connected persons").

D. Implementation mechanism: the CoIC, its mandate, composition, powers, and the decision-making process

60. Implementation of substantive rules on conflict of interests, gifts, asset declarations, etc. is entrusted to the CoIC – a collective body composed of ten members, appointed by the Parliament. There is a great variety of institutional models on anti-corruption/integrity/conflict of interests bodies: some countries have opted for the creation of a single centralised anti-corruption agency with broad powers, while in other countries (often with a long-standing tradition of independent civil service) such matters are dealt with by the same institution where the civil servant works.[37] If the activities of MPs or Ministers are investigated, a different control mechanism (decision by the Parliament or an apex court) should be used.

61. Establishment of a *collective* anti-corruption body is not always the best solution. Thus, the verification of the declarations of assets needs mainly investigative work to collect enough evidence. A large committee having to make many procedural decisions is not the most efficient decision-maker as to the verification of the asset declarations. Further, it is not clear why the tasks of the CoIC (or at least some of these tasks) do not fall under the existing anti-corruption Agency.

62. Transferring those powers to the Agency, however, would require a profound revision of the manner of appointment of the head of the Agency and the principles of its functioning. As this Opinion does not cover the law on the Agency, the Venice Commission cannot make any recommendations in this regard. Furthermore, there is no clear international standard which would prevent countries from establishing collective anti-corruption bodies with such a remit. It is ultimately a matter of expediency. And, indeed, collective bodies have some advantages – for example, they may be more representative of the society and less prone to individual biases. In the following analysis the Venice Commission will therefore proceed on the basis of the model existing under the current law and proposed in the draft Law, with the CoIC as the main implementing body.

1. Size of the CoIC

63. The draft Law envisages the CoIC to have ten members. This raises an obvious issue that decision-making might be blocked simply because of the even number of members. More importantly, it is not clear why so many members are needed. The number of officials which the draft Law covers appears to be slightly below 600. The day-to-day work (for example of verifying asset declarations) would need to be conducted by permanent staff. A smaller number of Commission members – for example five – would seem more appropriate.

[37] See, for example, Preventing and Managing Conflicts of Interest in the Public Sector - Good Practices Guide (2018), pp. 18 et seq.

2. Independence of the CoIC

64. Article 17 (2) of the draft Law defines the CoIC as an "independent" body. The need to ensure the independence and political neutrality of anti-corruption bodies is emphasised in many international documents.[38] However, due to the great variety of models, mentioned above, it may be difficult to develop a uniform approach to what independence and political neutrality should mean in this context. Admittedly, the need for an independent and politically neutral anti-corruption agency is stronger in those States where the level of corruption is high, and, at the same time, where there is a real risk of a political capture of such a body.

65. If compared with the current law, the draft Law makes several steps which potentially increase the independence/political detachment of the CoIC. The main positive change is the new requirement that public officials may not become members of the CoIC (Article 17 (15)),[39] that they are selected following an open call for candidates (Article 17 (5)), that a standing parliamentary committee[40] carries out a pre-selection of candidates (Article 17 (8)), that they should have appropriate professional experience (Article 20 (1) (i)) and cannot have been members of a "management body" of a political party for five years prior to applying to the CoIC (Article 20 (1) (h)). Those measures could indeed decrease political partisanship of the CoIC members and make this body more professional. The draft Law also prohibits in Article 17 (16) "any form of influence on the work of the Committee that might jeopardize autonomy and independence". This is welcome,[41] even though some of these provisions would benefit from further clarification. For example, it would be necessary to explain what "management body" of a political party means in the context of Article 20 (1) (h). Furthermore, the legislator could consider requiring members of the CoIC to sever all ties with the political parties once elected, irrespectively of whether or not he/she is in the management bodies of this party.

