PARLIAMENTARY SEMINAR ON

PARLIAMENTARY INTEGRITY: PROMOTING TRANSPARENCY AND ACCOUNTABILITY MEASURES FOR MEMBERS OF PARLIAMENT

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for

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the Parliament of Bosnia and Herzegovina

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SUMMARY REPORT

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¹ Views expressed in this report are those of the author and do not necessarily reflect the position of the Council of Europe
This report summarises the proceedings of the seminar organized by the Parliamentary Assembly of the Council of Europe (PACE) and hosted by the Italian Parliament on 26-27 October 2017. The seminar focused on measures to regulate conflicts of interest of members of Parliament (MPs) (including obligations to declare assets and interest), and the regulation of immunities of MPs. The majority of discussions focused on conflict of interest and asset declarations. The event was oriented towards Western Balkan countries, with presentations from representatives from Albania and Bosnia and Herzegovina (BiH). In addition, however, regulation was also presented in detail by representatives of France, Italy and Ukraine, providing a very useful comparative perspective. This report presents the main outputs of the discussions for the three issues covered – conflict of interest regulation, asset declaration regimes, and immunities, presenting country detail where appropriate. The report does not provide a detailed account of each presentation or attribute all insights explicitly to those that made them, but attempts to make sense of the material and discussions in order to identify the most important lessons.

1. General issues

1.1 Two types of regulation

A major theme that ran through contributions during the seminar was the need to regulate conflict of interest and the corruption that may stem from it not only through ‘deterrence’ mechanisms – i.e. mechanisms establishing obligations (usually prohibitions) and sanctions in cases where prohibitions are violated. Italian participants – and in particular PACE MP Michele Nicoletti, the author of a recent report of the PACE Committee of Political Affairs and Democracy on “Promoting integrity in governance to tackle political corruption” highlighted the need to go beyond such mechanisms and also embrace measures to underpin a culture of good governance or ‘Constitutional morality’ as termed by Italian MP Guiseppe Pisicchio. In practice this means paying particular attention to mechanisms such as Codes of Conduct, counselling of officials etc. A key question raised by several participants was whether formal rules and mechanisms can be effective in changing culture; in this context, the importance of education of society in general and especially the young was highlighted repeatedly. The lesson may be that a proper balance must be struck between mechanisms to build culture and integrity in a positive sense on the one hand, and mechanisms to establish and enforce legal obligations on the other.

1.2 General objectives vs. country specificity

On all the themes discussed, a second issue that was highlighted was the need for regulatory solutions to be tailored to specific country circumstances (specific examples can be found in later sections of this report). While international standards (including those of the Council of Europe) establish vital benchmarks and tools of guidance for tackling corruption, their purpose in some areas (including regulation of conflict of interest and immunities) should be seen more as to lay down clearly the objectives of regulation rather than establishing precise rules to be transplanted across different political and administrative contexts and cultures. In
other words, a “one size fits all” culture should be resisted. However, country specificity should not be used as an excuse for inaction; for example, it was agreed that the complicated political and administrative structure of Bosnia and Hercegovina is not a justification for not clarifying and improving the regulation of conflict of interest and asset declarations.

2. Conflicts of interest and asset declarations

2.1 Basic regulatory issues

An important basic issue underpinning discussion of conflict of interest and its regulation is the need to distinguish conflict of interest from corruption. The definition of conflict of interest in the Council of Europe model Code of Conduct is: “Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.” In other words, conflict of interest is a situation in which an official may find themselves, not an action; whether an official in a situation of conflict of interest engages in corruption is a different question, although the existence of a conflict of interest will clearly increase the risk of this.

Conflicts may be functional (the holding of parallel positions or interests that give rise to conflicts with official position) or situational (case-by-case conflicts that arise from specific emerging circumstances). Accordingly, it may be regulated by:

i) preventing functional conflicts through prohibitions on the holding of certain positions or interests at the same time as holding public office (incompatibilities);
ii) addressing situational conflicts through obligations to disclose such conflicts, and where appropriate recusal from processes or decisions that may be affected.

Given the focus of the seminar on elected officials, an important point raised by several participants was the need for conflict of interest regulation to be tailored appropriately according to the type of official. Specifically, elected officials differ from elected officials in being in principle ‘amateur’ or ‘temporary’, in the sense that their mandate is limited to the term for which they are elected; as noted by a participant from the Group of State Against Corruption (GRECO) secretariat, MPs need to reintegrate into society after leaving office. In France the institution responsible for asset declarations actively encourages the view that the holding by MPs of external assets and interests is normal, and that duties to declare assets are a means of fostering public integrity by preventing conflicts of interest going hidden or unnoticed.

