ORGANIZATA PËR DEMOKRACI,
ANTI-KORRUPSION DHE DINJITET – ÇOHU!
OFFICE FOR ANTI-CORRUPTION INFRASTRUCTURE AND LEGAL ADVISORS

POLICY ANALYSIS:

LEGAL FRAMEWORK AGAINST CORRUPTION

- Drawbacks and the need to review -

SERIES OF ANALYSIS # 4

DECEMBER 2011

Street "2 Korriku" 4/4, Prishtina, 10000
organizatacohu@yahoo.com
www.cohu.org

Note: This Policy Analysis has been supported by Civil Rights Defenders – (CRD). The opinions expressed here belong to Organization ÇOHU! and do not reflect those of CRD-s.

METHODOLOGY:

This Policy Analysis is a result of qualitative research which is based on primary and secondary sources. As concerns the primary sources, methods of direct interviews of relevant actors in the area of anti-corruption, as well as direct monitoring of the entire process of the promulgation of Laws against Corruption by the OFFICE OF ANTI-CORRUPTION INFRASTRUCTURE AND LEGAL ADVISORS - ÇOHU! were utilized to compile this Policy Analysis. Furthermore, legal framework against corruption has been consulted and other legal acts, such as strategic documents against corruption have been reviewed alike.

Regarding secondary sources, other policy have been taken into consideration, public opinion research and reactions which are focused in the area of anti-corruption, with special emphasis on the legal and institutional framework against corruption. Additionally, other sources of information have been consulted, such as electronic and print media.

ABBREVIATIONS:

ACA – Agency against Corruption

MJ – Ministry of Justice

CRD – Civil Rights Defenders

KI – Kosovo Institutions

PCL – Parliamentary Commission for Legislation

KPMAKK – Parliamentary Commission for Overseeing the Agency against Corruption

NGO – Non-governmental Organization

WG – Working Groups

TI – Transparency International

FRIDOM – Functional Review and Institutional Organization of Ministries

CRK – Constitution of the Republic of Kosovo

KPC – Kosovo Penal Code

KPPC – Kosovo Penal Procedure Code

LAAK – The Law on the Agency against Corruption – (nr. 03/L-159)

LDA – The Law on Declaration, Origin and Control of Wealth of High Public Officials and on Declaration, Origin and Control of Gifts for all Official Persons - (Nr. 04/L-050)

LPCI – The Law on Prevention of Conflict of Interest in exercising Public Functions - (Nr. 04/L-051)

CONTENTS:

1: INTRODUCTION:

"The ground for corruption"

This policy analysis is the fourth in the line of analysis produced by the Office of Anti-corruption Infrastructure and the Legal Advisor (Organization ÇOHU!), with the support of Civil Rights Defenders, (CRD). The series of policy analysis have continually reviewed the core legal framework against corruption[1], displaying the loopholes and ambiguities. Within this framework, ÇOHU! within this Policy Analysis elaborates on the laws against corruption in the context of their advancement towards preventing and fighting corruption.

Kosovo Institutions, in their efforts to improve the legal framework against corruption[2], have undertaken the initiative for the amendment of two laws[3] against corruption.

The partial amendment of the legal framework against corruption consists of the ***fourth phase*** of promulgation of the laws and building of the institutions ever since 2004, when the anti-corruption endeavor commenced for the first time.

Phase 1: Framework against Corruption: **2004 – 2007** (Aproval of the first Law and Strategy against corruption),

1. Strategy against Corruption; Action Plan against Corruption; and the **2)** Law against Corruption 2004/34);

Phase 2: Framework against Corruption: **2007 – 2009** (Partial Review of the framework against corruption),

1) The Law on Preventing Conflict of Interes during the exercise of Public Function,(approved in November 2007), and **2)** Draft Law on Declaration and Origin of wealth of high public officials (27 February voted in principle); **3)** Promulgation of Strategy and Action Plan against Corruption 2009-2011;

