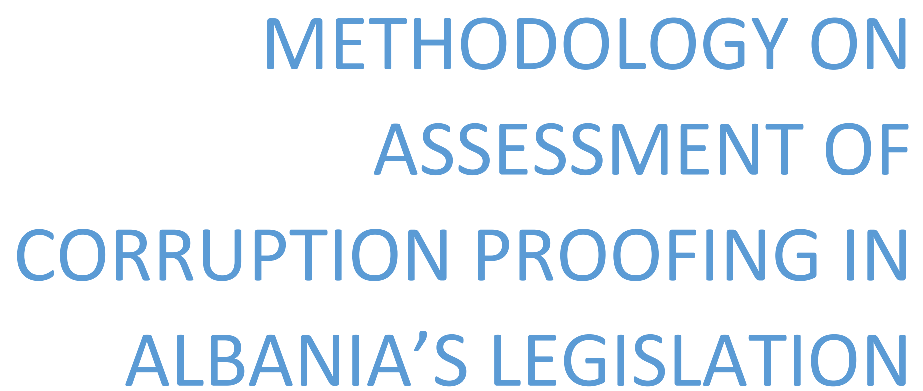

METHODOLOGY ON ASSESSMENT OF CORRUPTION PROOFING IN ALBANIA'S LEGISLATION

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1. Phenomenon of Corruption in Albania

According to the Transparency International, corruption in Albania within the public sector remains one of the country's biggest challenges, particularly in areas such as political parties, health, and justice systems. The low wages, the social acceptance of bribery and the narrow social networks make difficult the task of combating corruption among police, judges and customs officials. In 2009, Albania applied for EU membership, but the Commission assessment, while recognizing progress made, concludes that Albania's democratic institutions still lack effectiveness and stability and have not yet been brought to EU norms.[1]

In 2012, the Transparency International Report (E.U.), despite the "zero tolerance" policy by the government of Democratic Party, ranked Albania as the most corrupt country in Europe and also as one of the most corrupt countries in the world. Albania was in 116th position out of 176 countries in 2012, down from 95th place in 2011. Other international reports have shown that $1.3 billion moved illicitly out of the country from 2005 to 2010. Things have, however, improved ever since. A Transparency International report on Corruption Perception Index in 2015 ranked Albania in the 88th position out of 168 countries, marking a considerable improvement since 2012. This bears witness to Government of Albania's measures undertaken to curb corruption during this period.

A survey conducted by IDRA on "Corruption in Albania: Perceptions and Experience" also reveals that corruption is seen as a major problem by citizens in Albania. Findings show that citizens' perception on corruption in the country remains high; about 89% of the public opinion thinks that corruption is "widespread" or "very widespread" among public officials. More than half of citizens think that corruption among public officials either has increased (33 percent) or has remained the same (37 percent) compared to three years ago. Similar to findings of the 2010 Survey findings[2], citizens regard most institutions as corrupt, scoring 61 points in a 100-point scale of corruption perception where 0="very hones" and 100="very corrupt".

Corruption in Albania takes up many different forms from bribing public officials, abuse of tenders, faulty privatization, rewarding of public contracts, formation of monopolies on basic goods, discriminatory application of laws and taxes, illegal funding of political parties, etc.[3]

According to another report on "Analysis of the Justice System in Albania", which is based on perceptions and testimonies of citizens, a judge or prosecutor must pay a minimum of 300 thousand Euros to be appointed in the judiciary in Tirana and starting from 100 thousand Euros

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[1] http://www.pecob.eu/Corruption-Albania-biggest-challenge-integration-E-U

[2] IDRA has conducted 5 surveys on "Corruption in Albania: Perceptions and Experience" (form 2006 to 2010) funded by USAID.

[3] http://www.againstcorruption.eu/uploads/norad/Albania.pdf

in other main Albanian cities.[4]

Irrespective of problems, Albania has made some progress in the fight against corruption. A new anticorruption strategy and action plan were adopted recently. However, according to 2015 European Commission Report on Albania, more efforts are needed to make progress with a view to establishing a solid track record of investigations, prosecutions and convictions at all levels. Proactive investigations, systematic risk assessments and inter-institutional cooperation need to be improved. The independence of institutions involved in the fight against corruption needs to be enhanced, as they remain vulnerable to political pressure and other undue influence.

The track record of investigations, prosecutions and convictions in corruption cases remains limited. So far, there are only very few first instance convictions of corruption cases involving high-level state officials. One judge has been convicted on corruption related grounds. The number of final convictions involving junior or middle-ranking officials has increased steadily since 2010, but remains low overall. A number of high-profile cases, including some where evidence of alleged wrongdoing by high-level state officials, judges, mayors and former ministers was leaked to the media, have never been seriously investigated.[5]

The current government's reforms have focused on improving administrative systems, enforcing the rule of law, and making it easier for people to report corruption.[6] Last year, the government launched an online anti-corruption portal to allow citizens to anonymously record instances of unscrupulous practices. The website covers 12 key areas, including police, health and customs.[7]

By the time the portal became accessible to the public, 6,840 reports have been logged by citizens. Many of these involve complaints about poor service, but 777 cases directly relate to accusations of corruption, with 35 reports referred to prosecutors.

The scheme, run by the Ministry of State for Local Issues and Anti-Corruption, and supported by the World Bank, was launched in March 2015 and has reached more than 33,000 people, about 20% of whom have provided feedback.[8]

1.1 Risks in the Process of Legislation Development: Assessment of Corruption Proofing

Legislation prepared by state institutions is a key instrument in designating their authorities towards policies and citizens. If the process of legislation development encounters problems, then opportunities for corruption and abuse of power arise. A badly-designed law could

[4] http://www.balkaneu.com/alarming-figures-corruption-albanian-justice-system/
[5] European Commission Report on Albania 2015
[6] http://www.theguardian.com/global-development/2015/jun/26/albania-battle-against-corruption-organised-crime
[7] Ibid
[8] Ibid

constitute an effort to favor certain interests or, as is often the case, a result of ambiguous/vague formulation leaving space for abusive interpretation.

For instance, if a law adopted on business registration makes this procedure complicated and abnormal, or in case its formulation is vague, citizens may turn to bribe to accelerate procedures.

To address this problems, a discipline on corruption proofing of legislation has come into use in the last few years. This practices examines various scenarios where the risk for corruption is deliberate by the person responsible for drafting the legislation as well as cases where this risk is unintentional.[9] The technique of corruption assessment seeks to basically seal up all spaces for corruption in the proposed legislation, aiming at preventing corrupt actions that result from poor drafting of the legislation. In addition, corruption proofing assessment are intended to improve the process of drafting the legislation.

The GoA has incorporated corruption proofing in its recent anti-corruption (2015-2017) strategy considering the importance and efficiency of this technique. Corruption proofing practice is a relatively new discipline and has, therefore, very few instruments and examples in the region that can serve as references. Some success stories of application of the corruption proofing methodology in other countries, particularly in the case of Moldova, can serve as a framework upon which a similar process can be built in Albania.

Albania does not currently have a legislative framework to assess corruption risk in its adopted legislation. Basic guidelines on assessment of corruption proofing have been presented by Council of Europe in cooperation with Cristina Cojocaru in the form of a Technical Paper on Methodology for Corruption Screening of Legal Acts and Draft Legal Acts for Albanian Legal Drafters. This manual sets forth basic principles of the methodology to be employed when assessing corruption proofing in legislation with the aim of identifying vulnerabilities of corrupt acts stemming from a deficient process of legislation development. In light of the above rationale, the methodology elaborated in this document seeks to lay the foundations which these mechanisms will build upon in the future.

The following are the core principles of the methodology for the assessment of corruption proofing:

In principle, the methodology to assess corruption proofing foresees that experts involved in the process consider the following questions:

What should an expert consider in the course of drafting the report on assessment of corruption proofing?

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[9] Assessment of Anti-Corruption Laws (Corruption Proofing)

- Coherence of the draft and its interaction with other legislation
- Establishment of new public authorities and definition of their duties;
- Changes proposed to the current regulation of the public authorities' duties;
- Justification of the draft's solutions and "hidden intentions";
- Who will benefit from the draft and how;
- Who might be damaged by the draft and how;
- Financial implications of the draft

I. General evaluation

- Justification of the draft
    - General justification of draft *(a. author, b. category, c. goal, d. sufficiency of the reasoning)*
    - Economic-financial justification of the draft
    - Promotion/harm of private interests, missing public interest
- Evaluation of the compatibility of the draft with the new anti-corruption strategy
    - Compatibility of the draft with the provisions of the national legislation
    - Transparency in decision-making

II. Detailed analysis of the draft

- Excessive discretion of public authorities
- Imposition and promotion of interests/benefits contrary to the public interest
- Damages contrary to the public interest which might be inflicted through the enforcement of the act
- Vague linguistic formulation
- Conflict with the law
- Faulty legal reference provisions
- Excessive requirements for exercise of rights/obligations
- Limited access to information, lack of transparency
- Lack or insufficiency of supervision and control mechanisms
- Badly-defined responsibilities and sanctions
- Detailed analysis of the corruption risks contained in the draft's provisions

2. THE PROCESS OF DRAFTING LEGISLATION IN ALBANIA

2.1 Legal Foundation for Drafting Legislation

The process of drafting legislation in the Republic of Albania is currently based on:

- Constitution of the Republic of Albania
- Law No. 9000, dated 30.01.2003, "On Organization and Functioning of the Council of Ministers"
- Law No. 146/2004, "On Public Notification and Consultation"
- Council of Ministers' Decision No. 828, dated 28.03.2003, "On Adoption of the Regulation of the Council of Ministers"
- Decision No. 828, dated 07.10.2015, "On Adoption of Rules on the Creation and Administration of the Electronic Register on Public Notifications and Consultations"
- Regulation of the Assembly of Albania, adopted upon Decree No. 166, dated 16.12.2014 (updated)

2.2 Types of Acts

Types of acts as per the Law No. 9000, dated 30.01.2003, "On Organization and Functioning of the Council of Ministers"

The type of acts of the institutions of the executive branch include:

a) A normative act, which is an act issued by the Council of Ministers in pursuance of Article 116 of the Constitution;

b) A decision of normative character which is a sublegal act of the Council of Ministers to regulate relations defined by law, imposing general rules of conduct;

c) A decision of individual character which is a sublegal act of the Council of Ministers to regulate a specific relation or intended to one or several entities -individually specified- of the right;

ç) An instruction, which is a sublegal act of the Council of Ministers, a minister or head of a central government institution under the authority of the Prime Minister or minister, of explanatory character, that provides exhaustive elaboration of all provisions of a law or a Council of Ministers' decision;

d) An order, which is a sublegal act of the Prime Minister, minister or minister or head of a central government institution under the authority of the Prime Minister or minister,

intended for internal use, that may impose general rules, rules of conduct, or may regulate a specific relation.

2.3 Initiative on Draft Act

The Prime Minister or any other minister has the right to propose a draft act for review at the Council of Ministers. The ministers exercise this right in accordance with the area of state activity under their authority and with the responsibilities stemming from the strategies and other documents adopted on main directions of the general state policies. The Prime Minister exercises this right in every case, in general or when this right is not exercised by the relevant minister. The Prime Minister may propose for review and approval at the Council of Ministers draft acts that regulate the main directions of the general state policies. As per his/her judgment, co-proposers of the draft act may also be one or several ministers. When the scope of relations regulated by the draft act is linked with activities that fall under the authority of more than one minister, the initiative to propose a draft law for review in a Council of Ministers' meeting is endorsed jointly by relevant ministers. As a rule, within December of every calendar year and in each and every case within the deadline set by the Prime Minister, in accordance with the scope of activity under their authority, the ministers submit to the General Secretary of the Council of Ministers a detailed draft agenda of draft acts foreseen to be proposed for review in the Council of Ministers' meeting in the next year. The draft agenda must be harmonized with the National Plan on European Integration for those draft acts that seek to harmonize Albanian legislation with the European Union acquis. The detailed draft agenda of the draft acts on each area of activity shall be divided in quarters and shall contain:

a) a list of draft acts foreseen to be proposed for review at the Council of Ministers;
b) deadline for their submission to the General Secretary of the Council of Ministers with the aim of reviewing at a meeting of the Council;
c) an exhaustive rationale with explanations on the main reasons for proposing the draft acts, important issues expected to be regulated by the draft act, compliance with the political program of the Council of Ministers, national or sectoral development plans of the country. If a draft act aims to implement the National Plan on European Integration, the rationale must also contain a clear reference to this item.

