

EMPOWERING ANTI-CORRUPTION AGENCIES: DEFYING INSTITUTIONAL FAILURE AND STRENGTHENING PREVENTIVE AND REPRESSIVE CAPACITIES

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LEGAL STATUS OF THE ANTI-CORRUPTION AGENCIES HOW TO MAKE THEM MORE EFFICIENT?

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There are several issues arising from my experience in the prevention of corruption - as a former member of Macedonian Anti-Corruption Commission and as anti-corruption consultant that I want to share with the participants of this Conference. The expert opinion on these topics by the participants will be welcomed. I will appreciate very much if these issues attract the attention of anti-corruption experts for exchanging views and provide suggestions about them.

The topics which I want to address further more, are stipulated, managed and resolved in different manners in various countries. In this particular occasion, I will be focused on the problem that may arise due to not precisely clear anti-corruption legislation, which in fact currently exists in Macedonia

These issues primarily refer to the following:

- Independence of anti-corruption agencies – which is closely connected with their legal status and is based on the political will of the Government to empower this agency for efficient fight against corruption, to monitor the implementation of the legislation, to review and manage the obstacles which may arise in the performance of its function;
- Conflict of interest;
- Limitation of the term of office (mandate) of the Commissioners (members of the anti-corruption agencies);
- Certain conditions which may be necessary for appointment of the Commissioners

Independence of anti- corruption agencies - What does it mean?

The UN Convention against Corruption (Merida Convention) provides an obligation for the countries to establish an independent agency for prevention of corruption.

Each country shall determine the status of anti-corruption agency (or agencies) and decide about the best manner for efficient prevention of corruption and what powers it will entrust to these agencies in order to be independent and autonomous in the performance of their function.

The status of anti-corruption agencies varies from country to country. In some countries these agencies are established within the Government (which refers to a very questionable independence); in other countries, they have succeed formally to avoid the Government's umbrella and the Commissioners are elected and dismissed by the Parliament (which should denote that they are independent); while in other cases, such agencies are included and are an integral part of in the existing institutions (for example, Police or Public Prosecutors' Office). In a very small number of countries, anti-corruption agencies really enjoy a high level of independence and autonomy, having

strictly defined competences and sufficient financial resources to efficiently carry out their duties and responsibilities.

However, in spite of their different status; they all share one common matter. The members of such anti-corruption agencies (Commissioners) are professionally engaged with the agency, which means they are employed with the Anti-Corruption Agency. Macedonian Anti-Corruption Commission differs in this regard from all other anti-corruption agencies, which leaves the door open for potential conflicts of interest among the members of Anti-Corruption Commission, and which on the other hand may have impact on their credibility.

Conflict of interest

The Law on Prevention of Corruption was adopted in April 2002, and the State Commission for Prevention of Corruption (Anti-Corruption Commission) was established six months later, in November 2002. According to the Law, the Commission is an autonomous and independent in exercising the activities defined by the Law and has a status of a legal entity. Pursuant to the Law, the members of the Anti-Corruption Commission (Commissioners) shall be appointed from the rank of eminent experts in the legal and economic fields, having good reputation to exercise the function. The members have a mandate or term of office of five years (previously, it was four years), without right for re-appointment. They receive remuneration for their engagement in the Commission's work.

The Law also provides that Commissioners do not exercise their function professionally, or in other words, they are not employed with the Commission and have regular jobs somewhere else. Some of the members have even two or more engagements at the same time, such as in the public administration as public servants, as professors at the University or being presidents of NGOs, and they are only partly engaged in the Anti-Corruption Commission. It should be pointed out that this solution was questioned from the very beginning of the establishing of the Commission by many experts, NGOs and specially by the media, primarily focusing on the conflict of interest that may arise, and later on, addressing different cases when some Commissioners were faced with a conflict of interest in the performance of their function in the Anti-Corruption Commission (ACC) with their regular jobs. In certain cases, some of the Commissioners were even criticized by the media for using (or misusing) this function to gain benefit in their regular job. Frankly, such

possibilities are very realistic, having in mind the current legal status. Although the Law on Prevention of Corruption, and later on the Law on Prevention of Conflict of Interest, have certain safeguarding provisions concerning the prevention and managing of conflict of interest if some circumstances indicate such possibility for an elected and appointed functionary, including the Commissioners, such as an obligation to demand his/her exclusion from the decision-making, still the possibility for a conflict of interest to arise is more likely in the case when two or more jobs are being carried out at the same time.