Phase 3: Framework against Corruption: **2010** (Total review of Legal and Institutional framework against corruption),

1) Law on the Agency against Corruption - No. 03/L-159; **2)** Law on Declaration and Origin of Wealth and Gifts of High Public Officials - No. 03/L-151; **3)** Law on Prevention of Conflict of Interes during Exercise of Public Function - No. 03/L-155, and;

Phase 4: Framework against Corruption: **2011**(Partial review of Framework against Corruption);

1) Law on Declaration, Origin and Control of Wealth of High Public Officials and on Declaration, Origin and Control of Gifts for all Official Persons – No. 04/L-050; **2)** Law on Prevention of Conflict of Interest in Exercising Public Function - No. 04/L-051; dhe **3)** Beginning of procedures for drafting a Strategy and Action Plan against Corruption – 2012-2016.

[1] "The legal framework against corruption" contains 3 laws against corruption based on which the Kosovar Anti-corruption Agency (ACA) functions.

- **a)** The Law for the Kosovar Anti-corruption Agency;
- **b)** The Law on Declaring, Origin and Control of Assets of High Public Officials,. Origin and Control of Gifts for all Official Persons and;
- **c)** The Law on Preventing Conflict of Interest in Exercising Public Functions.

[2] The letter by Stephan Fule addressed to Kosovo Institutions, where among others, is required the promulgation of 40 laws, among which two against corruption.

[3] **a)** The Law on Declaration, Origin and Control of Wealth of High Public Officials and on Declaration, Origin and Control of Gifts for all official persons and; **b)** The Law on Prevention of conflict of interes in Exercising a Public Function.

Despite the fact that these two laws would enter the procedure of amendment only a year later, after their promulgation in 2010, the legal framework against corruption has not marked any substantial qualitative improvement. For the time being, the legal framework against corruption continues to be inconsistent and with serious deficiencies in content.

This Policy Analysis will argue that the changes made to the legal framework against corruption remain cosmetic and consequentially without any substantial advancement. This is because the Kosovo Institutions, involved in this process have deemed it sufficient, for the time being, to make minor improvements and changes into the laws, blaming the lack of time for a more thorough consideration and the obligation of approving this package of laws, since they were included in the package of laws for compulsory approval.

Consequently, anti-corruption endeavors so far have resulted futile to provide an adequate and effective framework to contain the devastating effects of corruption in Kosovo.

Thus, the penetration and the devastating effects of corruption have not stumbled into insurmountable impediments or encountered proportional retribution.

2: OVERALL SUMMARY:

"The inevitable spiral"

The efforts in improving the core legal framework against corruption have not resulted successful nor brought substantial effects for years now. This is due to the fact that the political leadership in Kosovo has never been willing to establish an adequate and effective legal and institutional framework against corruption aiming of preventing and fighting it.

This Policy Analysis, in its content, will display particular aspects which have marked the latest initiative of the Kosovo Institutions in amending the core legal framework against corruption.

Furthermore, this policy analysis will emphasize the loopholes and ambiguities of the three basic laws against corruption separately.

In the context of particular aspects which have marked in entirety the amendment process of the laws against corruption, ÇOHU! has distinguished four of them.

First, *the core legal framework against corruption continues not to cover some substantial aspects in preventing and fighting corruption.*

In particular, here is included the lack of sanctioning some of the most corruptive deeds as penal actions.

These substantial aspects are in fact the core base in creating an adequate and effective legal framework against corruption.

Second, *the amendment process of the laws against corruption has been carried out without a preliminary analysis of the legal framework against corruption.*

Up to the moment, the Kosovo Institutions **have not produced a single integrated document of policies which clearly identifies the drawbacks and gaps that the legal framework against corruption contains and which would provide concrete recommendations to be implemented whenever an amendment process is to commence**. Furthermore, the recommendations from civil society and the Agency against Corruption have never been taken into account.

Also, this amendment process has passed without reviewing empirical data which identify the level of corruption, prevailing forms, and

the most affected sectors. As such, this process has been carried out without a clear guide which identifies the gaps and drawbacks of the legal framework against corruption.