The Prime Minister coordinates the process of preparing an analytical program of the draft acts and proposes it for approval at a meeting of the Council of Ministers.

Upon approval of the analytical program of the Council of Ministers' draft acts, in accordance with the scope of activity under his authority, the minister issues an order on the approval of the detailed program of measures, timeframes, and structures responsible for developing the

entire legislative process and any draft act, a progress report until completion of the draft, and its submission for review at a meeting of the Council of Ministers.

The proposing minister submits the draft act to interested ministries and institutions for their opinion, not later than 30 days ahead of the date set in the approved analytical program.

2.4 Preparation of the Draft Act

Prior to initiation of the drafting process, the technical structure in coordination with the legal structure conducts a preliminary evaluation of the initiative to propose the draft act, including, among others, explanations on:

a) Scope of the draft act and objectives it aims to achieve;
b) Compliance with the political program and analytical program of the Council of Ministers' draft acts. National Plan on European Integration, and with the strategies and programs approved on the main directions of the general state policy;
c) Compliance with the Constitution and applicable legislation;

ç) Projections and measures relative to enforcement of the draft act;

d) Budgetary spending and expected financial effects.

In case draft acts are proposed in pursuance of the National Plan on European Integration, the drafts acts shall be accompanied with a table of compliance to help legal structures of the line ministries and their European Integration units to identify scale of compliance with the Albanian legislation and EU acquis. The sample of the table of compliance is attached to this Decision.

In reliance of the preliminary evaluation of the draft act, the minister specifies, by means of a specific order, the issues that need to be regulated, forms of participation and main steps to achieve and coordinate the legislative process, timeframes for their accomplishment, responsible structures, and human and material resources assigned to cooperate with the legal department on writing the draft act.

The draft act is prepared under the responsibility of the legal department, which, in cooperation with the responsible structures and those of relevant areas of the ministry, holds consultation meetings with heads and specialists of departments, sectors, or entities as well as with civil society structures, whose activity is linked with the scope, goal and enforcement of the draft act.

The legal department may seek the opinion of other experts, inside and outside of the ministry, in the course of preparing the draft act.

In coordination with the legal department, the responsible structure prepares the rationale of the draft act, an evaluation report on the revenues and budgetary expenditures, and financial resources, and complete the required associating documentation prior to submission for review to the minister.

Upon completion of the consultation and review of the draft act, its rationale, economic evaluation report, and related documentation, the minister, after having examined the initiative, decides to submit it to ministries and interested institutions for their opinion or issues an order for its review within a deadline set by him.

The draft act circulated for opinion must be accompanied with an explanatory report including all its elements and related documentation. In the case of draft acts prepared in pursuance of the National Plan on European Integration, the draft act must be accompanied with the tables of compliance and with the EU acquis, which is aimed for harmonization, and translated into Albanian.

The explanatory report shall contain:

a) Scope of the draft act and objectives it aims to achieve;
b) Political evaluation and its connection or of the draft act with the political program of the Council of Ministers, acts that have shaped the main directions of the general state policy as well as other documents on strategies and development policies;
c) Rationale on proposal of the draft act, by providing an analysis of the advantages and potential problems in the enforcement of the draft act, level of effectiveness, enforceability, efficiency, impact and related effects, as well as the economic costs identified in ratio to the applicable legislation;
ç) Preliminary assessment of the legitimacy and conformity of the form and content of the draft act with the Constitution, its harmonization with the legislation in force and with the norms of the international law binding to Albania;
d) For normative draft acts, an evaluation of the extent of approximation and table of compliance with EU acquis. In case of partial approximation, explain future initiatives to be undertaken until complete approximation with EU acquis;
dh) An explanatory summary of the draft act’s content;
e) Institutions and entities charged with the implementation of the draft act
ë) Persons and institutions that have contributed to the preparation of the draft act.

The evaluation report on budgetary revenues and expenditures shall contain:

a) Total amount of annual spending for enforcement of the act;
b) Detailed provisions on each and every budget item required for enforcement of the act;
c) Start time of financial effects;

ç) Detailed spending for structures assigned with the enforcement of the act;
d) Ensured and expected sources of funding;
dh) An analysis of the increase or decrease of budgetary expenditures, at least for the first three years of the act's implementation;
e) The value of expected or exempted fiscal obligations foreseen by the draft act;
ë) When the draft act's scope is to approve use or allocation of public funds, it shall be accompanied with the relevant bill of quantities.

The text of a normative draft act that aims at approximation with EU acquis shall include the adoption date and full title of the EU acquis legal instrument that the draft act seeks to be harmonized with, including its CELEX and natural number. References of EU acquis legal instruments are provided as a footnote at the foot of the first page, and are linked with the draft act title. References are also provided for draft acts that ratify international agreements, which are concurrently part of the EU acquis.

2.5 Solicitation of Opinions on Draft Act

All draft acts shall be submitted to the Ministry of Justice for opinion. This ministry shall provide opinion on legitimacy of the form and content, on issues of unified application of legislative technique and juridical terminology of the draft act, by providing, as per the case, relevant formulations.

All draft acts are submitted for opinion to the minister covering central government's relations with the Parliament. The minister shall base his opinion on the political program of the Council of Ministers, on Prime Minister's commitments to Parliament, and work objectives of each ministry.

The draft act is also sent to interested ministers to solicit their opinion.

If it has financial implications on the revenues and expenditures of the State Budget, the draft act is also submitted for opinion to the Minister of Finance in each and every case, and to the Minister of Economy as per the case.

In case the draft act addresses issues related with the availability and administration of public and state assets, with foreign funding and international economic relations as well as with impact on the economic growth and development, it shall always be submitted for opinion to the Minister of Economic and to the Minister of Finance, according to case.

Normative draft acts that aim to harmonize domestic legislation with EU acquis shall be sent for opinion to the Minister of European Integration. Draft acts shall have attached a rationale and

table of compliance on verification and confirmation of extent of their conformity with EU acquis.

, an evaluation of the extent of approximation and table of compliance with EU acquis. In case of partial approximation, explain future initiatives to be undertaken until complete approximation with EU acquis. Draft acts produced by the line minister within the scope of his authorities, shall be submitted, prior to their approval, to the Minister of European Integration for his opinion, when these acts aim to harmonize with EU acquis and shall have attached a rationale and table of compliance on verification and confirmation of extent of their conformity with EU acquis. Draft acts falling short of rationale and table of compliance with EU acquis shall be returned by the Minister of European Integration to the proposing institution for further completion prior to submission for review by the Council of Ministers.

The Council of Ministers shall not review a draft act that aims approximation with EU acquis unless it has been initially submitted for opinion to the Minister of European Integration.

All draft acts with a scope on adoption in principle of the international agreements are submitted for opinion to the Minister for Foreign Affairs.

Draft acts addressing social issues and affecting human resources are sent for opinion to the Minister of Labor and Social Issues and to the Department of Public Administration.

The ministers and heads of interested institutions submit their opinion on the draft act to proposing minister/s in written and electronic form not later than 7 (seven) business days from the date of receiving the draft act and request for opinion attached to it, through e-act system. This deadline is 10 (ten) days for the Minister of Justice, Minister of European Integration, Minister of Finance, and Minister responsible for relations with the Parliament. In case, upon expiration of the above deadlines, the requested opinion is not provided, it shall be deemed that the relevant minister agrees with and has not objections to the draft act, with the exception of the Minister of Justice, who is required to express his opinion on the act.

Opinions of ministers and interested institutions include objections, comments or suggestions for technical issues of form and content of the draft act, its rationale, evaluation report on revenues and expenditures, and any other related document, providing, as a rule, specialized opinion according to relevant scope of activity under their authority.

The draft act is revised to incorporate the feedback and suggestions of ministers and heads of other interested institutions. Feedback and suggestions provided by the Minister of Justice and, according to case, by the Minister of Economy, Minister of Finance, and Minister of European Integration are addressed first in the draft act revision.

The Minister of Justice's legal opinion on legitimacy of form and content of the draft act is incorporated by the proposing minister in the draft act revision by conducting, in case it is deemed necessary, joint consultation meetings or by resubmitting for final opinion.

The European Integration Minister's opinion on assessment or extent of approximation of draft acts with EU acquis are incorporated in the revised draft act by the proposing minister. If deemed necessary, joint consultation meetings may be conducted for this purpose. In case the draft act is revised by the proposing minister to incorporate line ministries' feedback in the final draft and when the Ministry of European Integration has provided its feedback on draft act's conformity with the EU acquis, the final draft shall be resubmitted to the Minister of European Integration for final opinion prior to its submission for review to the Council of Ministers. A template of rationale and table of compliance of normative draft act with EU acquis is attached to this decision and is part of Council of Ministers' rules of procedures therein.

In case the feedback seeks to propose other alternative solutions or contradicts completely or partially the substance of the draft act content, the minister shall provide the rationale and related arguments on each issue and, as per the case, the necessary reformulations of the draft act provisions.

When the content of opinions submitted by the ministers and heads of interested institutions suggests other alternative solutions or contradicts completely or partially the substance of the draft act content, the proposing minister may:

a) Decide to fully or partially withdraw draft act proposal;
b) Decide to revise its content upon consultations with relevant ministers; or,
c) When deemed that the process of consultations specified in letter "b" of this paragraph does not resolve disputes or disagreements or when suggested alternative solutions or objections are not grounded, immediately submit to the Prime Minister, through the General Secretary of the Council of Ministers, a reasoned request for coordination of attitudes and resolution of disputes between him and relevant ministers, as well as the draft act and its documentation.

Upon finding out that the draft act and its documentation do not meet the criteria, the General Secretary of the Council of Ministers decides to send back the draft act to the proposing minister and provides the reason for doing so.

When the draft act and its accompanying documentation is complete, the General Secretary of the Council of Ministers decides to submit it to the Prime Minister for his review and attaches a technical explanatory rationale on its content, problem, and possible solutions suggested for the disputes and disagreements identified in the document set.

In accordance with the circumstances, the Prime Minister decides to:

a) Summon for consultations the interested ministers and other persons deemed by him for the case prior to taking a decision on the case;
b) Delegate the solution of issues to the Deputy Prime Minister or Minister of State assigned with the governmental coordination or to the General Secretary when the substance of disputes is related with the issues of legitimacy. In addition to delegation, the Prime Minister sets modalities and related timeframes of this procedure and a report on results to be submitted for approval or decision-making;
c) Delegate the draft act for review and broad consultation to inter-ministerial committees.

In case the Prime Minister decides to summon for consultation interested ministers and other people he may find helpful for the case, prior to making related decision, the proposing minister and other ministers and heads of interested institutions take measures to enforce the Prime Minister's decision in the manner and within the deadline set by him.

In case the Prime Minister decides to delegate the solution of issues to the Deputy Prime Minister or Minister of State assigned with the governmental coordination or to the General Secretary when the substance of disputes is related with the issues of legitimacy, in addition to delegation, the Prime Minister decides modalities and related timeframes of this procedure and a report on results to be submitted for approval or decision-making, the delegated authority holds a consultation with the participation of interested ministers and other political functionaries and, according to case, legal department and coordination department of the Council of Ministers, legal and technical departments of interested ministries, and other persons that may contribute to the resolution of the issue. Upon completion of the consultation, the delegated authority submits a written report to the Prime Minister proposing for approval or decision-making the potential solutions of the issue.

If the Prime Minister decides to delegate the draft act for review and broad consultation to inter-ministerial committees, the General Secretary of the Council of Ministers takes measure to include the issue in the meeting agenda and organizes an Inter-Ministerial Committee's meeting in accordance with the modalities and timeframes determined by the Prime Minister.

When deemed necessary, in pursuance of the Prime Minister's orders, the General Secretary reviews the technical aspects of the agreed solutions with the participation, as per his judgment, of legal and coordination departments of the Council of Ministers, legal and technical departments of other ministries and interested institutions, or other experts.