In order to avoid or to narrow this very possible conflict of interest and to strengthen the credibility, capacity and efficiency of this agency, the experts in several occasions suggested changing of the status of the Commissioners through amendments to the Law, by offering a possibility to the current Commissioners to choose between a full time engagement (employment) with the Commission or to leave this position and focus only on their regular job. Such suggestions by the experts were (and still are) considered as a fair solution, that besides the prevention of conflict of interest will give more credibility to the Commission and especially to the Commissioners. The amendments to the Law, which were adopted in July 2004, provided changing the status of the next Commissioners, meaning that they shall be engaged full time with the Commission. Unfortunately, the amendments to the Law adopted after the Parliamentary Elections in 2006, have changed this solution, which was considered as a good one and compatible to the international standards and best practices of similar anti-corruption agencies, and thus the previous status of the Commissioners was reinstated. The Government was criticized by the experts and media that the decision to keep this status for the Commissioners was primarily guided from its political needs and personal interests and influence of some high officials. The possibilities for conflict of interest appeared very soon - actually after the election of the new Commissioners, when it was announced that the new president of the Anti-Corruption Commission is engaged in three different jobs and that almost all new elected members are public servants, and some of them even senior officials.

In addition to the very high likelihood of occurrence of conflict of interest because of this legal status, the other very important constraint is a limited efficiency and success of this body due to the partial engagement of the Commissioners in its work due to their other regular jobs. There are no doubts that the effectiveness and efficiency will be much better if the

Commissioners are regularly employed with the ACA (the same refers to the former Commissioners as well).

I am deeply convinced that such unique situation can no longer exist, and Macedonia should follow the practice and experience from other countries, especially those with long tradition and success in the prevention of corruption, in which the activities of ACC has an important role to play, as well as full engagement of its staff, credibility, efficiency, skills and avoidance of conflict of interest.

What was the explanation to maintain this status in the future as well?

This status was justify with the necessity to empower the Anti-Corruption Commission and make it independent from the Government, mainly from a financial point of view, meaning that having another job or profession and receiving a salary somewhere else will enable the Commissioners not to depend on the remuneration, which they are receiving from the budget for the work and activities performed in the Commission. However, the practice did not approve such view. The independence in exercising the function of the ACA depends at mostly on the personal engagement, enthusiasm in the prevention of corruption, knowledge, ethical behavior, professionalism, courage, background and experience in this field by the Commissioners.

If we accept that financing of the activities from the state budget is crucial for ACA to be independent in the performance of its function, in that case such, justification for being independent shall mean that all ACA financed by the state budget depend on the Government in exercising of their activities, which could be observed as an absurd situation, because all anti-corruption agencies are financed by the state budget and many of them are very efficient and independent in the performance of their mandate. On the other hand, the Commissioners in Macedonia also receive remuneration for their work in the Commission from the State Budget. Therefore, such justification to keep two or more jobs at the same time while performing the function of a member in the Anti-Corruption Commission cannot be fully acceptable. In defining the status of the Commissioners the crucial key point is:

What is more important for the efficiency of ACA – a full engagement in its activities by the Commissioners, their credibility which also means avoiding conflict of interest or having another job as a guarantee for independence (besides receiving remuneration from the state budget)?

As it was emphasized before, the independence in performing the function mostly depends on personal credibility, courage, knowledge, experience and professionalism, and ability to deal with the pressure by the Government or any high officials, rather than having another job.

As a proof that the personal attitude and professionalism of the Commissioners is the one that is more important than their so called “financial independence“ is the comparison on the results and activities between the former and the current Commission (having the same legal status), which was made by the experts and media in the last year. While, the former Anti-Corruption Commission was highly respected entity and recognized by everybody in the country as a fighter in the prevention of corruption, highly transparent towards media and the public in general, tackling upon number of corruptive cases where high officials were involved, initiating prosecutions, dismissals or removals of officials, the public considers that the current Commission has not been as effective and transparent, demonstrates a selective approach while tacking upon corruptive cases, especially in those where the current high officials are involved, and is under a huge political influence of the Government, which all has created doubts in its capacity and impartiality.

This confirms the fact that efficiency and independence of the ACC do not depend on financial means received by the Budget for exercising its function, but only on personal attitude, political independence and courage in the prevention of corruption.

The question of independence of anti-corruption agencies (although we cannot talk about completely independence, because each state body must be supervised or be responsible to someone, or to bear a little bit of political influence) depends primarily on the political will of the Government to empower such agencies to exercises their function according to the law and try not to interfere in its activities. Of course, of crucial importance are the personal features of persons appointed as Commissioners: credibility, courage and power to resist the pressure from the Government; ability to make control over the activities of the Government when they are considered corruptive; ability to manage the obstacles and challenges which may arise; and to enjoy

public trust. Whether these goals can be reached or not, it depends at most on the Commissioners.

Limitation of the mandate of the Commissioners: yes or not?