Thirdly, *the laws against corruption lack systemic, clearance/harmonization with the highest judicial documents such as the Code of Penal Procedure of Kosovo (KPPC).*
This has caused the legal framework against corruption to be in direct collision with KPPC, as well as in collision with laws and legal norms.

Fourthly, *the amendment of two laws against corruption has been approved without reviewing the other laws and documents against corruption..*
The entire legal framework against corruption, as well as the strategic documents which have entered the preparation procedure, have been reviewed and approved in a fragmented manner, separately, which has made it impossible for an appropriate coordination between the working groups, thus generating continuous conflict between the institutions in one hand, and the judicial documents on the other.

2.1. The lack of substantial elements in the legal framework against corruption:

The amendment process of two of the core laws against corruption, even this time around, did not include some of the most substantial issues which have continuously been raised by civil society[4]. Practically, the core legal framework even this time has failed to create a strong and sustainable ground against corruption.

Some of the most substantial aspects which the legal framework against corruption does not include are related to the issues of **not penalizing some of the most serious actions** of corruption. Issues such as ***"false declaration of wealth"*** or; ***"continuous exercise of conflict of interest"*** are not penalized with the Kosovo Penal Code and therefore neither with the new laws against corruption. Furthermore, ***"refusal/non-declaration of wealth"*** or; ***"refusal/non-declaration of conflict of interest"***, is sanctioned only with fines and other minor offence measures, but not also with penal measures.

Although these two laws have entered the procedure of amendment only a year after their stipulation in 2010, the non inclusion of the abovementioned issues have practically mede the laws with no essential effect. This is due to the fact that these aspects represent the crucial knot in making these two laws effective in preventing and fighting corruption in Kosovo.

In the case of the declaration of wealth, the lack of penalizing of ***"false declaration of wealth"*** or ***"refusal/non-declaration of wealth"*** enables high public officials to declare their

[4] **Organization for Democracy, Anti-corruption and Dignity ÇOHU;** "Analysis of the Legal Framework against Corruption; March 2010. http://www.cohu.org/index.php?option=com_content&view=category&layout=blog&id=2&Itemid=4
Lëvizja FOL; "Prevention and fight of conflict of interest in Kosovo"; September 2010. http://levizjafol.org/images/uploads/files/Parandalimi_dhe_luftimi_i_konfliktit_-_Analiz%C3%AB_e_shkurt%C3%ABr_politikash.pdf
"Enforcement of legal provisions regarding declaration of wealth by high officials elected directly in the central level"; July 2011. http://levizjafol.org/images/uploads/files/Analiz%C3%AB_Politikash_-_Zbatimi_i_dispozitave_ligjore_p%C3%ABr_deklarimin_e_pasuris%C3%AB_nga_zyrtar%C3%ABt_e_lart%C3%AB_t%C3%AB_zgjedhur_drejtp%C3%ABrdrejt_n%C3%AB_nivel_qendror.pdf
Kosovo Democratic Institute KDI; "Study of the Integrity of the Institutional System", 2011. http://www.kdi-kosova.org/publications/NIS2011.pdf
"Comparative Analysis:Legislation on Declaration, Origin and Control of Wealth of High Public Officials –Albania, Macedonia, Croatia and Kosovo" – April 2010. http://www.kdi-kosova.org/publications/Analiza_legjislacionit%20_%20dekl_pasurise.pdf

wealth according to their willingness or to entirely refuse to declare their wealth[5] **because they are aware of the lack of penal punishment.** The punishment as minor offence, as foreseen in the Law on the Declaration of Wealth, is easily afforded by public officials, especially when we consider that **the monetary amount determined with the law[6] is minor** compared to the importance of preventing the abuse with declaration of wealth, as a measure to fight corruption.

The lack of penalization of these judicial categories as penal actions with KPC becomes even more grave, bearing in mind that during the review of laws against corruption, working groups of the Ministry of Justice (MJ) have been involved in the process of amendment of KPC, and have not deemed it necessary to include these judicial categories in KPC.