In exemption from the general rule and for legitimate reasons, the Prime Minister may, through the General Secretary of the Council of Ministers, decide to include issues and draft act of special importance in the Inter-Ministerial Committee's meeting agenda and dissemination of its documentation without requiring to comply with or meet one or more elements of

preliminary coordination procedures. In this case, the proposing minister, through the General Secretary of the Council of Ministers, must deliver a copy of the act, rationale, and related documentation to Committee members once notified of the date and agenda for the Inter-Ministerial Committee's meeting.

If the draft act is approved at the Inter-Ministerial Committee, it is submitted for approval in the next Council of Ministers' meeting. When objections have been made to the draft act by the Inter-Ministerial Committee, the proposing minister incorporates them and presents a revised draft act and its related documentation for approval to the Council of Ministers.

2.6 Submission of Draft Act for Review to the Council of Ministers

Upon conclusion of the drafting process and coordination for opinion of ministers and heads of interested institutions, the proposing minister submits the draft act for review at a meeting of the Council of Ministers.

The draft act, explanatory rationale, and the documents defined in the law, in two original copies, with a cover letter are submitted to the General Secretary of the Council of Ministers at least 10 days ahead of the date set for Council of Ministers' meeting.

The proposals of the draft act shall have attached to them:

a) The draft act coordinated with relevant ministers;
b) Explanatory rationale, which must contain grounded explanations on reasons for not incorporating objections or suggestions made by interested ministries;
c) Opinion of ministers and heads of interested institutions with the exception of cases where, due to expiration of established deadline, it shall be determined that the relevant minister agrees and has no objections for the draft act. In any case, the opinion of the Minister of Justice must be attached to the draft act.
ç) Full text of the international treat or agreement, in foreign language and Albania, officially attested by the Ministry of Justice, if it is in the scope of the draft act.

When observing that the documentation attached to the draft act is complete, the General Secretary of the Council of Ministers accepts it for preliminary review.

The General Secretary of the Council of Ministers decides to send back the draft act to the proposing minister, only when:

a) One of the documents defined in the law is missing;
b) The form and content foreseen in the law on the preparation and drafting of draft act, explanatory rationale and attached documents are not met;
c) The draft act is not compliant with the Constitution, conflicts or is not harmonized with the international agreements ratified in the country or with the domestic legislation;

ç) Flaws of the draft act, particularly those linked with the voluminous content, from the viewpoint of legislative technique, are quite visible and present throughout the entire content.

The General Secretary of the Council of Ministers may correct the draft act in terms of the legislative technique and terminology used in it, but in no case shall this correction affect the draft act substance.

The General Secretary of the Council of Ministers may consult draft acts submitted for review in a meeting of the Council of Ministers, in weekly meetings with General Secretaries of ministries or heads of interested institutions on issues relative to the content of the draft act and to clarify its technical aspects and lack of coordination with relevant ministries thereof.

The General Secretary of the Council of Ministers may call to consultations legal and technical departments of the proposing ministries in order to clarify technical aspects of the draft act content.

On draft acts of particular importance, the Prime Minister, after being informed by the General Secretary of the Council of Ministers, reviews the proposal upon several criteria linked with the urgency of proposal, public demand, compliance with the objectives of the national development policies, likelihood of fast implementation, etc.

These draft acts may be discussed about in broad groups, which may include representatives of state institutions, NGOs, experts of international institutions or organizations, etc.

When observing that the ministers or heads of interested institutions have stated their objections on the draft act in written form, the General Secretary of the Council of Ministers submits the draft act for coordination in accordance with the procedures foreseen in Chapter V of this Rule of Procedures.

2.6.1 Agenda

In reliance of the draft acts and issues presented by members of the Council of Ministers, the General Secretary of the Council of Ministers prepares the agenda of the Council of Ministers' meeting and submits it for approval to the Prime Minister.

As a rule, the draft acts are included in the agenda of the Council of Ministers' meeting, if they have been submitted to the General Secretary at least 10 days ahead of the date set for the coming Council of Ministers' meeting. For grounded reasons and upon Prime Minister's initial approval, draft acts submitted beyond the 10-day timeline may be included in the agenda.

The agenda of the meeting and the documentation on issues to be reviews in the Council of Ministers' meeting are submitted to Council of Ministers' members by the General Secretary not later than two days before the date determined for the meeting. For extraordinary meeting, the agenda is disseminated no later than 2 hours ahead of the time set for the meeting.

2.6.2 Discussion of Draft Acts in Council of Ministers' Meeting

The presider of the meeting presents the substance of the draft act, asks the proposing minister to provide comments on his proposal, if any, and invites other members of the Council of Ministers to state their opinion. Once the discussions are concluded, the presider of the meeting invites ministers to vote the draft act. Upon conclusion of the review of the draft act, the Council of Ministers decides to:

a) Approve in the form it is presented;

b) Approve with changes;

c) Postpone its review at a later time;

ç) Not approve.

2.6.3 Publication and Dissemination of the Act

The General Secretary of the Council of Ministers takes measures to:

a) Publish all Council of Ministers' acts

b) Regulate acts approved with changes;

c) Sign the act;

ç) Disseminate the acts to institutions that have obligations or are linked with the act's content.

The General Secretary takes measures to publish all normative acts of the Council of Ministers in the Official Journal within the established legal deadline and in other publishing means in the shortest time possible.

Acts are officially disseminated under the leadership of the General Secretary not later than two days after its signing.

2.7 LEGISLATIVE PROCEDURES ACCORDING TO THE RULES OF PROCEDURE OF THE PARLIAMENT OF ALBANIA

The right to propose laws belongs to the Council of Ministers, every Member of Parliament and 20,000 electors. The draft laws must be drafted as a normative acts and must have attached to them a rationale that contains the objectives its approval aims to fulfil, arguments to prove that these objectives cannot be accomplished by means of the existing legal instruments, its conformity with the Constitution and harmonization with the legislation in power and the EU legislation, and its social and economic effects. For the draft laws of financial character, the rationale must also specify the expected financial implications stemming from the implementation of the draft law. No non-governmental draft act that increases the expenses of the state budget or shrinks its revenues shall be adopted without taking the opinion of the Council of Ministers to be stated within 30 days from the date of receiving the draft act. If the Council of Ministers does not state its opinion within the established deadline, the draft act passes for consideration according to the normal procedure. The Speaker of Assembly can return the submitted draft act to the initiator, with grounded justification, if the requirements foreseen above are not met.

2.7.1 Inclusion of Draft Act in the Assembly's Program

The Conference of Parliamentary Group Chairpersons discusses about and decides on the work program and calendar of the Assembly and its committees and issues related to the proceedings of the Assembly in plenary sessions. The Conference of the Chairpersons is composed of the Speaker and the heads of the parliamentary groups and is presided over by the Speaker. The Conference is convened by the Speaker or at the request of the Council of Ministers or of a chairman of a parliamentary group. **Attending the Conference of the Chairpersons is also a member of the Council of Ministers, who is assigned with maintaining relations with the Assembly**. As a rule, a Chairpersons' Conference meeting is held not earlier than 48 hours from the notification for the meeting. This conference reviews the work program and calendar of Assembly proceedings based on the proposals of the Speaker of Assembly. By and large, the work program and calendar of proceedings are approved on consensus of Chairpersons' Conference and in failure to achieve consensus, the Speaker submits it to the Assembly in a plenary session. Summarized minutes are kept in the meetings of the Conference of the Chairpersons and are made public and are distributed to the media or other people.

Review of normative acts with the power of a law, draft laws, are automatically included in the work program of the Assembly. The work program contains the list of issues that the Assembly intends to consider. **It specifies the institution that endorsed the initiative, the submission date and the responsible committee assigned to consider it**. The Speaker appoints a standing committee, as the responsible body, and if he considers it necessary, he proposes a joint meeting of two standing committees or the establishment of an ad hoc committee.

The draft laws are firstly registered in a special register according to their submission and are made known to the Speaker of Assembly. The Speaker orders their immediate distribution to the MPs and copies of the draft law are made available to media representatives or other interested persons, at their request. The draft laws cannot be included in the agenda of the Assembly proceedings, ahead of at least two weeks from their submission, except for that the Assembly Rules of Procedure specify otherwise. Draft laws presented on the initiative of the MPs must be included at their request in the agenda of the plenary session no later than 8 weeks from the submission of the draft law.

2.7.2 Submission of Draft Law to Responsible Committee

In accordance with the work program and agenda of the Assembly, **the Speaker refers the draft law for review to the responsible committee or committees, which are required by the Assembly Rules of Procedure to state their opinion. Permanent committees review draft laws, draft decisions and other issues submitted to the Assembly in accordance with their scope of authority.** IN the course of legislative process, the Committee may hold public hearing sessions with members of the Council of Ministers, top representatives of state or public institutions, experts, representatives of civil society, representatives of groups of interest or other interested groupings. The committee is obliged to hold such hearings, according to the provisions of this article, if one-third of the members of the committee so demand by means of written justification. The committee shall not prepare a report for the plenary session unless a hearing session has been conducted.

When determined in the work program of the Assembly or when deemed necessary, committees may hold joint meetings. A joint meeting is presided over by one of the chairpersons of the committees that is elected by consensus among them and when they fail to reach an agreement, the meeting is headed by the chairperson of the committee that has closest connection with the issue under consideration, designated by the Speaker of Assembly.

Joint meetings of the committees come up with one single report. When attitudes of the committees are different, they are presented separately in the final report of the meeting.

The committee assigned to review the issue appoints the rapporteur/rapporteurs. The rapporteurs are appointed at the meeting where the committee's work program is approved and for every issue included in the program. The opinion of the rapporteur regarding the issue must be submitted in the written form at least 3 days prior to the date set for the examination of the issue by the committee. In the course of preparing the report, the rapporteur may seek the help of the Council of Ministers' specialists knowledgeable of the issue and the legal services of the Assembly as well as the assistance of other experts.

Initially, the responsible committee holds the discussion of the issue or the draft law in principle. The rapporteur introduces the overall assessment of the draft law or the issue under discussion, and, if he deems it necessary, proposes to the **committee to seek the opinion of the Council on Legislation**.

The Council on Legislation consists of 10 MPs, appointed by the Speaker of Assembly after having taken the opinion of heads of parliamentary groups, in such a way as to guarantee equal

representation between the majority and the opposition. Appointed MPs must have legal background or a considerable legislative experience. **The Council express its opinion on the draft laws at the request of the responsible committee reviewing the draft law or of the Speaker of Assembly**.

The responsible Committee, upon the majority of votes of all its members, or the Speaker of Assembly may seek the opinion of the Council on Legislation about the quality of the draft law, its explicitness and simplicity, the constitutional or legal issues in its text and other issues, deemed necessary by the Committee or the Speaker. The submitted request must give reasonable time to the committee to review it and must be in compliance with the work calendar of the responsible committee and harmonized with the work calendar of the Assembly. The responsible Committee's rapporteur and the Council of Ministers' representative participate in the meeting of the Council on Legislation. The report of the Council on Legislation is submitted to the responsible Committee for the consideration of the draft law. In case the responsible committee refuses to take into consideration the opinion of the Council, it must express the grounded reasoning in the report presented to the plenary session.

The chairperson of the committee after the listening to the rapporteur invites the committee members to put questions to the initiators of the bill and to the rapporteur and after this, he declares open the debate in principle on the bill. The discussion in principle is always done in the presence of the representative of the Council of Ministers. In the end of the discussion in principle, the committee decides for the approval or rejection of the bill in principle. Every Member of Parliament has the right to express his opinion on the draft law under consideration in the meeting of the responsible committee.

If the responsible committee approves the draft law in principle, it starts the article-by-article consideration and voting, and for issues proposed to seek the opinion of the Council on Legislation or other committees it decides with an open voting whether an opinion will be solicited or not. These points are examined once an opinion of the Council on Legislation or the standing committee is obtained. The responsible committee shall be obliged to review the European Integration Committee's report prior to approval of the draft law as a whole. **When the responsible committee decides to reject the draft law in principle, or when the opinion of the Council on Legislation favors the rejection of the draft law in principle, the issue is adjourned for discussion in the plenary session. When the Assembly in plenary session decides for the approval of the draft law in principle, the responsible committee starts the article-by-article consideration of the draft law in its very next meeting.**

After examination of the draft law, the committee prepares a report for the plenary session making a proposal for approving the draft law in the form it is submitted, approving it with changes or for turning it down. The responsible committee's report, other committees' opinion or the feedback of the Council on Legislation shall be made available in several copies and disseminated to the MPs and the Council of Ministers at least 2 days before the date of the consideration of the draft law in a plenary session.