66. In spite of these positive amendments, the power to appoint members of the CoIC still belongs to a simple majority in Parliament (see Article 17 (12)). This means that the loyalty to the ruling majority may be a key condition to be elected as a CoIC member and creates a risk that the CoIC would be politically homogenous and thus subservient to the political majority.[42]

67. Several avenues could be explored to avert this risk. The Venice Commission has previously supported the idea of appointment of the head of an anti-corruption agency and two members of an anti-corruption Commission[43] by a *qualified majority* of votes in the Parliament.[44] This model should be coupled with an adequate anti-deadlock mechanism in case such majority cannot be

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[38] See, as an example of good practice, the Jakarta Statement on Principles for Anti-Corruption Agencies of 2012, and, most importantly, the Council of Europe Committee of Ministers' Resolution (97) 24 on the twenty guiding principles for the fight against corruption (GPC 15), principle 3. See also Article 20 of the Criminal Law Convention on Corruption and Articles 6 and 36 of the UNCAC.

[39] Under the current law all nine members of the CoIC are either MPs or top managers of the Agency.

[40] The Joint Committee on Administrative Affairs of the Parliamentary Assembly of Bosnia and Herzegovina

[41] It is unclear why candidates are required to pass "administrative qualifying exam" (which is usually required for civil servants) and how this is compatible with the requirement that the members of the CoIC cannot be "public officials". Probably, there is no contradiction if the term "public official" is interpreted narrowly, as defined in Article 4 of the draft Law (i.e. as public officials of a certain high rank). In this case, ordinary civil servants would not be excluded from being candidates to the position in the CoIC, and the requirement for candidates to have passed an administrative exam would not be too restrictive.

[42] See the Colombo Commentary on the Jakarta Statement on Principles for Anti-Corruption Agencies, Vienna, 2020, pages 28 and 29, which stresses the importance of the cross-party support for appointment of members of anti-corruption agencies.

[43] Dealing with illegally acquired assets

[44] CDL-AD(2010)030, Final opinion on the third revised draft act on forfeiture in favour of the state of assets acquired through illegal activity of Bulgaria, para. 15

reached. In addition in case a new member may not be elected for want of the necessary qualified majority, the mandate of the outgoing member should be automatically extended. A qualified majority should be required either in the nominating parliamentary Committee or in the plenary session, or at both levels.

68. Other solutions – such as some form of proportional representation of the main political forces in this body, or the appointment of some members by civil society or another independent external body, could be considered as well.[45] Again, consideration should be given to amending the composition of the nominating parliamentary Committee by adding members representing the civil society, academia, etc. Whatever arrangement is chosen, the goal is to ensure that the CoIC is not politically monolithic, and members appointed with the support of the ruling majority cannot take decisions single-handedly. [46]

69. In addition, Article 17 (6) establishes that members may perform the function for up to two terms. This raises the risk that members who are approaching the end of their first term can be influenced more easily if they are interested in being re-elected. Consideration should be given to limiting the term of members to one, while ensuring that it is longer than the standard term of the legislature.

70. Article 22 (2) (e) (which should be 22 (2) (f)) establishes that a CoIC member shall be removed if the Parliament does not adopt the annual report on the work of the CoIC twice in a row. This does not make sense, as it imposes a sanction on an individual CoIC member for something that is the responsibility of the CoIC as a whole, and should be deleted. Again, to ensure the independence of the CoIC it would be advisable to provide for the removal of its members only for an identifiable breach of the law (a criminal conviction, a serious disciplinary offence, etc.), and for the removal to be decided by the CoIC itself, and not by a vote in the Parliament (which may be driven by political considerations). In particular, removal for unjustified absence from sessions should not be a matter for the Parliament to decide.

71. Another threat to the independence of the CoIC comes from its relationship with the Agency. The Agency has no power to deal with specific breaches of the law but, by contrast, it is given considerable human and financial resources. The CoIC has such powers but no independent budget, no secretariat and even no seal (see Article 24). Administratively speaking, the CoIC is fully dependent on the Agency. This model of relationship between the two anti-corruption bodies was repeatedly mentioned to the rapporteurs as one of the reasons why the system in general is so inefficient. The Venice Commission therefore recommends separating the CoIC from the Agency in administrative matters. It is necessary to provide the CoIC with its own budget and with an independent secretariat, managed by the CoIC itself.