The law on the Declaration of Wealth, as part of its title contains the word ***"control"*** as well, namely the control of wealth of high public officials. Nevertheless, none of its acts envisages any **mechanism** or **special procedure regarding control of wealth** of the high public officials. Moreover, the Agency against Corruption, as a specialized institution for the prevention and fight against corruption, does not have legal rights to undertake steps in order to verify or control the wealth of public officials. The Agency does not have legal rights to utilize some of the essential mechanisms, such as access to bank accounts, or tapping of phone calls among others, in order to scrutinize the wealth of high public officials.

The very same aspect which degrades the importance of the law, as a measure to prevent and fight corruption, has been replicated also in the Law for the Prevention of Conflict of Interest. In this case, the Law becomes useless and valueless since in two of these cases,[7] it fails to provide the infrastructure for prevention and fight against corruption.

Moreover, the legal framework against corruption has suffered a regress as regards an aspect. In the former Law on Conflict of Interest, one of its acts[8] has envisaged that

[5] See municipal court decisions regarding those who did not declare their wealth during 2010. **The Kosovar Agency against Corruption;** "Court decisions for non-declaration of wealth". http://www.akk-ks.org/?cid=1,1168

[6] See **Law, HEADER VI; PENALTY PROVISIONS; Article 17**
1. Whoever violates the determined obligations with this law, which are not penal actions, the high public official is committing a minor offence, and is sanctioned as follows:
1.1. with a fine of one thousand (1000) up to two thousand five hundred (2500) Euro, the official is sanctioned for minor offence for non-declaration of regular annual wealth;
1.2. with a fine of one thousand (1000) up to two thousand five hundred (2500) Euro, the official is sanctioned for minor offence for non-declaration of wealth when receiving official duty;
1.3. with a fine of one thousand five hundred (1500) up to two thousand five hundred (2500) Euro, high public officials are sanctioned for non-declaration of wealth by a request from the Agency;
1.4. with a fine of one thousand (1000) up to two thousand five hundred (2500) Euro, high public officials are sanctioned for non-declaration of wealth after abandoning the function;
1.5. with a fine of one thousand (1000) up to two thousand five hundred (2500) Euro, the subject is fined for minor offence if it does not act according to paragraph 3. of article 15 of this law, by a request from the Agency.

For initiating procedures for minor offence, the Agency informs the head or institution where the high public official works or has worked,

The Agency published the names of high public officials who have not submitted the form on the state of wealth, as stipulated by this law.
Alongside fines, sanctioning measures can be issued, such as:
4.1. termination of exercise of function up to one (1) year.
If the violation of obligations determined by this law consist of a penal action, the Agency files a penal charge.

[7] **Article 14, act 4** and **Article 15, act 5 and 6,** of the Law on Prevention of Conflict of Interes.
For more details, si this Policy Analysis, page 15.

[8] **Law Nr. 02/L-133 – On Preventing the Conflict of Interest while exercising Public Function.**
ARTICLE 21; Sanctions on violating the dispositions of this law.
Officer, on receipt of public office under section 5 of this Law, shall provide a written statement containing the consent to the procedure before the Agency. Under the requirements of this law will give officials a statement that the proposal and the Agency's request to offer his resignation, the institution which has made his appointment to the worst forms of violations of this law.

officials should be fired if he/she violates the provisions of this law. However, this provision has been entirely removed in the Law on Conflict of Interest. This Law determines that the Minor Offence Court can perform sanctioning measures of ***prohibition of exercise of function***[9] up to a year, along with fines for the violation of the provisions of this Law.