This has important implications for regulation – specifically, that prohibitions on external activities must be established carefully in order not to isolate MPs from sources of income they may need after the end of their mandate – and paradoxically encourage the very misconduct in office that the prohibitions are designed to prevent. For MPs, the implication is that the balance of regulation may be best directed towards effective requirements to disclose interests and conflicts of interest. It was mentioned in the seminar that in Ukraine the majority of MPs have corporate holdings, either directly or through family members – largely illegal under the present law.

A second basic issue is the fact that resources for oversight and enforcement (for example staff and budget of an oversight institution) are always limited. This is of particular
relevance for asset declaration regimes, specifically how many officials’ declarations should be verified in detail. The situation in this respect varies considerably in the countries presented at the seminar: for example, in Albania all MPs’ declarations are subject to full verification, while in Ukraine the National Agency for Prevention of Corruption has only checked fully 6-7 of its 432 MPs’ declarations. Despite the limited population of MPs, question marks nevertheless remained over whether all MP declarations can be verified thoroughly, or whether a more selective approach should be adopted. Conversely, limited resources should not be used as an excuse for not conducting efficient oversight.

Obligations to declare assets, income and interests may be seen as one category of conflict of interest regulation, although the objectives of asset declaration regimes are broader – for example, discrepancies in a declaration may reveal direct evidence of corruption or other offences such as tax evasion. A number of participants stressed that the primary purpose of asset declarations is not for the purposes of official verification (important though this may be), but rather as a means for fostering public trust in officials, and to establish a depository of data on officials’ interests so that conflicts of interest during their participation in decisions and other official processes are less likely to occur.

2.2 Country situations: Albania and Bosnia, Hercegovina

Regulation of conflict of interest and obligations to declare assets for MPs in Albania and in Bosnia and Hercegovina (BiH) were presented in detail.

Albania. A key aspect of regulation highlighted in Albania was the complexity of conflict of interest regulation – identified not only by MPs but also by the representative of the oversight body for conflict of interest, the High Inspectorate for the Declaration of Assets and Conflict of Interest (HIDAACI). Two laws exist (on Conflict of Interest and on Declaration of Assets), there is a complex set of obligations relating to different sub-categories of conflict of interest, and implementation and enforcement responsibilities are divided between HIDAACI and public institutions whose officials are obliged under the laws. Regarding MPs (and also other elected officials), key issues revolved around unfulfilled GRECO recommendations, notably that i) a Code of Conduct is elaborated and implemented; ii) requirements for disclosure by MPs of case-by-case conflicts of interest are established; and iii) MPs asset declarations are published proactively. The Parliament is at an advanced stage of drafting a Code of Conduct. Recent amendments to the Asset Declarations Law explicitly provide for publication of declarations online (although not before at least mid-2020).

Bosnia and Hercegovina. BiH passed a law on conflict of interest in 2002, including obligations to declare assets, and with responsibility for implementation and enforcement with the national Central Election Commission. The law established clear obligations and sanctions, and had a direct impact during early implementation. However, regulation was weakened several times since then, most severely with legal amendments in 2013 that moved responsibility for enforcement from the CEC to a Parliamentary committee; other problems include the fact that while declarations are accessible, they are not made public in any effective manner. The current situation was characterized as a legal vacuum, with regulations inconsistent between the State level and the Entity/Brčko District level, and little or no enforcement in most of the country. Currently, a joint Parliamentary commission has elaborated a new draft, regarded by independent observers as a promising basis for a new law.
2.3 Key issues/lessons for conflict of interest and asset declaration regimes

With regard to regulations on conflict of interest, the key issue that came out of the discussion was the need for clear and consistent definition of the obligations of officials (including MPs). Participants highlighted problems in this area for Albania, BiH and Ukraine. As indicated above, BiH currently has big problems with varying rules, for example differences between national and republic/district definitions of officials subject to conflict of interest regulations. In Albania, a key issue for MPs is the absence of clear obligations on the declaration of conflicts of interest when participating in parliamentary proceedings (voting, committee meetings, etc.). In Ukraine, the Law on Prevention of Corruption (which establishes conflict of interest obligations) defines business activity in a different way to the Commercial Code, which in turn creates uncertainty over which external activities are prohibited to MPs.