Every MP or the Council of Ministers have the right to present amendments in written justification submitted during the consideration of the draft law by the responsible committee. The conclusions of the committee related to them are made known to the plenary session in the final report prepared by the committee

The initiator of the draft law may draw his draft unless it is voted in principle in the plenary session.

2.7.3 Review in a Plenary Session

The consideration of the draft law in plenary session includes the review of the draft law in principle and its discussion article by article. Prior to the discussion in principle, the members of Parliament are invited by the presider of the session to ask questions to the initiators or to the Council of Ministers regarding the draft law. The draft law is reviewed in the plenary session in the presence of the signatory minister and the officials authorized in writing by the Secretary General of the Council of Ministers. The draft law is reviewed in principle both in case the responsible committee or the Council on Legislation agrees to adopt it in principle and when they are against its approval. In case the responsible committee or the Council are against the approval in principle and the plenary session decides to adopt the draft law, the latter is sent back to the responsible committee to resume its review article by article. **The draft law not approved in principle in the plenary session cannot be presented again unless 6 months have elapsed from the date of its rejection**.

Review in Principle

The discussion in principle of the draft law begins with the initiator's introduction of the reasons that led to the proposal of the draft law and the presentation of the report of the responsible committee and, according to case, a report from the Council on Legislation. The chairperson of the committee reads the report and the rapporteur of the respective committee may be given the floor for no more than 10 minutes, at his request. The plenary session presider gives the floor to MPs who have asked to discuss in principle, balancing the discussion time length for each parliamentary group. Before the end of the discussions, the floor shall be given to the rapporteur of the respective committee for not more than 5 minutes and to the chairpersons of the parliamentary groups, beginning from the group with the smallest number of MPs. No amendments can be forwarded during the time of discussion in principle. **The presider of the plenary session, after the answering of the MPs' questions and the discussion in principle, announces the time by which the Assembly will decide by voting**. The proceedings of the Assembly resume with the discussion in principle on other draft laws listed in the day's agenda.

Review Article by Article

Once approved in principle, the draft law is then reviewed article by article. During the consideration article by article, every MP has the right to discuss for no more than 5 minutes.

This time is doubled in the cases of the discussion of the draft laws whose adoption need a qualified majority.

During the debate article by article, written amendments can be presented. The amendments must refer to the content of only one article. As a rule, the amendments must be presented and discussed first in the responsible committee. The author of the amendments has the right to present the amendments in the plenary session for not more than 7 minutes.

Every MP or the Council of Ministers have the right to present in the plenary session the amendments regarding the draft law or the proposed amendments by the responsible committee provided that they are registered at the secretary at least 24 hours before the beginning of the plenary session and that they have been distributed to the other MPs. **When deemed necessary by the Speaker of Assembly or upon the request of the chairperson of a parliamentary group or a group of 10 MPs, the amendments are presented for discussion in the responsible committee, calling off, if necessary, the plenary session. In this case, the author of the amendment and the representative of the Council of Ministers have the right to state their opinion in the meeting of the committee.**

Order of Voting of Amendments

Amendments are voted prior to the text of the draft law. Before proceeding with the voting of each amendment, the presider of the plenary session reminds MPs of the opinion of the responsible committee. Voting on amendments starts with those seeking the total or partial removal of the article or its replacement or amended wording. In case there have been two or more amendments submitted for the same article or part of it, the first amendment to be voted shall be the one less similar to the actual wording. When the responsible committee submits several amendments to one article of the draft law, the chair of the plenary sitting shall forward them to be voted jointly, unless 7 MPs or the head of a parliamentary group request separate voting. The Assembly shall decide on separate voting for each amendment, other than when the approval of one amendment excludes the other ones.

Voting as a Whole

At the end of the discussion article by article, the draft law is then passed as a whole. If the text of the draft law has undergone significant changes during its review in the plenary session, the chairperson of the session shall ex-officio or on the request of the chair of a parliamentary group of 7 MPs postpone voting in general for the next session submitting the full revised text to the Assembly.

Adoption

The President of the Republic promulgates an approved law within 20 days from its submission. The President has the right to return a law for re-consideration only once. The decree of the President for the re-consideration of a law loses its effect when a majority of all the members of the Assembly vote against it. In case the President does not promulgate the approved law or does not return it for reconsideration within 20 days from its submission, the law is then promulgated. If the President of the Republic returns the law for reconsideration to the Assembly, the Speaker of Assembly submits it immediately for reconsideration to the responsible committee that has reviewed it at first. The responsible committee reviews the decree only for issues presented by the President.

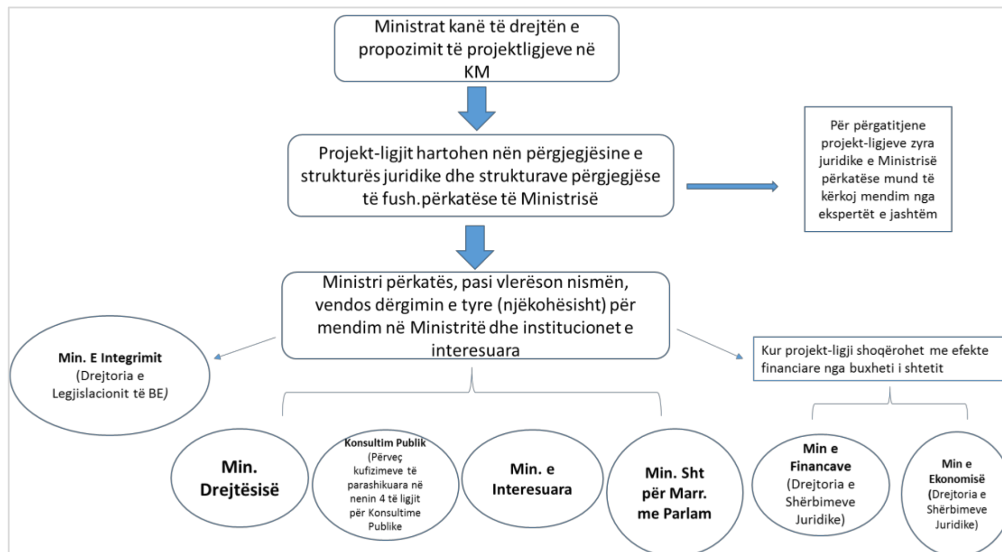
2.7.4 Entry into Force

A law enters into force with the passage of not less than 15 days after its publication in the Official Journal, but in cases of extraordinary measures, as well as in cases of necessity and emergency, when the Assembly decides with a majority of all its members and the President of the Republic gives his consent, a law enters into force immediately, but only after it is made known publicly. The law shall be published in the first number of the Official Journal.

2.7.5 Accelerated Procedure of Review of Draft Laws

Upon a request of the Council of Ministers or 1/5 of all the MPs, the Assembly may decide to consider a draft law be means of an accelerated procedure. The accelerated procedure is not allowed for use on draft laws specified in the Article 81, item 2, of the Constitution, except for the letter “dh”. The request for the examination of a draft laws on an accelerated procedure is submitted in written form to the Speaker, who announces it to the first plenary session. A speaker in favor and one against are heard for not more than 10 minutes each after the announcement of the Assembly Speaker. The Speaker submits the respective draft-decision for approval to the Assembly, noting the date of examination of the bill in the responsible committee, terms within which amendments should be proposed and the date of consideration by the plenary. The Conference can determine the debate time in the plenary session. The timeframe within which the issue shall be examined in the committee and in the plenary session cannot be less than one week from the date of submission of the request to the plenary session by the Speaker. The Assembly cannot apply the accelerated procedure for more than three bills over a 12-week work program, and more than one bill over its 3-week work program.

2.7.6 Phases of Drafting a Piece of Legislation

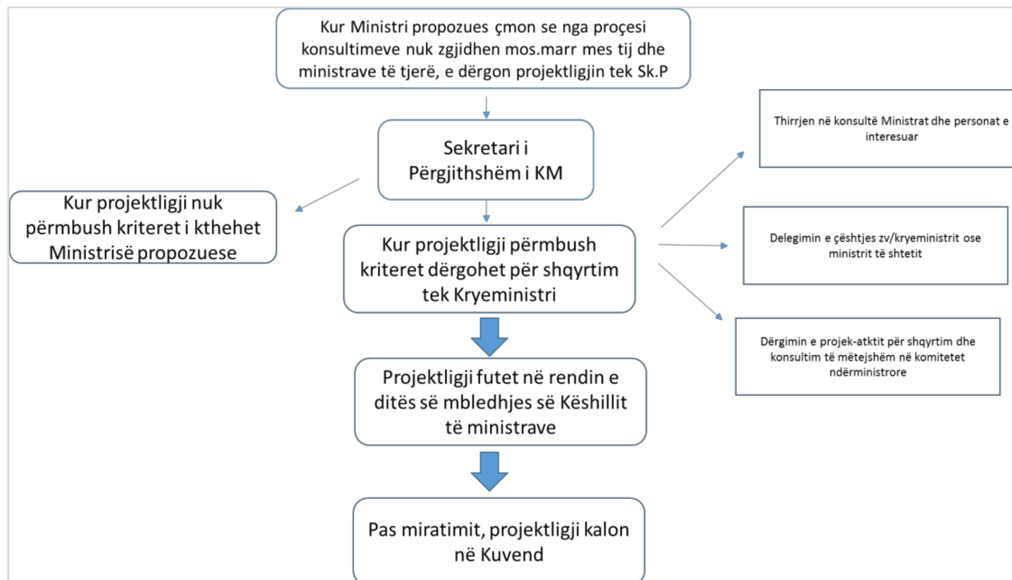


Phase 1

- Ministers have the right to propose draft laws to the Council of Ministers
- A draft law is designed under the responsibility of legal and relevant departments of the incumbent ministry -> in the course of preparing a draft law, the legal department of the ministry may seek assistance of outside experts
- The relevant minister, after having endorsed the initiative, submits the draft law to other interested ministries and institutions to seek their opinion -> when the draft law includes financial implications to the state budget
  - Ministry of Integration (Department of EU Legislation)
  - Ministry of Justice
  - Public consultation (except for restrictions stipulated in Article 4 of Law on Public Consultations)
  - Interested ministries
  - Minister of State for Relations with Parliament
  - Ministry of Finance (Legal Service Department)
  - Ministry of Economy (Legal Service Department)

A draft law is formulated by the legal department and various other departments of the incumbent ministry

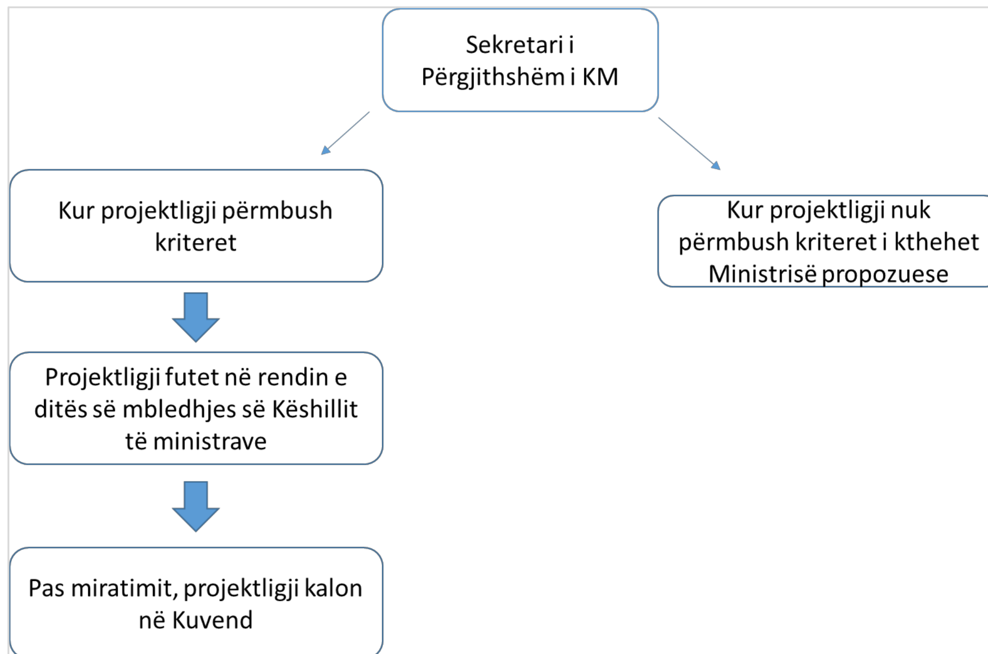
In cases where the draft law has financial implications