3. Ethnic quotas

72. Similarly to the currently existing CoIC, the new CoIC would be composed along ethnic lines: Article 17 (3) states that the Parliament "shall ensure that the number of Committee members from the ranks of constituent peoples and a member from the ranks of Others is in accordance with the BiH Constitution." It is not clear what this means, as the Constitution appears to contain no provision establishing ethnic quotas for such bodies. Reference in the Preamble to the

[45] See CDL-AD(2021)012, Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption, paras. 38 et seq.

[46] As regards lustration bodies, the Venice Commission recommended the involvement of two branches of power (the President and the Parliament) in the process of appointment of its members, together with an active involvement of the civil society - see CDL-AD(2015)012, Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhovna Rada on 21 April 2015, para. 87 et seq.

Constitution to Bosniacs, Croats, and Serbs as "constituent peoples" is not sufficient to claim that the Constitution *requires* such a composition. It appears to be a choice of the legislator, and not a constitutional necessity.

73. The Venice Commission recalls that ethnic-based ineligibility for certain political positions was previously found by the European Court of Human Rights to be incompatible with Article 14 of the European Convention on Human Rights (the ECHR), prohibiting discrimination, taken in conjunction with Article 3 of Protocol No. 1 (free elections), and of Article 1 of Protocol No. 12 (general ban of discrimination).[47] Ethnic quotas do not limit the minorities' rights in the same categorical manner as direct ineligibility based on ethnicity. Nevertheless, a question of the possibly discriminatory character of such measures may arise under the ECHR.

74. In the opinion of the Venice Commission, the CoIC should be established based on merit, not ethnic origin. Ethnic representation contradicts the professional and non-political character of the CoIC. The Commission understands that, in the specific context of Bosnia and Herzegovina, even if the ethnic representation rules are not clearly set out in the law, they would be *de facto* followed through political bargaining amongst three communities at the moment of appointment of the CoIC members. The Venice Commission is aware of this possible scenario; to reduce its likelihood, it recommends indicating in the draft Law that the CoIC members are to be selected on the basis of their competencies, reputation and expertise (which means that they should not be elected on the basis of their particular ethnicity).

4. Voting procedure in the CoIC

75. The current CoIC has hardly been operational in the past few years. One of the reasons for this was a special majority requirement: under Article 17a "decisions of the Commission shall be taken by a majority vote of all members, which shall include the votes of at least two members from each constituent people". This means that every two members from the same "constituent" ethnic community may block the decision-making, either by voting against a decision or by not participating in the voting at all.

76. The draft Law makes some changes to the voting procedure. Under Article 18 (6) the CoIC can take decisions with a quorum of seven members. Every decision "on matters of high importance" should be taken unanimously, but if this threshold is not reached, there is a second round where such decisions are taken by the 2/3 majority, and, finally, in a third round a simple majority is required. In any case the majority must include votes by one representative of each of the three constituents peoples (Article 18 (9)). As to the "decisions on matters regarding day-to-day operations" (Article 18 (8)) they are always passed by the 2/3 majority, and there is no requirement related to the votes of the representatives of the constituent peoples.

77. As previously noted by the Venice Commission, such a "decreasing majority mechanism" sometimes makes the requirement to have a qualified majority in the first round of voting redundant.[48] At the same time, a strict adherence to a qualified majority sometimes may lead to blockages. In the context of Bosnia and Herzegovina, decreasing the majority needed for the CoIC to take decisions may improve the efficiency of this body. However, in many regards the proposed procedure is not entirely consistent or clear.

78. First, it is difficult to see how the "matters of high importance" would be distinguishable from the day-to-day operations. Most conflict of interest issues are sensitive and could be considered important.

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[47] See *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009

[48] See CDL-AD(2013)028, Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, para. 8

79. Second, the draft Law provides for the possibility of three rounds of voting on the "important" issues. As a result, an important decision could be taken by a simple majority in the third round (including votes of at least one Serb, one Bosniac, and one Croat), while a less important decision would still require a 2/3 majority (without a mandatory ethnic representation, however). This is not entirely consistent.