In Albania, BiH and Ukraine all elected officials have to submit asset declarations. The presentations and discussions at the seminar did not discuss in detail the systems for submission of declarations or the methods by which they are verified, with the exception of the need for international assistance (see the International dimension, below). They did however focus in detail on the issue of transparency – i.e. whether and how asset declarations are published in each country. The three countries vary considerably: in BiH declarations are not published at all; in Albania they currently may be accessed individually on specific request with certain information redacted; in Ukraine declarations are accessible in full online. The French case – where declarations are published but only after ensuring that they are controlled and complete – highlights the variety of modes of publication. An interesting discussion was held over the appropriateness of redacting data on specific items of wealth such as jewels, specification of real estate, etc. on the grounds that declarants may be vulnerable to kidnapping, theft or blackmail. The clearest statement on this was made by the Ukrainian participant MP, Serhiy Kiral, according to whom none of these fears had actually materialised in Ukraine despite the complete transparency of asset declarations. This provides support for the idea that full transparency of asset declarations is a legitimate aim, at least for senior officials. In addition, the transparency of other public registers that shed light on assets and interests of officials – such as land registers, company registers – is also desirable to facilitate scrutiny by non-governmental actors.

2.4 Implementation and enforcement

Several participants highlighted a key issue concerning the implementation of anti-corruption policy measures, including conflict of interest and asset declaration regimes – a tendency to pass laws without establishing a permanent and adequate mechanism for implementation and enforcement. The following specific problems were raised during the discussions:

- **Independence.** In BiH, oversight of conflict of interest and asset declarations was moved from the national Central Election Commission to a Parliamentary committee, resulting in a situation where effective oversight ceased. The conclusion of discussions was that self-regulation (in this case, where MPs oversee MPs) can only work if the number of
those regulated is large enough, which is generally not the case for parliaments. The implication is that – at least in challenging environments where problems of conflict of interest are likely to be severe - good practice is to entrust oversight to an independent body.

- **Vulnerability of those entrusted with enforcement.** A recurring theme in discussions was the difficulty of ensuring proper oversight in a context where enforcement is likely to damage vested interests that are *de facto* more powerful than those entrusted with enforcement. In BiH, enforcement in Republika Srpska (reportedly the only part of BiH where implementation of laws regulating conflict of interest continued to some extent following legal amendments in 2013) halted when the Complaints Committee ceased working after threats were received by a number of members. In Ukraine the problem was described more directly in terms of the control of politicians – as well as the media, a key accountability mechanism – by “oligarchs”.

- **Support from other enforcement bodies.** Several participants underlined the fundamental importance of bodies responsible for asset declarations having support from law enforcement bodies and the judiciary – and in both Ukraine and Albania a lack of such support was noted. In Ukraine, reportedly, the establishment of the National Anti-corruption Bureau, which has prosecutorial powers but is independent of the Prosecutor General, has made a big difference but there is still a need to establish an anti-corruption court with similar independent status. The implication is that where an oversight institution lacks support from law enforcement, it may be appropriate to consider establishing such institutions with special independent status, and/or establish investigative powers for the oversight body itself.

- **Official enforcement vs societal accountability.** An important implication from the problems covered above is that countries with administrative systems of control that are not yet consolidated should not rely too much on classic enforcement by an oversight body. Rather, transparency should be maximised in order that the media and civil society can play a maximum role in ensuring accountability. A good example is Ukraine, where the publication of asset declarations facilitates their scrutiny by a very active network of NGOs. In this context the impact of the Internet and social media in particular are of fundamental importance as a mechanism for facilitating transparency and accountability and should be explicitly taken into account when regulations are being designed.

- **Role of political parties.** An interesting dimension to enforcement of integrity in politics was introduced by participants from France and Ukraine. This was the role that internal control mechanisms and procedures within political parties can play in preventing the emergence of situations of conflict of interest (and corruption). In France, it was suggested that better internal control mechanisms could have prevented scandals such as that of the 2017 Republican Presidential candidate François Fillon. By contrast, the participating MP from Ukraine, Mr Serhii Kiral, referred to mechanisms of internal democracy within his own party that had detected conflicts of interest before they could affect the party’s voting in Parliament.
2.5 The international dimension

A theme that came up repeatedly at the seminar was a perceived need among participants for more active engagement with and assistance from the international community. There were three main aspects to this:

- **International cooperation in the verification of declarations of assets and interests by public officials.** It was noted that the institutions responsible for verifying asset declarations in Albania and Montenegro have little or no way of ascertaining assets and interests held by Albanian officials abroad. Institutions responsible for verification should be enabled to take maximum advantage of mechanisms that are available for obtaining information from abroad. The case of France – presented during the seminar – appeared to be an illustration of good practice in this respect. The French High Authority for Transparency in Public Life, which is *inter alia* responsible for managing the asset declarations system accesses information from abroad through protocols with the French tax authority and financial intelligence unit, which obtain such information through their contacts/networks with similar institutions abroad.