The other issue which I want to address is the limitation of mandate of the Commissioners and the positive and negative aspects of this restriction. Under the Law on Prevention of Corruption, No 28 from 2002, the Commissioners are appointed by the Parliament for the term of four years, without right of re-appointment.

The Law precisely focuses on limitation of the term, no matter of the efficiency, professionalism and activities in the prevention of corruption of the Commissioners in the performance of their function. The justification of this limitation was to “prevent Commissioners to be corrupted”, considering that “an unlimited mandate may create the opportunity for misuse of function”. This explanation may lead to another question, such as: whether only officials who are not employed with the anti-corruption agency can be corrupted or abuse their function? How much this could be accepted? On the other hand, the experience in this field (four or five years) could be very useful and of value for the next steps and activities of the Commissioners in the prevention of corruption. They can continue their work more efficiently. Every new appointment means starting from the very beginning which necessary shall take several months or more, especially for those who have no experience and knowledge in this area. Isn't corruption an ethical aspect? Is corruption necessary connected with the length of term in the anti-corruption agency, or it depends on the moral attitude and behavior of the official?

I will appreciate very much the opinion, experience, and different views on this matter from experts and especially from the practitioners.

Should certain conditions for appointment as Commissioners be required?

The crucial issue for the creation of an efficient anti-corruption agency is the appointment or election of the most capable persons as Commissioners. The countries have different manners for appointment of Commissioners and selection of the most suitable persons on this position through requirements

for fulfilling certain conditions. (such as experience in this field, knowledge, skills.)

The question that arises is: whether the Commissioners should be appointed upon a public announcement, thus give an opportunity to every person having appropriate experience, skills and knowledge to compete for this position, or a selection should be made from the rank of public officials, including those from the Public Prosecutors' Office, Police, Financial Police, Customs or judges.

The countries have chosen different manners. In some countries, only the President of ACA is appointed upon a public announcement for the whole mandate (four or five years), while the other Commissioners are elected from among civil servants or officials in other state institutions. Some countries have chosen to appoint the Commissioners, including the president from among experts in these fields - police officers, public prosecutors, customs or tax officers, judges and other officials. The experience deriving from these different manners should be a topic of discussion among the participants.

In Macedonian case, pursuant to the Law from 2002, the Parliament appoints the members of the Commission "from the rank of eminent experts in the legal and economic field, having a good reputation to exercise the function". This was considered as a good and suitable solution, if it is implemented properly. More or less, the former Commissioners were appointed from among the persons well known to the public for their engagement in the international organization (Council of Europe, UNDP), or from among public prosecutors and lawyers.

Aiming to implement the foreign experience and to attract more capable persons to compete for this position, the amendments to the Law No. 126 from 2006 provides for an open announcement for members of Anti-Corruption Commission. The previously required conditions for appointment of the Commissioners have also been changed. The only requirement stipulated by these amendments require from the Commissioners to "have a university degree in legal and economic field and a working experience of at least 8 years". The previous requirement to enjoy a good reputation as an expert in this field was excluded from the conditions, which narrows the criteria and standards that should be met by the Commissioners. Such solution was detected by the experts and public as a way for appointment of persons who do not meet to the previously required criteria, but who are "politically suitable" for the current Government, and who will hesitate to take any actions to prevent the high officials from corruptive behavior or to monitor the

activities which are considered illegal. The number of applicants was impressive and surprising - even 56 applicants for seven Commissioners, among which some highly regarded experts (former judges of the Supreme Court, former General State Auditor and others). The explanation for such big interest was mainly based on the high respect and the results achieved in the prevention of corruption of the former Commissioners, the high level of independence in decision making and transparency - allowing a free access to the public especially to the media for all activities. The selection of the new Commissioners did not respond to the public expectations and criteria required to be fulfilled by the persons for this position. On the contrary, they were deemed to be in close relations with the high officials from the political parties in power, and this was considered to be the prevailing factor for their appointment.

This also refers to the key issue that the Government's political will is crucial for the prevention of corruption and for empowering the ACA to successfully exercise its duties. If the Government is strongly determined to fight corruption, then special conditions and requirements for Commissioners must to be prescribed and implemented. And what is more important is to exclude the political influence and pressure over this body.

In order to overcome such situation, despite different approaches used in different countries regarding the status of ACAs, and in order to strengthen their efficiency and independence and to identify various institutional failures, a close collaboration and assistance especially from OLAF will be very welcomed and useful. The setting of a European standard and requirement concerning ACAs will be helpful and empower these agencies to be free from political impact. The assistance or certain directions from OLAF (avoiding the word "control") to identify institutional failures and loops in the legislation will contribute towards efficiency and will strengthen the collaboration and joint actions between different state bodies dealing with this issue.