80. Third, the draft Law does not foresee the frequency of the meetings of the Committee; therefore, it is unclear whether the next meeting with a simpler decision-making may follow right after the end of the previous session and who decides on it. The draft Law provides for short deadlines for the decision-making, so having three rounds of voting may lead to those proceedings being time-barred.[49]

81. Finally, it is unclear whether these majorities are calculated with reference to the overall number of members of the CoIC or the members present at each particular session.

82. In any event, the Venice Commission recommends abandoning the "special majority" requirement altogether. If, for political reasons, it is difficult to avoid it, some minimal special majority requirement should be reserved for a clearly defined and narrow category of important decisions – like, for example, the adoption of the rules of procedure or other normative acts by the CoIC. As to the individual decision-making, the quorum and the majority requirement should be realistic and not based on ethnic criteria. The Venice Commission also reiterates its earlier recommendation that the number of members of the CoIC could be reduced, for the sake of efficiency.

5. Procedure before the CoIC

83. Contrary to the current law, the draft Law provides quite detailed rules on the procedure the CoIC should follow when examining specific cases. This is positive, although there may still be a need for the CoIC to develop these rules further in the Rules of Procedure, which should be adopted at one of its first meetings. The draft Law should specify when and how these meetings are convened.

84. Article 26 describes the procedure of examination of specific cases by the CoIC. In particular, it gives the CoIC the power to request written submissions from the public official concerned (see point 11) or to hear him/her in person (see point 10), as well as to collect other evidence. The question is whether the public official has a *right* to present his/her case before the CoIC (orally or in written) and whether he/she enjoys other basic rights of the administrative due process. That should be stipulated more clearly.

85. Article 16 of the draft Law describes how the CoIC should verify asset declarations. It states in point (1) that the CoIC shall compare declarations against "data on assets and income of the public official from institutions, authorities and legal entities that dispose of such data, *at all levels of government*" (italics added). It is not entirely clear whether this data includes information from private entities. The Ministry of Justice maintained that private entities are under an obligation to provide information – if this is the case, this should be stated more clearly in the text of the law. It is of crucial importance that the CoIC should have access to information on bank accounts, but also other financial institutions (e.g. pension funds, leasing companies, etc.). The CoIC should be able to request such information not only within the country but also abroad (indeed, the efficiency of this mechanism would depend on the existence of the agreements on mutual legal assistance and similar mechanisms of the exchange of information). Article 16 should be

[49] Especially if a separate decision is required to start proceedings under the law: under Article 26 (8) the statute of limitations to initiate the proceedings is six months from the moment when the CoIC learns about the violation of the law.

complemented by establishing an *obligation* of public bodies and private companies (and in particular financial institutions) to provide information about financial instruments and other property owned by the public officials.

86. The Venice Commission is aware that establishing such obligation may be problematic from a constitutional perspective. If, for example, the legislation on bank secrecy falls within the competence of the Entities, a State law cannot introduce new rules in this sphere without the Entities' approval. At the same time, if the CoIC has no power to request and receive information from the Entities or from the private financial institutions and companies in general about the assets of public officials, the whole mechanism of asset declarations may become superfluous, since it would be too easy to hide assets from the CoIC.

87. Article 26 (3) establishes a 30-day deadline for the CoIC to decide on a case, extendable to 60 days in exceptional circumstances. This may not be a sufficient period for any case that is not simple, so the draft Law should allow for investigations to be extended for longer if necessary (especially where the verification of asset declarations involving possible foreign property of a public official is involved).