However, the enforcement of this sanctioning measure remains unclear, contradictory, and in direct conflict with the Constitution of the Republic of Kosovo as regards the Parliamentarians of the Assembly of Kosovo, the President and the Prime Minister. In this case, the Law does not envisage as to how a decision by the Minor Offence Court concerning the sanctioning of the exercise of duty by a deputy would be executed. Furthermore, this act of the Law can be considered also unenforceable, since one Minor Offence Court in reality cannot decide on sanctioning of exercise of function for a deputy. The sanctioning of exercising the function by a deputy can be enforced only according to the rules and procedures stipulated in the Constitution of the Republic of Kosovo[10].

The same logic applies also for the President[11] and the Prime Minister, since they are voted and mandated by the Assembly of Kosovo, and this institution is the only one that can perform a sanctioning measure of exercise of function for these public officials.

This amending process of the legal framework against corruption has not even minimally touched upon the mandate of the Agency against Corruption. The organic law of ACA was not included in the amending procedure, despite the fact that this Law has

Ammended with
Law No. 03/L-155 – FOR CHANGING AND SUPPLEMENTING THE LAW NO. 02/L-133 FOR PREVENTION OF CONFLICT OF INTERES IN EXERCISING PUBLIC FUNCTION. Article 8.

Article 21 of the Law is changed and supplemented as follows:

21.1. If the official is in violation of article 11 of the law, then the official is sanctioned according to legislation in power.

21.2. When the official is in violation with article 8 of the law and the consequence has taken place, the Agency requests by the institution where the official works to initiate procedures of work termination for the official.

21.3. If the violation from paragraph 2 of this article has damaged public interest, then the Agency informs the case to the prosecuting bodies.

21.4. If after the election, naming or confirmation of the mandate, the official person continues to perform activities of a function, which this law deems as not complying with the new function, then the Agency warns the official person and decides on a deadline according to which he/she will be requested to terminate activities or the post. The deadline determined by the Agency cannot be shorter than peswmbwdhjetw (15) days or longer than three (3) months.

21.5. In case the official person referred to the previous paragraph continues to perform incompatible activities or functions, regardless of the warning by the Agency, then the Agency proposes to the institution where the official performs the function to initiate procedures for the termination of his position.

21.6. The competent body where the official person continues to perform activities of function not in compliance with the law, initiates the procedure for the termination of the function according to the proposal by the Agency. In cases when a deputy of the Parliament performs activities not in compliance with the law for the prevention of conflict of interest in exercising a public function, the Agency informs the President of the Assembly regarding this deputy. After having been informed by the Agency, the President of the Assembly warns the deputy to terminate activities which are not in compliance with the Law. Regarding actions undertaken according to the proposition by the Agency, the competent institutions should immediately inform the Agency.

[9] **Article 20; Sanctions for violations of the provisions of this law, act 2**

2. For violations of the provisions determined with this law, the high public official, or heads of leading institution, apart from the fine issued by the court, can face also a sanctioning measure: termination of exercise of public function up to three (3) months to one (1) year.

[10] **Constitution of Republic of Kosovo, CHAPTER IV; Assembly of Republic of Kosovo; Article 70; Mandate of Deputies, act 3** The mandate of the deputy expires or becomes void, if::

(1) Does not perform the oath;

(2) give resignation;

(3) is elected member of the Government of Kosovo;

(4) the mandate of the Assembly ends;

(5) is absent for six (6) months in a raw in sessions of the Assembly. In special cases, the Assembly of Kosovo can decide otherwise;

(6) is sentenced with a court decision for penal action with one or more years of imprisonment;

(7) he/she passes away.

[11] **Constitution of Republic of Kosovo, CHAPTER IV; Assembly of Republic of Kosovo; Article 65; Competences of the Assembly, act 7,** Elects and may discharge the President of the Republic of Kosovo in compliance with this Constitution.

substantial drawbacks which hamper an effective work of the Agency.

2.2 The lack of preliminary analysis and research:

This process of amending two laws against corruption has proceeded devoid of two preliminary analyses, which are essential in order to come up with an adequate and effective legal framework against corruption. Not only did the last process of amending the laws against corruption pass without these analyses, but all actions undertaken in this direction since 2004 have been undertaken without any preliminary analysis.