Phase 2

- When the minister deems that the process of consultations does not resolve disputes or disagreements between him and other ministers, he submits the draft law to the General Secretary of the Council of Ministers,
- The General Secretary:
    - Returns the draft law to proposing minister in case the draft does not meet the established criteria
    - Sends the draft law to the Prime Minister, when the draft law meets the established criteria
        - Summons the minister and interested people to consultations
        - Delegates the case to the deputy prime minister or minister of state
        - Submits the draft law for further consultation to interminsterial committee
    - Draft law is included in the Council of Ministers' meeting agenda
    - Draft law is submitted to parliament after approval from Council of Ministers

Returns the draft law to the proposing minister



Phase 3

- The General Secretary of the Council of Ministers:
    - when the draft law meets the established criteria
        - Draft law is included in the Council of Ministers' meeting agenda
            - Draft law is submitted to parliament after approval from Council of Ministers
    - Returns the draft law to proposing minister in case the draft does not meet the established criteria

E drejta për të propozuar ligji i takon Këshillit të Ministrave, çdo deputeti dhe 20.000 zgjedhësve

Këshilli i Ministrave propozon projektligjin

Futja e projektligjit në kalendarin e punës së Kuvendit bëhet nga Konferenca e Kryetarëve. Në program shënohet institucioni që ka ndërmarrë nismën, datën e paraqitjes, si dhe Komisionit/eve përgjegjëse për shqyrtimin e ligjit

Pas regjistrimi të projekt-aktit në regjistër të veçantë i kalohet Kryetarit të Kuvendit i cili urdhëron shpërndarjen deputetëve, medias dhe personave të tjerë.

Kryetari i Kuvendit dërgon për shqyrtim projekt-ligjit në komisionin përgjegjës dhe në komisionet që duhet të paraqesin mendimet e tyre. Komisionet kur përcaktohen nga Kuvendi, ose kur e shohin të nevojshmemund të bëjnë mbledhje të përbashkëta. Komisionet, sipas rastit, kërkojnë mendimin e Këshillit të Legjislacionit.

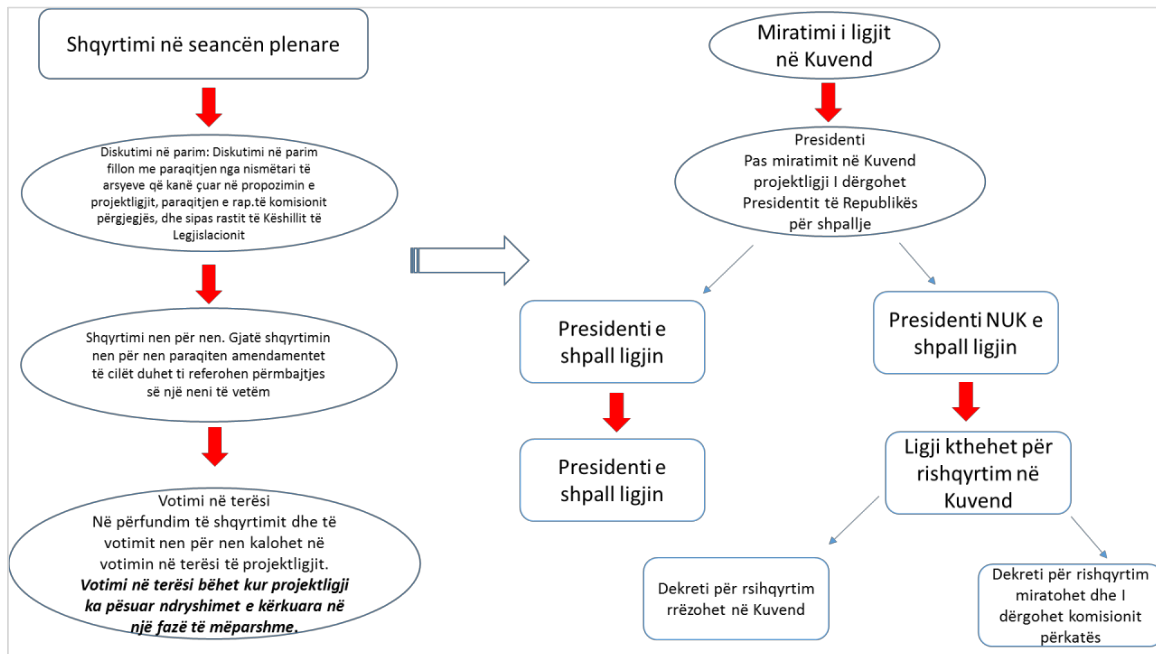
Vazhdon...

Phase 4

The right to propose laws belongs to the Council of Ministers, every Member of Parliament and 20,000 electors.

- Council of Ministers proposed a draft law
- Draft law is included in the work calendar of Parliament by Conference of Chairpersons; Work program includes data on institution endorsing the initiative, submission date, and committee(s) responsible to review the draft law
- The draft law is firstly registered in a special register and is then submitted to the Speaker, who orders its distribution to MPs, media, and other people.
- The Speaker submits the draft law for consideration to responsible committee and to other committees required to state their opinion. Committees may conduct joint meetings when determined by the Speaker or when deemed necessary. They may also seek the opinion of the Legislation Council.

  To be continued…



Phase 5

Review in plenary session:

- Discussion in principle starts with the presentation of initiator's rationale on the need for the draft law, presentation of report of responsible committee and Legislation Council, if any.
- Discussion article by article includes presentation of amendments related to the content of one single article
- Voting ~~in whole~~ starts after article-by-article discussion has concluded. This voting is conducted when the draft law has already incorporated the amendments demanded in a previous phase.

Adoption of draft law by Parliament

- After adoption by Parliament, the law is submitted to the President for promulgation
- The President promulgates the law
- The President does not promulgate the law if:
  - Law is returned to Parliament for reconsideration Law is returned to the Parliament
  - President's decree for reconsideration is rejected
  - President's decree for reconsideration is approved and the law is resent to responsible committee

resent to the responsible committee

3. METHODOLOGY TO ASSESS CORRUPTION PROOFING IN ALBANIAN LEGISLATION

This methodology is developed on the basis of:

- Joint practical guide for legal drafting, developed by European Union
- Methodology for Corruption Screening of Legal Acts and Draft Legal Acts for Albanian Legal Drafters, developed by Cristina Cojocaru, Council of Europe, 2010-2011.

3.1 Scope of Methodology

A poorly-drafted law reduces legal certainty and stability and increases public authorities' chances for misuse of law for individual interests affecting public interests. Poorly-designed legislation may also fail to achieve its objective and may prove difficult to enforce regardless of good will and commitment.

In this context, the goal of this methodology is to serve as a guide to Albanian officials in the course of drafting, discussing and approving legislation from the viewpoint of minimizing or avoiding corruption vulnerabilities that may be caused unintentionally or deliberately.

This methodology is intended to people involved in the preparation of corruption proofing screening of draft laws and other normative draft acts. The methodology seeks to serve as a guide for improving and maintaining high quality and preventing corruption vulnerabilities of Albania's legislation.

3.2 Application of Methodology

The most efficient method to apply this methodology is to establish a group of experts that will assess the draft for corruption risks once it is completed by the drafters and prior to submission of the draft law for final adoption.

<u>This Methodology should be applied by experts, who meet the following criteria:</u>

- Are lawyers, preferably with legal drafting experience;
- Are not authors of the draft they intend to screen for corruption risks;
- Are able to carry out corruption proofing of the draft and prepare a corruption proofing expertise report after the draft is finalized by the author, but before it is passed in the final reading by the adopting authority;
- Are specialized in certain areas of law and conducts corruption proofing of drafts in their areas of expertise;
- Know the methodology and have undergone special training on corruption proofing

When applying this methodology, specific terms are used and shall mean:

- **Corruption risk** – possibility resulting from legal provisions of favoring the occurrence of corruption acts in the course of implementation of these provisions;
- corruption proofing – process of expert reviewing of the draft laws and of other regulatory acts in the view of identifying the rules which favor or might favor corruption risks;
- corruption proofing expertise report – written evaluation prepared by an expert as a result of conducting corruption proofing;
- expert – person who possesses theoretical knowledge and practical skills which allow him/her to recognize the corruption risks in a regulatory act text;
- Methodology – methodology for corruption screening of legal acts and draft legal acts.

<u>Preparation of experts to write the corruption proofing expertise report</u>

When getting ready to produce the corruption proofing expertise report, the expert shall read:

1. Pertinent laws or normative acts directly related to the draft, such as: in case of an amending law or indirect law that affects the same or similar issues, etc., the expert should read first the text of the law subject to amendment and run approaching analysis to it.

2. Explanatory memorandum of the draft, in order to identify the goal of the proposed draft, the seriousness of the draft and of the drafters' intentions

The expert needs compare the goal stated in the explanatory memorandum with the goal and objectives stated in the text of the draft (in case of integral acts). It is important to check whether the draft has an unstated goal, resulting from its provisions and to confront it with the stated goal for possible mismatches. The explanatory memorandum of the draft must carefully meet the requirements of point 9 of the Council of Ministers' Decision No. 584, dated 28.03.2003, "On Adoption of the Rules of Procedure of the Council of Ministers" (as amended and updated).

Special attention has to be paid to statements in the explanatory memorandum related to:

- ensuring compliance of the draft with other legislation;
- establishment of new public authorities or public offices;
- changes proposed to the current regulation of the public authorities' duties;
- justification of the draft's solutions;
- who will benefit from the draft and how;
- who might be damaged by the draft and how;
- financial coverage of the draft

3. **Text of the draft,** having in mind the questions: Can a public servant interpret abusively this provision? What can a public servant or individual do bad with this provision? To recognize the corruption risks in draft legislation, these have been divided into seven categories that may lead to corruption vulnerabilities in the course of enforcing a piece of legislation:

   i. Coherence of the draft and its interaction with other legislation
   ii. Manner of exercising public authority duties
   iii. Public interest and manner of exercising rights and obligations

iv. Transparency and access to information
v. Accountability and responsibility
vi. Control mechanisms
vii. Language

4. Other relevant information prior to preparation of the analysis:

a) Official information: legislation in the field; official publications (printed or electronic, including web resources); data of the state statistics department, public reports of the official (state and international) institutions; court practice; archive materials;
b) Unofficial information: written and electronic mass media; publications, media, books, reports, studies, assessments etc.

4. DETAILED ANALYSIS OF RISKS FOR CORRUPTION IN A LEGAL ACT

I. Coherence of the Draft and Its Interaction with Other Legislation

In general, a drafter of laws must ensure coherence of entirety of laws by avoiding conflicts among various legislative provisions that may appear during the legislative process. A new law to be drafted must conform to the existing legal order.

Similar legal issues should be regulated in the same law rather than being spread over several laws. The legislation should be viewed as a programme of action where questions and answers, facts and legal consequences are defined as closely as possible to each other. It is therefore not advisable to adopt a range of laws concerning the same problem or to supplement a general law with numerous special laws. Instead, codification should be considered or appropriate legislative powers for making delegated legislation should be used. A negative example of distribution of an issue in several laws is Law No. 9049, dated 14.03.2003, "On Declaration and Audit of Assets, Financial Liabilities of Elected and Several Public Officials", which was amended by Law NO. 9637, dated 7.04.2005, Law No. 9475, dated 9.2.2006, Law No. 9529, dated 11.5.2006, Law No. 85/2012, dated 18.09.2012, and Law No. 45/2014, dated 24.4.2014. Such scattering has rendered this law very hard to understand and enforce for those that this law targets. This situation creates room for abuse with power on the part of enforcement officials.