88. Article 26 (17) states that in the case of suspicion that a criminal offence has been committed, the CoIC shall suspend proceedings and send a report to the prosecutor's office. However, offences provided for by the draft Law are not necessarily identical to the criminal ones provided by the Criminal Code. Thus, an untimely submitted asset declaration would not necessarily mean that the public official has taken a bribe or misappropriated public funds. In many situations it would be possible to conclude proceedings relating to offences provided for by the draft Law without entering the criminal law field. And there is a risk that if the CoIC waits until a criminal case is terminated, the proceedings under the draft Law may become time barred. This provision should therefore be revised in order to allow the CoIC to conclude the proceedings under the draft Law when a criminal investigation is pending, provided that the CoIC would not prejudge the outcome of any criminal case. In other words, when using its sanctioning power, the CoIC must take into account the possible *ne bis in idem* effect, but a pending criminal case should not be an obstacle to bring a public official to liability under the draft Law, when the criminal and administrative proceedings do not have the same object.

89. Finally, the draft Law is not entirely clear as to whether the decisions of the CoIC are immediately enforceable, and what is the procedure for appealing them. Article 29 states that "decisions of the Committee are final, and no appeal shall be allowed against them. However, an administrative dispute may be initiated before the Court of Bosnia and Herzegovina." It is understood that such dispute would be heard by the Administrative Division of this Court. At the same time, according to Article 30 (4), in order to impose a monetary fine "the Committee shall initiate the minor offence procedure before the Court of BiH". It is not entirely clear how it is possible for the Court of Bosnia and Herzegovina to be a court of first instance for the purposes of imposing a sanction under Article 30 (4) and, at the same time, be the court which reviews administrative sanction imposed by the CoIC itself under Article 29. It is also unclear what role the Appeal Chamber of the Court of Bosnia and Herzegovina will play in this process. While it is positive that sanctions imposed under the draft Law could be reviewed by a judicial body, the role of the judicial body in this process should be clarified.

90. The Ministry of Justice in its comments explained that "an appeal would be filed with the Administrative Division of the Court of BiH against the decisions of the CoIC establishing the existence of a conflict of interest as a legal remedy for that decision, while as a part of the minor offence procedure (for imposing sanctions prescribed by the draft Law), a procedure would be initiated before the same Court […], but it would be decided by the division of the Court that is competent to conduct minor offence procedures." If there are two different avenues for the judicial review of the decisions of the CoIC, depending on the type of decision taken by it, this should be explained more clearly in the draft Law.

91. It has also to be verified if the Court of Bosnia and Herzegovina is competent to decide on the administrative disputes (Article 29) and minor offence procedures (Article 30 (4)). The draft Law does not make amendments to the relevant procedural laws, which may be necessary to do in order to reflect the provisions of the draft Law.

E. Sanctions

92. Article 30 establishes a range of sanctions for various violations of the draft Law. The CoIC may issue a reprimand, impose a monetary fine (or seek a court order imposing such a fine – see above), or initiate a disciplinary removal from office or resignation of a public official.

93. The Venice Commission recalls that in order to be efficient, the duty of public officials to report a conflict of interest, to regularly submit an asset declaration, and to follow regulations on gifts should be accompanied by *appropriate sanctions.* In particular, the UN Convention Against Corruption (the UNCAC), ratified by Bosnia and Herzegovina in 2006, provides for an obligation of member States to establish measures requiring public officials to make declarations about outside activities, employment, investments, assets and substantial gifts or benefits.[50] It also requires "effective financial disclosure systems for appropriate public officials and [...] appropriate sanctions for non-compliance".[51] The Technical Guide to the UNCAC stresses that the duty of public officials to disclose assets and interests should be ensured by the "appropriate" deterrent penalties.[52]

94. At the European level, many GRECO reports of the 4th evaluation round[53] stress the need to have appropriate sanctions to enforce the obligation to file financial declarations which, in turn, may detect and prevent conflicts of interest. For certain categories of public officials (like judges, for example) GRECO recommends that submission of false declarations should be punished by criminal sanctions.[54] More specifically, in the Evaluation Report for Bosnia and Herzegovina (2016) GRECO recommended introducing appropriate sanctions for false financial reporting, both for the elected officials and for the judges and prosecutors.[55] The OECD Anti-corruption Network for Eastern Europe and Central Asia is also in favour of criminal sanctions for intentional false or incomplete information about assets of significant value.[56]