These analyses would pave the way for the Institutions of Kosovo whenever engaging in a process of building a legal and institutional framework against corruption. These analyses would practically show where to focus and which aspects of the fight against corruption should be emphasized.

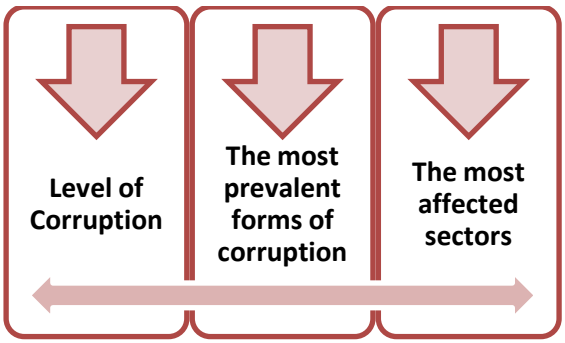
First of all, the Institutions of Kosovo have not produced an integrated document of policies which would clearly show the present situation regarding the legal and institutional framework against corruption. Not once, since 2004 when the Kosovo Institutions undertook the initiative to build the legal and institutional framework against corruption[12], has there been produced such a policy document. **Ever since the process of amending the framework against corruption began, the Kosovo Institutions have not had a clear guide through which to build an effective basis against corruption.** The actions on building a framework against corruption have always been fragmented, selective and tending to ad-hoc approaches, and pressed by an unjustifiable urgency sentiment.

Second, Kosovo lacks a local empirical study which would document the nature of corruption in the country. An empirical study would reflect the nature of corruption through three aspects.

First, this study would reflect the overall level of the perception of corruption in Kosovo.

Second, the study would reflect the most prevailing and most present forms of corruption in Kosovo.

Third, the study would reflect also the most affected sectors by corruption in Kosovo.



Although studies of this nature on corruption in Kosovo are done by Transparency International, through its two main indexes: **a)** The Perception Index on Corruption[13] and; **b)** the Global Barometer on Corruption[14], these data have not been taken into account during the process of drafting the legal framework against corruption, in order to be used as a guide for devising adequate and effective laws against corruption.

[12] First specific legal norms and the first document on policies against corruption are: **Law against corruption 2004/34**; and **Strategy and Action Plan against corruption 2004-2007**.

[13] **Transparency International**; Perception Index on Corruption - IPK. http://www.transparency.org/policy_research/surveys_indices/cpi

[14] **Transparency International;** Global Barometer of Corruption – BGK. http://www.transparency.org/policy_research/surveys_indices/gcb

Furthermore, the Kosovo Institutions did not even take into account those few available local documents, which reflect the nature of corruption in Kosovo, while devising the legal framework against corruption.

The Agency against Corruption, through its annual reports[15], displays cases of corruption reported in this Agency. In this respect, the Reports of ACA, although quite generalized and superficial, reflect the trends of the nature of corruption in Kosovo and the most affected sectors[16]. Additionally, ACA has lately also published another report which reflects "Prosecutions and trials of cases of corruption in Kosovo"[17]. This report displays in a rather generalized manner the trends of the nature of corruption in Kosovo through cases supposed corrupt which have been reported in the Courts of Kosovo.

These reports, however generalized, provide an idea regarding the nature, form, presence, and the sectors most affected by corruption in Kosovo.

Apart from these reports published by ACA, within the project for the reformation of the public administration – FRIDOM, an analysis has been published which aimed at reviewing the functionality of anti-corruption systems in Kosovo[18].

Despite the fact that there is generalized information regarding the nature of corruption in Kosovo, never thus far have these data been taken into account while devising the framework against corruption. In practice, this has influenced the quality of laws and institutions against corruption for they have systematically been in disadvantage towards corruption and the involvement of politics in it.