- **International support for reformers.** Participants from BiH and Ukraine stressed that in the face of domestic oligarchies and other vested interests, reformers cannot succeed without more active support from the international community. While initiatives such as a recent protocol between representatives of the Italian and Bosnian parliaments, or a twinning project with the Albanian Parliament were mentioned, some participants were in favour of the international community pursuing a much more aggressive (or less diplomatic) strategy towards officials convicted or suspected of corruption. Direct involvement of the international community in anti-corruption mechanisms was mentioned by participants from Albania, where a vetting mechanism for judges and prosecutors is currently in operation with international participation.

- **Transparency of beneficial ownership.** Participants at the seminar voiced criticism of richer countries that the latter expect compliance/progress in the area of corruption control, but at the same time function as havens for laundering criminal assets. In this context, the fundamental importance of further progress being made to ensure the transparency of beneficial ownership of corporate entities and assets (for example through implementation of the G20 High-level Principles on Beneficial Ownership Transparency, or the provisions on beneficial ownership disclosure in the EU 4th Anti-money Laundering Directive) were underlined.

In this context, an additional contribution to the two days’ proceedings was provided during a high-level event held during the seminar, at which Mr Michele Nicoletti presented the recent PACE Report (see Section 1.1). One component of the report highlighted was the recommendation to create a network of European anti-corruption authorities.

3. Immunities
The second main theme of the seminar was immunities of elected officials. Presentations were given by representatives from Albania, Italy, Ukraine and GRECO. The main issues from and conclusions of the session were the following.

- **Parliamentary immunities are of two types**: immunity for speech and votes cast in Parliament ("non-liability"), and immunity from criminal proceedings ("inviolability"). There are considerable variations in practice across Europe, from systems where only non-liability exists (e.g. UK), to those where extensive inviolability is also provided (e.g. Ukraine). There has been a general trend towards immunities being restricted.

- **It is of vital importance** to be clear what is the purpose of Parliamentary immunity – namely, to protect the institutions of Parliament and parliamentary procedure from attacks from the executive, courts or political opponents. It is not to protect MPs *qua* individuals.

- The **historical origins of immunities** provide important lessons concerning not only the purpose of immunities (see above), but also to the appropriate scope of immunities in different historical contexts. Immunities were originally created to protect newly-formed parliaments from the monarch (or later, Executive). In Italy, immunities were established after the second world war to protect parliament from executive pressures such as those imposed under fascism. However, as time passed the threat from the executive has diminished and the judiciary has become increasingly independent. The lesson of this is that in countries with a recent authoritarian past there *might* be a case for broader immunities than in countries with a consolidated separation of powers. On the other hand, in newer democracies elected representatives might also be more vulnerable to corrupt pressures.

- There is therefore – and as noted in CoE COM Recommendation 97(24) and PACE Resolution 1675 (2009) a need to balance appropriately the need to protect the legislature from executive or judicial attacks, while avoiding the provision of undue privileges to MPs. ECtHR jurisdiction has determined that where inviolability goes beyond only serving to protect the free discharge of Parliamentary duties, it violates the ECHR. The Court judges the appropriateness of an immunities regime on various criteria of legitimate aims and proportionality – e.g. scope of acts covered, time period, *etc*.

- One of these criteria is also how *immunity is lifted*, i.e. what kind of procedure is involved, what the criteria are for lifting immunity, whether a request not decided is automatically rejected or accepted, etc. According to Yves-Marie Doublet, who presented the experience and lessons of Fourth Round GRECO evaluations, in around half of its 49 countries the evaluations found there were no criteria for lifting immunity or criteria are inadequate, resulting in recommendations to establish specific, clear and objective criteria for lifting immunity, that avoid the Parliament or its relevant body acting as judge in the case. However, the discussions in the seminar indicated that detailed guidance on criteria for lifting immunity is missing at CoE level and their development would be useful.