In addition to general considerations mentioned above, this risk may also appear in specific cases, such as the following:

1. Faulty reference provisions

Reference provisions are considered faulty when it is hard or impossible to identify the other provisions they refer to or when these refer to inexistent legislation. Identification of faulty reference provisions is easy when the following expressions are used: "in compliance with the legislation in force", "under the law", "in the prescribed manner", "according to the legal provisions" etc.

The danger posed by this risk is that the public servant may apply different pieces of other legislation or parts of the draft and may abuse this discretion when the reference is unclear. For correct use of reference provisions in the drafts, the following should be considered:

References are used in cases when the text of the law refers either (a) to a provision in the same law (internal reference) or (b) to a provision in another law (external reference).

(a) The drafter should determine whether an internal reference actually assists the clarity of a provision, or whether it would be better to redraft the provision. An internal reference should always indicate, as appropriate, the exact article, paragraph or sub-paragraph to

which reference is made. In rare cases it may be necessary to include a reference to an entire chapter or other part of the law. This is only appropriate where the reference is to all the provisions of the chapter or other part and should be avoided in cases when only some of their provisions are applied. Chain references for example, a reference in Article 3 to Article 7 that contains a further reference to Article 10 or worse, back to Article 3 should also be avoided.

(b) When a reference is made for the first time to another law, that law should be identified by a full citation of its title, including its number and date of adoption. If that law has been amended, the external references should not cite the amending laws but merely indicate "amended." In no event, however, should a reference be made in the text of a law to a law or other legal act that is not part of the Albanian legal order. Foreign laws and legal acts can be mentioned in the explanatory memorandum. Where a reference is made to specific provisions of another law, it should additionally always indicate, as appropriate, the exact article, paragraph and sub-paragraph to which reference is made. In subsequent references to the other law, the basic rule is that it should be identified only by its number of adoption (rather than the full citation) and an indication that it has been previously cited in the text

2. Faulty delegation provisions

These are provisions of the draft that grant to another authority an unjustified competence to establish independently binding rules, regulations, bans and exceptions. Delegation of regulatory competences is unjustified and dangerous when:

- given to the same authority that will enforce, control and/or punish for failure to observe rules it shall set based on the delegation provision, and;
- given to an authority that still does not exist, generating uncertainty in the social relationships regulated by the draft until that authority is created;
- the law sets "half rules", delegating the regulation of the other half to another authority, usually the one that is expected to enforce it. A similar situation is when the law sets the rule and delegates another authority to establish either all or more exceptions from it;
- such competences are contrary to the status of the delegated authority or are given by another / higher law to the legislator.

Faulty delegation provisions generate other risks: enlargement of discretionary powers, random establishment of deadlines for service provision, excessive requirements for exercise of some rights, etc. Identification of this risk is possible when the following expressions are used: "following the rules/procedure/term set by the Ministry/another authority", "according to the conditions established by…", "under the conditions established in its Regulations", "other exceptions/conditions/acts, established by…", etc.

A drafter should consider the hierarchy of normative acts and the main principle of the Constitution of Republic of Albania and legal system that all laws are approved by the Parliament. The latter can, however, delegate to the Central Government the duty of drafting

detailed and more technical acts that are known as "sublegal acts". Article 116 of the Constitution specifies that normative acts are "sub" to the laws, when addressing hierarchy of the laws.

Taking into account the increasing number of legal rules in a modern state, it is unrealistic for the legislature to enact all legal norms. The growing size and complexity of legislation often requires delegation of powers to the executive to make regulations. For this reason, when passing a law, the Assembly can decide to delegate to the Government the power to make legislation within the scope defined in the law. Such delegation empowers the Government to make delegated legislation (sublegal acts) within the overall legal framework established by the law in question.

Delegation allows for the government to issue rules (sublegal acts) within the legal framework stipulated by the law in compliance with Article 118 of the Constitution:

1. Sublegal acts are issued on the basis of and for implementation of the laws by the institutions provided in the Constitution.
2. A law shall authorize the issuance of sublegal acts, designate the competent body, the issues that are to be regulated, and the principles on the basis of which the sublegal acts are issued.
3. The body authorized by law to issue sublegal acts as is specified in paragraph 2 of this article may not delegate its power to another body.

In providing for a delegated legislative competence, the drafter should consider the balance between the legislative function of the Assembly and the delegated legislative function to be left to the Government. The inclusion in a law of provisions that are normally in delegated legislation can create complexity and an unnecessary rigidity, because if they then need to be amended this would require time-consuming legislative procedures in the Assembly. The reasons for providing a delegated legislative competence should always be outlined in the explanatory memorandum (rationale) to the draft law. In addition, the provisions on issue of sublegal acts should normally be as precise as possible.

The Assembly enjoys a general legislative competence derived directly from the Constitution and so does not have to declare any specific authority to legislate. However, it is customary in Albanian legislation for laws also to give the legal basis for their enactment.

3. Concurrent provisions

These are provisions creating a legal conflict. The conflict can appear between the provisions of the draft (internal conflict) and between the provisions of the draft and of other laws, national or international (external conflict). External conflict of legal provisions can appear between legal acts of the same legal power (i.e. between two organic laws), between acts of different level, between codes and other legislative acts.

The legal conflict hinders the correct enforcement of laws and creates preconditions for public servants to enforce the "convenient" provision in a particular situation, as they have the discretion to make an abusive choice of the applicable provision.

To avoid concurrent provisions, one should consider:

Every law should contain a clear reference, normally near the end, specifying what prior laws or provisions of laws are repealed by the law. The references should be precise. General provisions repealing unspecified laws or provisions (such as, for example: "all laws contrary to (or inconsistent with) this law are repealed") are not good practice. They should be used only in exceptional circumstances when it is not objectively possible to identify in an accurate manner all the provisions of the legal acts that are to be repealed.

The repeal provisions should not be added hastily at the last moment, but should result from a careful review of the existing laws in the field. In particular, the drafter should be careful not to repeal laws or articles of laws that have entered the Albanian body of legislation because of approximation with the EU acquis, unless there is a specific reason for doing so.

4. Legislative gaps

These are the legislator's omissions in regulating aspects of social relationships, which emerge from objective reality or other provisions of the same draft. The legislative gaps are also called "legislative voids". The danger of this corruption risk lies in the incertitude it generates in the social relationships, especially those referring to rights' enforcement mechanisms, fulfillment of obligations, ambiguity of public servants' duties and administrative proceedings they are responsible for etc., situations when the authorities responsible for the enforcement of the respective law can use of this deficiency to commit abuses.

To avoid this problem, it should be considered that the law must be as detailed and complete in regulating all aspects of social relations that exist or are likely to be produced by an objective reality or in the course of enforcing other provisions of the same draft.

II. Manner of Exercising Public Authority Duties

The major objective of establishing a rule of law and respect of civil rights has not been necessarily translated into real advantages for citizens in their daily interaction with the public administration bodies as long as there are no clear and straightforward procedures to provide services to citizens, i.e., manner of exercising public authority.

Law No. 44/2015, "Administrative Procedures Code of Republic of Albania", is a normative act of special importance and a practical tool whose main aim is to ensure a citizen-oriented governance system. In a nutshell, the Administrative Procedures Code is essentially a piece of legislation that aims to regulate how public administration bodies exercise their authority on

private entities as well as provides a mechanism of control over administration. In order to assess corruption proofing, users of this methodology must possess deep knowledge of this administrative code.

In addition to general considerations mentioned above, this risk may also appear in specific cases, such as the following:

5. Extensive Regulatory Powers

These are the duties that endow a public authority with the rights to legal regulation in areas exceeding their competences. Regulatory powers are considered excessive, if the area of the executive authority's legal intervention coincides with the legislator's area of intervention. The executive branch has the task to adopt legal acts aimed at enforcing the law and not at completing it.

Usually, the extensive regulatory powers as a corruption risk can be found in draft laws developed by the Government, which allows the authority responsible for the enforcement of this law (immediate author of the draft) to establish convenient rules for itself.

Extensive regulatory powers are frequently found in non-exhaustive listing of rights and duties of the public authorities, of procedural aspects etc., the provision containing in the end a derogation providing for the establishment of exceptions other than those envisaged in the law, other rights, obligations, and procedural aspects through departmental acts.

To avoid this risk, the provisions on issue of sublegal acts should normally be as precise as possible. Article 118 of the Constitution specifies that the provision on issue of sublegal acts shall authorize the issuance of sublegal acts, designate the competent body, the issues that are to be regulated, and the principles on the basis of which the sublegal acts are issued. Powers obtained from this delegation may not be delegated to another body.

6. Excessive Duties or Duties Contrary to the Status of the Public Authority

These are powers which exceed the competences or contradict the status of the public authority that is assigned these powers.

This risk may be avoided by checking the framework-laws regulating the fields in which the executive public authority is working, as well as the act determining its status and main duties, and ensuring that the powers specified from the draft do not conflict with these laws.

7. Duties Set Up in a Manner that Allows Waivers and Abusive Interpretations

These are powers of the public authorities which are formulated ambiguously, determining the possibility of interpreting them differently in different situations, including interpreting them in

the preferred version or derogating from them. The unclear formulation of the powers of the public authority generates the possibility for an official to choose the most convenient interpretation of his/her powers, without considering other legitimate interests and the spirit of law, that he/she shall comply with in performance of his/her duties..

8. Parallel duties

This risk is identified in regulations where duties of a public authority are established in the draft, while other similar or identical duties of other public authorities are regulated in the same draft or in other legislation. Parallel duties create give rise to competence conflicts between the authorities vested with parallel duties or create the risk for both responsible authorities to decline their competence.

Parallel duties also appear in the situations when the adoption of certain decisions is assigned to two or several public authorities (joint decisions). The level of this risk increases when provisions allow overlapping competences of public servants within the same authority or from distinct public authorities, or when several officials are in charge of the same decision or action.

This problem can be avoided if the drafter clearly specifies the responsible authorities to undertake the procedures and actions foreseen in the draft.

9. Regulating an obligation of the public authority by using discretionary formula as "may", "has the right", "can", "is entitled" etc.

These formulas amount to corruption risk only when formulate as a right what is intended to be an obligation/duty of the public authority or servant. The danger of this risk lies in the officials' discretion that appears when using such discretionary descriptions of their competences, which should be established in an imperative manner.

This discretion can be used by the officials in an abusive way, so as to avoid performing exactly his/her legal obligations due to the discretionary character of regulation of his /her competences. The danger of this corruption risk further increases when there are no criteria to identify under what circumstances the official "has the right" or "can" and in what circumstances he/she has not the right and cannot perform the duties

This risk may be avoided by making appropriate and consistent use of modal verbs to indicate mandatory requirements and discretionary matters.

10. Exercising duties of setting up rules, controlling their implementation and applying sanctions

This is the empowerment of an executive authority with competences to establish rules, to verify their observance and to punish the legal subjects for violation of these rules. The

corruption danger of this element has two sides. On one side, the authority / public servant may abusively promote or damage, with corrupt intentions, the interests of some persons held to apply the rules imposed by this authority. On the other side, the persons bound to comply with the rules set by the authority, can feel easily tempted to corrupt the representatives of this authority in order to avoid control or sanctioning, as all the competences are cumulated by the same authority of the public administration.

This risk can be avoided by making reference to Article 118 of the Constitution, which specifies that the provision on issue of sublegal acts shall authorize the issuance of sublegal acts, designate the competent body, the issues that are to be regulated, and the principles on the basis of which the sublegal acts are issued. Powers obtained from this delegation may not be delegated to another body

11. Non-exhaustive, ambiguous or subjective grounds for a public authority to refuse to act

This is the partial establishment of cases when an authority can refuse to carry out certain actions, to execute certain obligations.

To avoid this risk, the drafted must specify specific, appropriate, objective, and exhaustive grounds for a public authority to refuse to act.

12. Lack/ambiguity of administrative proceedings

When the administrative procedures are regulated insufficiently or ambiguously, there arises a dangerous discretion of the responsible official to develop procedural rules which are convenient to his/her own interests, contrary to the public interest. Lack/ambiguity of administrative procedures appears whenever the text of the draft mentions or implies the existence of a mechanism / procedure, but:

- fails to clearly specify them;
- uses vague reference provisions to unclear legislations that would regulate such procedures;
- uses delegation provisions to transmit the task of regulating the administrative procedure or a part of it to the directly responsible authority;
- uses ambiguous linguistic formulations to describe them;
- establishes discretions of the public officials regarding various aspects of the procedure, without determining criteria for using such discretions by public servants.