Practically, without an integrated document of policies which would include aspects of the legal and institutional framework against corruption, and without a local empirical study on the nature of corruption in Kosovo, the process of building a legal and institutional framework against corruption will not mark any substantial improvement or advancement. Furthermore, a continuous cosmetic change of the legal and institutional framework against corruption resembles an endless spiral where events and activities repeat themselves without practical effects in the field in preventing and fighting corruption.

2.3 The lack of systematization and clarity:

All the actions of the Kosovo Institutions directed at improving and advancing the legal framework against corruption can essentially be considered futile. In reality, all the efforts in improving the legal framework against corruption have led to a situation where *laws against corruption* are in direct contradiction with KPPC. The laws against corruption are also in contradiction with each other, and there are legal norms within the laws in mutual contradiction.

Article 18, act 1.1; 2.2; and 3 as well as article 20, act 1 of the Law for the Agency against Corruption, and article 16 of the Law on Declaration, Origin and Control of Wealth of High Public Officials and Declaration, Origin and

[15] Annual Reports of the Kosovar Agency against Corruption (ACA); http://www.akk-ks.org/?cid=1,16

[16] Ibid.

[17] **Kosovar Agency against Corruption (ACA)**; "Analysis on Prosecution and Verdicts of Cases of Corruption in Kosovo; July 2011. http://akk-ks.org/repository/docs/Raporti_me_statisikat_12072011.pdf

[18] **Functional Review and Institutional Organization of Ministries - FRIDOM;** "Functional Review of Anti-corruption Systems; 2008-2009. http://map.rks-gov.net/userfiles/file/FRIDOM/Rishikimet%20Horizontale/anticorruption.pdf

Control of Gifts for all Officials Persons, **are articles in direct contradiction with KPPC, making them unenforceable in practice.**

The Law on Declaration of Wealth, article 16, foresees competencies for the Agency which exceeds the parameters stipulated in its organic law as well as other higher judicial acts. Through this article, the Agency is entitled to have access in bank data. Although with KPPC[19], this right becomes possible only through a decision by the judge preliminary procedure and what is especially the competence of the prosecution, there are nonetheless different opinions regarding this.

In this respect, the employees of the Agency admit, based on the legislation in power, that they do not have a right to access bank data[20]. However, the members of the Parliamentary Commission for Legislation (PCL) state that the mandate of the agency is limited only to "administrative investigation", and does not include penal investigation; therefore this institution is entitled the right to access bank data.

Such a treatment of this uncertainty and lack of harmonization with KPPC by PCL is senseless and contradictory. In reality, how is it possible that for penal investigation undertaken by the prosecution is required a decision by the judge of the preliminary procedure, whereas in the case of administrative investigation such a decision is not required? In both of the cases, the same data is collected and for the same purpose.

The competences, procedures and mechanisms determined for ***detecting*** and ***investigation*** of corruption do not empower the Agency in preventing and fighting corruption. In general, the mandate of the Agency is limited to ***preliminary investigation*** of corruption, whereas penal investigation remains the competence of prosecution. This fact puts the Agency in direct conflict with its mission, as a specialized institution to prevent and fight corruption, since corrupt actions, as stipulated in the Penal Code of Kosovo, are penal actions and consequently outside of the competences of investigation by the Agency.

In principle, it is paradoxical that an institution which is limited to administrative investigation of cases suspected of corruption should prevent and fight actions which in essence are penal.

Another aspect of drawbacks is also the open possibility of different interpretations of the laws against corruption by the Agency. Different interpretations may be done to the definition ***"preliminary investigation"*** which as a judicial category has not been defined even in KPPC, and neither in the Law for the Agency against Corruption.

The law on ACA does foresee the establishment of a special parliamentary commission for the supervision of the agency. Despite the change in this Law, the conflict of interest between the Agency and its overseeing body has not been avoided. In one hand, the Agency oversees the forms for the declaration of the wealth of the members of this commission, whereas on the other hand, this very Commission is entitled by law to oversee the forms of the wealth of the employees of the agency. This is a pure conflict of interest which has not been eliminated with the Law on AKK, and a which conflict was also present in the Law against corruption 2004/34[21].