95. Finally, the Venice Commission itself recommended stricter sanctions for offences related to the obligation of public officials to submit asset declarations.[57] It considered that what sanctions are "appropriate" depends on a multitude of factors. Such sanctions may be of an administrative,

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[50] See Article 8 para. 5, available at https://www.unodc.org/unodc/en/corruption/uncac.html
[51] *Ibid*., Article 52 para. 5
[52] Available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook, p. 36
[53] GRECO, 4th Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors.
[54] GRECO, 2017, Corruption Prevention: Members of Parliament, Judges and Prosecutors. Conclusions and trends, https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7 , p. 21
[55] See paras. 61 and 120 of the 4th Evaluation report on Bosnia and Herzegovina, available at http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c4999
[56] OECD, Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2016-2019, page 100, available at https://www.oecd.org/corruption/acn/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2016-2019-ENG.pdf.
[57] See CDL-PI(2021)010, Ukraine - Joint Urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe, on the draft Law amending provisions of the Code of Administrative offences and the Criminal Code regarding the liability of public officials for inaccurate asset declaration (No. 4651 OF 27 January 2021)

disciplinary or criminal character. While it is difficult to determine a monetary fine or a term of imprisonment which would represent a "European average" in such cases, providing for imprisonment for the most serious offences seems to be a sensible move, when the magnitude of the problem of corruption in the country so requires.[58] This is the case in the context of Bosnia and Herzegovina, where the level of corruption is widely regarded as being high and increasing (see paragraph 12 above).

96. As concerns the draft Law, the Venice Commission notes that the sanctions it establishes do not appear sufficient. First of all, Article 30 (9) does not give the CoIC the power to *dismiss* a public official: the CoIC can only *initiate* disciplinary proceedings or call for the resignation. The draft Law does not stipulate clearly that a serious breach of the conflict of interest rules, the failure to submit an accurate asset declaration, acceptance of gifts in breach of the law, etc. are disciplinary offences. If they are not defined as such in other pieces of legislation, the power of the CoIC to initiate disciplinary proceedings would be meaningless. It is therefore necessary to revise the legislation on public service and other relevant laws to ensure that serious breaches of the law on the conflict of interest are punishable with the dismissal, or to stipulate it clearly in the draft Law under examination.

97. As to the administrative sanctions provided by the draft Law, and in particular monetary fines, they seem to be rather mild. Thus, the sanction for submitting inaccurate information in an asset declaration is between about 2,500-5,000 EUR. While this may be an appropriate sanction for a certain category of inaccuracies (those that are not insignificant but not very serious), there is a scope for more severe sanctions where an official submits a false declaration with serious errors, there is evidence it was intentional, etc. There does not appear to be any sanction at all for failing to submit a declaration completely. One or both of these violations would be a criminal offence in some countries.[59] Limiting the amount of sanctions to 5,000 EUR may reduce the deterrent effect of the sanctions when high-value assets are not declared. Likewise, the sanction for failing to provide information requested for the purposes of verification is between about 250 and 1,000 EUR, which may be insufficient.

98. Finally, it is unclear whether a breach of any of the obligations established by the draft Law (to submit accurate asset declarations in time, not to accept gifts beyond certain value, to withdraw from the decision-making in a situation of a conflict of interest, etc.) amounts to a criminal offence and is punishable as such. On the one hand, there is a certain overlap between the provisions of the draft Law and offences defined by the Criminal Code of Bosnia and Herzegovina, such as bribery, abuse of office, embezzlement, forgery of official documents, etc. (see paragraphs 46 – 48 above). On the other hand, some of the stand-alone obligations established by the draft Law (for example, the failure to report a gift (Article 14 (4)), or the failure to submit an asset declaration in time (Article 15 (1)) seem to be punishable by an administrative fine only.