In a rule of law state, a procedure is as important as material rights, indeed, materials rights are utopia unless clear procedures are provided to achieve them. To avoid this risk, each and every normative act must envisage a clear administrative process on realization of a right or obligation. If this is not carried out, the provisions of the Administrative Procedures Code may be employed. It is, however, advisable to include such provision reference in the normative act.

13. Unjustified long or short terms or lack of specific terms

These are administrative terms which are too long or too short, which makes difficult the exercise of rights and interests, both public and private. The terms are considered to be too long, when the actions that should be undertaken within these timeframes are very simple and do not require much time. The terms are considered too short when the actions to be fulfilled are too complicated and require longer time in order to be fulfilled than the term set by the draft. There are cases where terms are either lacking or contain ambiguous timeframes.

14. Failure to identify the responsible public authority/subject the provision refers to

This risk occurs in the case of legislator's omission to expressly indicate the public authority stipulated in the legal provision, even when the authority is identifiable from the draft context. It makes it difficult for the individuals and legal entities to exercise their legitimate rights and interests. The danger of this corruption risk is similar to the establishment of parallel duties and could generate conflicts between the public authorities that simultaneously are assumed to fall under the incidence of the provision (especially when it provides rights and empowerments), or declining by the authorities the competences conferred through law (in case of obligations, responsibilities and tasks).

III. Justification and Public Interest and Manner of Exercising Rights and Obligations

Every law-drafting project should be preceded by evaluating and ascertaining the reasons why the law should be adopted, in particular its political and legal justification. It is the task of the drafter to determine what should be regulated by the law, who is the addressee of the law and how and in what conditions the given law will function.

15. Justification of the Draft

When the rationale or explanatory memorandum is not attached to a draft law, or when it has been poorly written, the draft may undergo unwanted risks of corruption. To avoid this risk, the following should be considered:

Every draft law should be accompanied by an explanatory memorandum to explain its provisions in simple, non-technical language, setting out the proposed changes to existing law made by the draft. To promote the quality and effectiveness of legislation, the memorandum should – like the legislation it supports – be drafted with care in order to ensure quality and effectiveness of legislation.

Explanatory memoranda serve a variety of purposes. Their primary function is to inform the members of the Assembly and assist them in their parliamentary consideration of the draft law.

Explanatory memoranda also perform an important function for the general public and, by extension, the media. Memoranda that set out their material in a complete and effective way enable public access to, and knowledge of, the proposed law. After laws are enacted, their explanatory memoranda can continue to have a significant role, in that they have an impact on the application of the law in practice. They can remain a source of information to the public on the law, thus contributing to its effectiveness. Those who administer the law may turn to its explanatory memorandum to establish the object and intent of its provisions as an aid to administering them. Finally, and importantly, the courts may refer to the explanatory memorandum as an aid to interpreting a law. It follows that an obscure, ambiguous or superficial explanatory memorandum may result in legislation being applied and interpreted in ways different from what was intended. However, in the practice to date, the explanatory memorandum is not used after the approval of the law and it is not easily accessible to the general public.

These factors raise the question of the legal status of explanatory memoranda. In theory, the text of legislation should provide a solution to all the legal issues falling within its scope. The explanatory memorandum should therefore only provide background information and ancillary guidance on the legislation. The drafter should beware of using the explanatory memorandum to bolster inadequate drafting of the formal legislative text.

According to the Rules of the Council of Ministers, Article 19 in Chapter III, an explanatory memorandum should include the following

a) The purpose of the draft act and the objectives that are intended to be achieved;
b) A political evaluation and whether or not the draft act is related to the political program of the Council of Ministers, the acts that have approved the principal directions of overall state policy or other documents about developmental strategies and policies;
c) Argumentation for proposing the draft act, making an analysis related to the priorities and possible problems in implementing the draft act, the level of effectiveness, the ability of implementation, the respective effects, impact and efficiency, as well as the resulting economic cost in relation to the legislation in force;
ç) A preliminary evaluation of the legality and conformity with the Constitution of the form and content of the draft act, as well as its harmonization with the legislation in force and the norms of international law binding on the Republic of Albania;
d) For normative draft acts, an assessment of the level of approximation of their content with the EU legislation (acquis communautaire);
dh) An explanatory summary of the content of the draft act;
e) The institutions and organs that are charged with implementing the act;
ë) The persons and institutions that have contributed to the preparation of the draft act.

According to Articles 14 and 20 of the Rules of the Council of Ministers, a report assessing the income and budgetary expenses should be prepared separately from, but attached to, the explanatory memorandum.

This report should contain, according to Article 20, the following:
a) the total amount of annual expenses for the implementation of the act;
b) detailed projections for each budget line necessary for implementing the act;
c) the time the financial effects will begin;
ç) detailed expenses for the structures assigned to implement the law;
d) assured and anticipated sources of financing;
dh) an analysis of the increase or decrease of budgetary expenses for at least the first three years of its implementation;
e) the amount of anticipated or excluded fiscal obligations that the draft act contemplates;
ë) when the draft act has the object of approval of the use or distribution of public funds, it is accompanied by the respective budget allocation."

In practice, the income and expense information is not included in a special evaluation but in the explanatory memorandum, and rarely in the detail required. In many cases this information is completely ignored. This should not be done; the requirements of the Rules of the Council of Ministers should be followed. In order to meet the requirements of the Rules of the Council of Ministers and to produce a concise and easy-to-read explanatory memorandum, the information to be included therein can be organized in three parts: the first part dealing with the background and general comments; the second part dealing with comments on specific provisions of the draft act; and the third, an evaluation that deals with financial implications of the draft act.

16. Promotion of interests contrary to the public interest

The danger of this corruption risk resides in the fact that the drafter is using legislation to satisfy one's individual and group interests, despite of and to the detriment of other legal interests. Usually, the promotion of interests, such as personal, ethnic, political, etc., represents an abusive favoring of individuals and legal entities to achieve interests and benefits. The reasons for supporting these interests can vary.

Examples include provisions of electoral code that give a certain political party advantage to the extent it violates equality of votes, (such as division of constituencies in the favor of one party, legal provisions that regulates an economic sector to favor one trade company over others, etc.).

17. Infringement of interests contrary to the public interest

This is damaging individual or group interests, to the detriment of the general interest of society, acknowledged by the State, in order to ensure its welfare and development.

The objective of each law should be to provide its users with as precise and comprehensive regulation as possible of the matter addressed. Its provisions should be limited to regulating objectively determinable societal circumstances by reference to their identifiable

characteristics. It should contain a clear and accurate statement of obligations, rights and duties.

Every law-drafting project should be preceded by evaluating and ascertaining the reasons why the law should be adopted, in particular its political and legal justification.

It is the task of the drafter to determine what should be regulated by the law, who is the addressee of the law and how and in what conditions the given law will function. The necessity for, and the effectiveness and comprehensibility of, the contemplated draft act should be established. Those preparing a law should establish to what extent and in what way the proposed law would change the existing legislative scheme; what will be its consequences for different affected interests; and what will be its cost for both the public and the private sector.

18. Exaggerated costs for provision's enforcement as compared to the public benefit

These are the financial and other expenditures, public or private, needed for the implementation of the provision, the amount of which is higher if compared to the advantages obtained by the society or individuals as a result of this provision's enforcement.

The following should be considered in order to avoid this risk.
The direct financial cost of implementing legislation is an obvious element in estimating the cost of legislation. Article 82/1 of the Constitution specifies that a law must always be accompanied by a report that justifies the financial expenses for its implementation. This requirement is also set out in the Rules of Assembly, Article 68. Article 25/1of the Law on the Council of Ministers provides that all draft laws submitted to the Council of Ministers for approval must be accompanied inter alia by an explanatory memorandum whose content is specified in paragraph 2 of the article. For draft laws that have an economic and financial nature, the explanatory memorandum must include the expected financial impact arising from their implementation.

There are, of course, a variety of costs of legislation. In addition to the anticipated costs of the state budget, there is also the cost to the public sector. Increased bureaucracy will have staffing and, therefore, financial implications. There may be other direct public sector costs, for example, if the legislation provides for grants for housing or small businesses.

The assessment of the administrative implications for the public sector should analyze especially whether the draft law requires the establishment of new administrative structures or the expansion of existing ones. New legislation should, as far as possible, aim at using existing administrative structures. It is inexpedient if the public sector becomes unnecessarily complicated through administrative inflation. Such a development may also mean that the public sector becomes more confusing and less accessible to the individual citizen. Instead, it is advisable to consider administrative simplification, for example, by merging several functions into one administrative unit. If it is necessary to establish new administrative units, efforts

should be made to ensure that economic and administrative costs are kept to a minimum, for example, by transferring staff between administrative units. There are also costs to the private sector. Legislation that imposes taxation, or fees, is an obvious direct cost. Extensive regulatory or compliance provisions are also a cost, because they absorb private sector human resources, which are ultimately paid for by the customer. If regulatory or compliance provisions impose excessive demands, they will finally be a burden on the taxpayer (because less profit will mean less tax revenue) and the community (because less tax revenue will eventually have a deleterious impact on public services). The evaluation of the costs to the private sector should be a particular priority in the case of draft laws that will affect the way in which business operates. The determination of the costs for the private sector may be based on the evaluation of the proceeds from it to the public sector. For example, the anticipated revenue from a new tax may be used as an indicator of its financial implications for business.

Draft laws may also have other implications for business costs. A law may require, for example, that certain technology is introduced or that certain safety or security standards are applied and such derivative costs should also, as far as possible, be taken into account. Among its indirect effects, a draft law may affect the way companies and consumers act within the market. Even before their adoption, draft laws may have an impact on market competitiveness as a result of provisions affecting education, infrastructure, access to know-how or access to capital. It should be established whether a draft law is likely to enhance or restrict the competitiveness of enterprises and, if so, to what extent.

Commonly, there will be a cost both to public and to private sectors. Whether the cost is justified may be the most difficult question. For instance, consider a proposal to introduce legislation to create a regulatory regime for some private sector financial activity. A regulatory regime often has to be extensive to be effective. An extensive regulatory regime is likely to be expensive for the public sector, because it usually requires a large highly trained bureaucracy. The private sector is also likely to have considerable costs in responding to such a regime, because it too will need, for example, highly trained compliance staff. These additional costs will be passed to the customer and there may, in the end, be a reduction in business, with a consequential reduction of tax revenue. However, a less rigorous regulatory regime may have harmful consequences. There may be an increase in illegality and a decrease in consumer protection This, in turn, may result in a lack of confidence, possibly leading to an undermining of state authority, or international confidence in the state, or ultimately even of the rule of law. Thus the final calculation may be that the greater cost of the more extensive regulatory regime is nonetheless justified.

The general criterion is whether the outcome of cost-benefit analysis of the legislation is acceptable. In determining this, it is necessary to take into account potential benefits of the proposed legislative provisions, including any beneficial effects that cannot be quantified in monetary terms, and to identify the likely beneficiaries. Then it is necessary to determine the potential costs of the provisions, again including any adverse effects that cannot be quantified in monetary terms, and to identify those that are likely to have to bear the costs. A full cost-

benefit analysis should also encompass a cost-benefit analysis of alternative approaches that could substantially achieve the same legislative objective.

19. Excessive requirements for exercise of rights/obligations

These risks occur in those cases where provisions impose too many or highly complicated and difficult requirements for an obligation to be met by citizens.

20. Provisions establishing unjustified exceptions and waivers

These are the provisions-exceptions from the set rule, in absence of justified reasons for the need to introduce exceptions. These provisions may be purposeful to help achieve certain interests. They create an additional risk unless they clearly specify the conditions in which waivers are established and avoid the risk of discretion for judgment. As an example, this provision identified with this risk include those of delegation and reference.

21. Unfeasible provisions

These are the provisions that, by virtue of specific circumstances of the regulated area, cannot be enforced, as they do not correspond to the social reality and relations. To avoid unfeasible provisions, the drafter should consider the preclusion of impositions that are impossible to meet on the part of subjects or incorporate the necessary waivers for people that cannot fulfill these obligations.