99. It is important that the character and the level of sanctions change depending on the seriousness of the impugned behaviour, in line with the principle of proportionality and having in mind their deterrent effect.[60] In particular, sanctions should increase after a *repeated failure* of the public official to comply with an obligation established by the draft Law. Article 12 allows the CoIC to impose the same fine (or range of fines) monthly if an official fails to refrain from violating the law. It would be more logical to allow a steep gradation of sanctions, including criminal sanctions for the repeated or persistent failure to meet the obligations it establishes.

[58] *Ibid*, para.60
[59] For example, in Albania, Ukraine and the United States.
[60] See CDL-PI(2021)010, cited above, paras. 36 and 37

100. Similarly, a minor inaccuracy in a declaration may be punishable by an administrative fine only. By contrast, a significant omission (even when there is no evidence of bribery, embezzlement, etc.) may lead to a criminal sanction.

101. The Ministry of Justice in its comments stressed that the purpose of the draft Law was not to establish criminal sanctions but to introduce an administrative law mechanism of combatting conflicts of interest. The Venice Commission is aware of that, but it recalls that reforms in this field cannot be undertaken without a "holistic vision" (see paragraph 15 above): administrative, disciplinary and criminal law mechanisms are mutually complementary, and the revision of the draft Law under consideration should go hand in hand with the revision of the relevant criminal law provisions.

102. In conclusion, the national legislation should provide for a clear hierarchy of sanctions: disciplinary ones (including dismissal), administrative fines for less serious violations of the law on the conflict of interests, and criminal sanctions (including possibly imprisonment) reserved for the most serious violations or the repeated/persistent failure to meet the obligations provided by that law.

IV. Conclusion

103. The draft Law on the conflict of interests was submitted to the Venice Commission for opinion by the Minister of Justice of Bosnia and Herzegovina, Mr Grubeša, on 27 April 2021. This draft Law had been developed by the Government of Bosnia and Herzegovina in response to the European Commission's Opinion on the EU membership application of Bosnia and Herzegovina, and the relevant key priorities defined therein.

104. The Venice Commission welcomes the willingness of the authorities to work with its European and other international partners in order to better ensure the integrity and the accountability of public officials . The draft Law nonetheless presents several shortcomings which need to be addressed through a comprehensive revision, including the relevant pieces of legislation at the State level and at the level of the Entities, the Brčko District, and the cantons. This revision should be carried out urgently.

105. The central problem of the currently existing legislative framework is its fragmentation. Most importantly, the State-level legislation does not apply at the Entities'/Brčko District level, and the Entities either do not have such legislation, or it is not implemented efficiently, or not harmonized with the State law. The Venice Commission reiterates its earlier recommendations that it would be desirable to transfer the competence to regulate such matters from the level of the Entities and the Brčko District to the State level, as it was the case originally, under the 2002 law. If this is impossible for political reasons, the Entities and the Brčko District should at least align their laws with the State legislation and entrust implementation of the former to a central body, created at the State level. Alternatively, as a minimum, there should be a possibility to appeal from the level of Entities and the Brčko District to a State-level body. Whatever model is chosen, the Entities and the Brčko District should ensure that their laws on the conflict of interest mirror a similar law at the State level, and that they are consistent with each other insofar as possible, in terms of both substantive provisions and procedural/institutional arrangements.

106. The draft Law is designed to apply equally to elected officials (in particular MPs) and to appointed office holders of high rank (ministers, directors of State agencies, advisors, etc.). While certain rules could be applied to the MPs and appointed officials without distinction (like those regarding asset declarations, for example), some other rules should be different (for example, the incompatibility requirements, specific situations of the conflict of interest, sanctioning mechanism, etc.). At the same time, the draft Law does not apply to ordinary civil servants, who are governed by a special regime (or even multiple regimes). The Venice Commission recommends a comprehensive revision of the structure of the draft Law and of the substantive

obligations, enforcement mechanisms and sanctions it establishes, in order to adapt its rules to different categories of public officials.

107. It is further necessary to revise certain substantive rules contained in the draft Law. In particular:

- the definition of the conflict of interest should cover both actual and potential conflicts and also "appearances" of such a conflict;
- private interests of the officials (financial or personal) should not necessarily be "contrary" to or "against" the public interest to constitute a conflict of interest;
- the definition of "close relatives" and "connected persons" should be expanded;
- the prohibition of a parallel employment or a business activity for appointed officials should be nearly absolute, and include a prohibition for a State-level official to run a company having business relations with the administrations of the Entities' or the cantons, as well as the prohibition to run a company which benefits from the public money indirectly. By contrast, special rules on incompatibilities, business activities, parallel employment and secondary activities should be designed for MPs and those appointed officials who perform functions part-time.

108. As regards steps to be taken by a public official in a situation of a conflict of interest, the draft Law should:

- clearly provide for a duty of public officials to declare the conflict to his/her superior and/or the oversight body for conflict of interest, and define the form of such declaration;
- specify whether the recusal, in the case of a conflict of interest, may be ordered by a superior administrative authority or another competent body.

109. The draft Law should not establish offences which are quasi undistinguishable from those regulated by the Criminal Code. A conflict of interest (as a situation which may alter the judgment of the public official) should not be put on the same level as a *knowing abuse of office* for personal gain. A prohibited gift is not the same thing as a bribe, although it can become one if there is a *quid pro quo* exchange.

110. The new rules on asset declarations are a welcome addition to the current law, especially if such declarations would be submitted in an electronic machine-readable format which can facilitate their verification. However, for this system to be effective and efficient, these declarations should include additionally:

- information about cash amounts and luxury items not subject to registration;
- information about property which is owned by someone else but used by the official concerned, such as a private house, car, yacht, etc.;
- information about assets of family members sharing the same household with the public official.

111. As regards the implementation mechanism, the Venice Commission notes with regret that the current Conflict of Interests Commission (CoIC) has hardly been operational in the past years. To increase its efficiency and independence the draft Law proposes certain amendments which go in the right direction but are still insufficient. Further amendments in this regard should be considered, namely:

- the CoIC does not need to have ten members, and can be reduced in size;
- to protect the CoIC from political dominance by the ruling majority its members should be appointed with a qualified majority of votes, either in the nominating parliamentary Committee or in the plenary session of the Parliament, or at both levels, with an

appropriate anti-deadlock mechanism. Other solutions – such as some form of proportionate representation of the main political forces in this body, or the appointment of some members by civil society or another independent external body, could be considered as well;

- ethnic quotas in the CoIC should be abandoned, and members should be selected only on the basis of their competencies, reputation and expertise;
- the CoIC should become administratively and financially independent from the Agency;
- in the voting process within the CoIC, the "special majority" requirement based on ethnic representation should be removed altogether or at least be reserved for a narrow and clearly defined category of important decisions. As to the individual decision-making, the quorum and the majority requirement should be realistic and not based on ethnic criteria;
- the law should clearly establish an *obligation* of public bodies and private companies (and in particular financial institutions) to provide information about financial instruments and other property owned by the public officials, and that obligation should be extended to the public bodies and companies at all levels of the administration, to the extent permissible under the Constitution;
- the draft Law should provide for longer deadlines for the examination of individual cases by the CoIC, or for a possibility to extend those deadlines;
- the procedure of judicial review/appeal against the decisions of the CoIC should be described more clearly.

112. Finally, the legislator of Bosnia and Herzegovina is encouraged to introduce more severe sanctions for breaches of the law. The law should stipulate clearly that a serious breach of the conflict of interest rules, the failure to submit an accurate asset declaration, acceptance of gifts in breach of the law, etc. are disciplinary offences punishable with dismissal (even if the decision to remove an official is taken not by the CoIC but by another competent authority). Administrative sanctions should increase gradually depending on the seriousness of the impugned behaviour. The most serious violations, in particular those involving large amounts of undeclared assets or the persistent failure to submit a declaration, should amount to criminal offences and be punished as such, including by imprisonment.

113. The Venice Commission remains at the disposal of the authorities of Bosnia and Herzegovina for further assistance in this matter.