IV. Transparency and Access to Information

22. Lack of access to information of public interest

This is the absent or insufficient regulation of the person’s possibility to get know or to be informed about data, facts, circumstances of personal or general interest and which normally should be accessible without undertaking special efforts. Efforts to impede transparency trigger efforts to obtain information through influences.

This absence of information may be uncovered in the analysis phase, because such provisions have extensive and vague formulation or lack/ambiguity of administrative procedures. In this case, the Administrative Procedures Code would come in handy, because it contains special provisions on information to parties in an administrative process as well as the Law on Right to Information, which extends this right to other interested parties.

Another important aspect to be considered by the corruption proofing expert relates with the publication of normative acts in the Official Journal. While according to Article 117 of the Constitution, the normative acts of the Council of Ministers, ministers and other central state

institutions acquire legal effect only after they are published in the Official Journal, in several cases the central government has adopted normative sublegal acts but has not published them in the Official Journal. This is an example of the flagrant violation of public interest as well as violation of the Constitution, which considers acts unpublished in the Official Journal without juridical effect.

V. Accountability and Responsibility

This is another case where, from the general viewpoint, the Administrative Procedures Code would be helpful, because it provides general principles of responsibility and accountability. New normative acts should, however, contain clear provisions on accountability with the aim of avoiding uncertainties in implementation of the required discretion. They should provide clear provisions for cases considered to be violations of the law.

23. Lack of clear accountability of public authorities for the violation of draft provisions

Typical cases of lack of accountability of public authorities for violation of legal provisions include:

- Omission or ambiguity in regulating the responsibility that a public authority or its officials shall bear for the violation of draft provisions. Common instances include imposition of no legal obligation or responsibility triggered from violation of a certain legal provision by a public authority
- Omission of establishing sanctions for violation of legal provisions, the ambiguity of sanctions for violations.
- Establishment of too severe or too mild sanctions for the committed infringements

To avoid this risk, the draft should clearly specify the cases and causes that instigate punishment for violation of the law. In addition, the draft must clearly and exhaustively specify the obligation of public authority to enforce certain conduct and the consequences to be suffered in case these obligations are not met by the public authority. Ambiguity of legal responsibility for the same infringement. This risk occurs when imposing different responsibilities for the same violation in various laws without specifying circumstances in which each responsibility will apply.

24. Non-exhaustive grounds for liability

These are grounds for liability that are ambiguously formulated or their list is left open, so that they allow various interpretations of the cases when the liability comes up. The following should be considered in order to avoid these risks:

The establishment of criminal responsibility should be based on a clear view that it is necessary to criminalize an action to be prohibited by statute, instead of applying other less radical sanctions. Provisions involving criminal liability must be phrased as precisely as possible in

accordance with the principle of legality. An alternative to a criminal sanction for breach of a legislative provision is the administrative sanction. Laws often have administrative sanctions for violations of their provisions.

In cases where the offence and the authority to punish a person committing the offence are not contained in the same provision, the sanction provision should contain a precise reference to the provision authorizing the punishment.

In addition, the draft should clearly specify in what cases and for what causes triggers punishment for violation of law. Every legal responsibility for a violation should be clearly defined and specified and the circumstances in which this responsibility applies must be well-defined.

VI. Control mechanisms

The ministers are held accountable to the Prime Minister and the Parliament, whereas civil servants report to the minister, general secretary, heads of department and their direct superiors. However, all these officials are and should be accountable to the public at large.

While political appointees' accountability, such as minister, is of political nature, civil servants' responsibility is a more complicated issue. To this end, any modern public administration must employ appropriate institutional mechanisms that enable oversight and accountability.

Oversight or control mechanisms and institutions may take on various forms. They may be internal or external. In most cases, oversight is exercised by higher hierarchical bodies, while in modern times there is an increase of semi-automatic control mechanisms, such as various inspectorates, which should definitely be clearly and explicitly mentioned in case the legislator intended their use.

25. Lack/insufficiency of supervision and control mechanisms (hierarchic, internal, public)

These are situations of omission of the regulations related to oversight mechanisms.
They are identified particularly when no clear procedures of control on the implementation of the draft's provisions are provided; the restrictions and/or interdictions for the public official get involved in patrimonial and/or financial relations are inexistent or inefficient; possibilities of conducting parliamentary, judicial or administrative controls is lacking; provisions regarding public control, through petitioning, complaining, civil society organizations' oversight etc. are lacking.

26. Lack/insufficiency of mechanisms to challenge decisions and actions of public authorities

The danger of this risk lies in the absolute and indisputable discretion of the public authority to address a certain issue of private or public interest, without the possibility for the interested persons to subject the authorities' actions to control. This corruption risk can be identified

together with other risks, such as concurrent provisions, legislative gaps, ambiguity of administrative proceedings, lack/insufficiency of the access to data of public interest and unjustified limitation of human rights.

VII. Language

27. Ambiguous expression that allows abusive interpretation

This risk is identified in the cases where the draft is unclear or equivocal and thus allows abusive interpretations.

28. Use of different terms for same phenomenon or use of the same term for distinct phenomena

This is the inconsistent or incoherent use of notions in the draft's text by employing synonyms to refer to the same phenomenon and/or by employing the same notion in order to refer to distinct phenomena. Such faulty provisions may lead to abuses on the behalf of the representatives of both, the public and the private sectors.

29. New terms which are not defined in the legislation or the draft

This is the use of terms which are not acknowledged in the legislation, which are not clearly explained in the text of the draft and which lack broad common understanding that would confer to these terms single and uniform meaning

The following should be considered to avoid such risks:

It is one crucial test of the quality of legislation whether any person affected by it can follow it, read it easily and understand it. Therefore, the drafter should express the law as simply, clearly and concisely as is consistent with legal accuracy. This objective can be furthered in various ways.

The structure of laws should not be logical puzzles but should correspond to the normal way of thinking of an average citizen.

Laws should address the specific and not the hypothetical.

Legal concepts should be expressed in terms that are as absolute as possible in order to leave less room for alternative interpretations. This is particularly important of provisions that empower the state to interfere with the rights of the citizen. It is also important that such provisions are certain and predictable.

Legislation should be drafted in as plain a language as is consistent with accuracy. Plain language drafting assists efficiency; it is easier and faster to read and queries are reduced It

should, however, be recognized that legislation of general application has multiple categories of user. Thus fundamental laws should be comprehensible to everybody, whereas laws regulating specialized matters may use more technical drafting language.

Avoid “torrential” drafting using a long list of synonyms. This is not only for reasons of style. If a list of synonyms is used, the provision may be interpreted as not extending to a synonym that has been omitted from the list (unless it contains some general inclusive phrase such as “matters such as a, b, c, and d” or “a, b, c and d or similar considerations,” but these phrases create their own legal uncertainties).

Avoid using unnecessary and superfluous words, for example, in Article 6 “… except for Article 5 above and Article 12 below”, because where else would you expect to find those articles in the same text?

Sentences should be short and clear.

The main statement should be placed as early in the sentence as possible.

There should be a limited number of concepts in each sentence. Experience and empirical research suggest that the reader can only retain information for a limited portion of text without a punctuation break.

Choose contemporary words and use them in their normal primary meaning. Do not, however, use informal words or expressions. Legal language requires a certain level of formality. Do not use archaic words which are not widely used or understood, or neologisms which have not found general acceptance or recognition in the language. Where it proves difficult to adopt this advice, consider defining the word.

Use words consistently in the draft law. The same word should be used throughout for the same concept and the same word should not be used for two or more different concepts. Also, use words in a way that is consistent with their use elsewhere in the legislation. This will reduce legal uncertainty, textual ambiguity and the prospect of misinterpretation.

The drafter should review existing legislation in the same field before starting work on the draft in order to assure the use of consistent terminology.

Articles in a law text are, certainly in a grammatical context, to some degree autonomous. Pronouns and adjectives should be used with caution; pronouns referring to terms used previously in other articles should not be used. Sometimes it may be necessary to repeat terms that have been used in other articles. However, particularly in the context of a single article, where it can be done without creating ambiguity, the drafter should consider using the narrative style to simplify the text and make it more accessible to the user.

Wherever possible use the singular rather than the plural to avoid unnecessary ambiguity. For example, "The Minister shall establish a procedure for each type of appeal which is specified in this article" is better than "The Minister shall establish procedures for the types of appeal specified in this article."

Definitions give the meaning of the main terms used in the text of a law. Definition provisions should be placed near the beginning of the law because it is important to have early knowledge of what the special words and phrases in the law mean. A balance should be struck between using definitions for these purposes and over-using the technique of definition, which may complicate the life of the reader. It will also complicate the life of the reader if words and phrases are defined differently from their normal meaning. Definitions are used to define and should not be used in order to express the substantive law. Definitions should be limited to one concept or word in each definition.

EXAMPLES OF CORRUPTION RISKS IN LEGISLATION

I. COHERENCE OF THE DRAFT AND ITS INTERACTION WITH OTHER LEGISLATION

Example: Law No. 138/2015 "On Guaranteeing the Integrity of Persons Elected, Appointed or Exercising Public Functions"

This law may conflict with the organic law, which is the Criminal Code of the Republic of Albania. Its conflict consists in deadlines specified in Article 4 of the draft law, "Period of Prohibition for Running for Office, Election or Exercising an Elected or Appointed Function" with Article 69 of the Criminal Code, which defines "rehabilitation", i.e., people who will be considered with clean records after a certain period of time. The draft law specifies longer periods of rehabilitation when compared with those stipulated in the Criminal Code. In addition, the draft law prohibits candidatures, elections, or office terms to individuals who have conducted certain criminal offenses. In such cases, prohibition is lifelong, but the Criminal Code stipulates otherwise for the same criminal offenses.

II. MANNER OF EXERCISING PUBLIC AUTHORITY DUTIES

Example: Council of Ministers' Decision "On Rules, Procedures and Manners of Making Available Immovable State Properties in Areas with Tourism Development Priority"

This act does not foresee the responsible structures to carry out designated procedures, but refers to the Ministry responsible for tourism, thus creating confusion for both the interested subject and for the operation/responsibility of the responsible structure (Chapter II). On the other hand, the act does not provide procedural timeframes for structures charged with its implementation, in terms of

procedures to be followed for making available the immovable properties, filing of documentation, etc. In addition, the act on 'Call for application' Procedure does not specify the structure responsible to announce the winner, review the complaints on decision-making, etc.

III. JUSTIFICATION, PUBLIC INTEREST AND MANNER OF EXERCISING RIGHTS AND OBLIGATIONS

Example: Decision "On Establishment of State Database on Employment Service System"

The explanatory memorandum (rationale) to be attached to the draft is lacking; the draft does not present financial implications of the employment service system.

IV. TRANSPARENCY AND ACCESS TO INFORMATION

Example: Non-publication of normative acts of Council of Ministers, ministers or other administrative bodies in the Official Journal

A typical example is non-publication of normative acts in the Official Journal. While according to Article 117 of the Constitution, the normative acts of the Council of Ministers, ministers and other central state institutions acquire legal effect only after they are published in the Official Journal, in several cases the central government has adopted normative sublegal acts but has not published them in the Official Journal. This is an example of the flagrant violation of public interest as well as violation of the Constitution, which considers acts unpublished in the Official Journal without juridical effect.

V. ACCOUNTABILITY AND RESPONSIBILITY

Example: Draft Law No. _____/2016 "On Probation Service"

The draft law specifies no obligation or responsibility for public authorities on violations of this legal act. Likewise, it provides no instrument for people to file complaints in face of injustice committed by public authority for purpose of gains.

VI. CONTROL MECHANISMS

<u>Example:</u> A typical example from the past relates with the Law on Right to Information.

The first law on right to information (1999) did not provide oversight mechanisms on its implementation. This situation was fixed with the adoption of a new law in 2014, by establishing the Commissioner on Right to Information and Protection of Personal Data.

VII. LANGUAGE

<u>Example:</u> Council of Ministers' Decision "ON Manner of Organization, Functioning and Composition of Public Sector Internal Auditors' Qualification Commission"

This decision features an overload of text, long and sometimes hard-to-understand sentences. This is typically the case in Chapter III, "Selection of Trainers and Supervisors", which specifies remuneration for trainers.