[19] **KPPC** clearly determines the right and procedure for access to bank accounts. According to KPPC, the Agency has not right to access bank accounts. See **Article 256-KPPC; Article 258-KPPC.**

[20] Interview with Jetullah Aliu – ACA.

[21] See more regarding this issue, ie. Conflict of interest between the Agency and its ex-supervising Council. **Organization ÇOHU!**; "Monitoring of Legal Responses in Cases of Corruption", March

In this context, the very idea of establishing a special Commission for the Agency[22] is inexplicable, especially its lack of functionality for more than a year since the Law on the Agency against Corruption has been promulgated.

2.4. The lack of review in package of laws, strategic documents and other legal acts:

Practically, the amendment of two basic laws against corruption, on the Declaration of Wealth and of Conflict of Interest during the summer of 2011, represents the fourth phase of building the legal and institutional framework against corruption. The initiative for advancing of the institutions and approving of laws against corruption began in 2004 with approving the first Law against corruption[23], and the first Strategy against corruption[24].

Ever since the beginning of devising a legal and institutional framework against corruption in 2004, laws, strategic documents, as well as other legal acts have never been reviewed as in package, in order to eliminate conflicts and harmonize with one another.

Even now, when the initiative for the amendment of the laws on Declaration of Wealth and Conflict of Interest entered into procedure, nonetheless they were not reviewed in package together with the other basic law, that of the Agency against Corruption[25], as well as other strategic documents against corruption[26].

In one hand, when the laws were being reviewed, that on the Declaration of Wealth and Conflict of Interest, the mandate of the Agency against Corruption had expired and there was uncertainty in the organic Law of ACA regarding the replacement of the director in the case of mandate expiry. This uncertainty generated a situation where, in one hand the Parliamentarian Commission on Legislation took a decision for naming, as acting director of the Agency, the head of the Administrative Department of ACA, while on the other hand, the current director deemed such a decision as illegal.[27].

Furthermore, the process for the amendment of the laws on Declaration of Wealth and that on Conflict of Interest has moved forward without a preliminary coordination with the process of devising a Strategy and Action Plan against Corruption 2012-2016[28].

3. CONCLUSION:

"The unjustifiable standstill"

The lack of ongoing coordination of activities against corruption while drafting laws, other strategic documents, as well as in the building

2008.
http://www.cohu.org/raporte/COHU_Infrastruktura_ligjore.pdf

[22] **Gap Institute**, in 2009 had proposed the establishment of a special Parliamentary Commission for Auditing, implying here only the Office of the Auditor General. "Parliamentary Commission for Auditing",2008.
http://www.gapinstitute.org/repository/docs/Komisioni%20Auditim.pdf
Nevertheless, the alternative of establishing a "Parliamentary Commission for Supreme Institutions of Auditing" should be reviewed, which would include institutions such as: **a)** Kosovar Agency against Corruption; **b)** Office of the Auditor General; **c)** Office of the Ombudsperson.

[23] "Law against Corruption", 2004/34.
http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=view&id=55&Itemid=28

[24] Strategy against Corruption; 2004-2007.

[25] Law on the Agency against Corruption; no. 03/L-159
http://www.ks-gov.net/gazetazyrtare/Documents/shqip-240.pdf

[26] **Kosovar Agency against Corruption –ACA-ja**, has initiated the procedure of drafting the Strategy and Action Plan against Corruption 2012-2016. http://www.akk-ks.org/?cid=1,46,294

[27] **Koha Ditore**; "Preteni heads anti-corruption without a mandate"; 18.08.2011. http://kohaditore.com/index.php?page=1,13,65497 (with acces on 26.10.2011)

[28] **Agency against Corruption-ACA-ja**, has initiated the procedure of drafting the Strategy and Action Plan against Corruption 2012-2016. http://www.akk-ks.org/?cid=1,46,294

of institutions against corruption, has determined that whenever such an initiative has been undertaken, the process have been followed with serious drawbacks and failures in building an adequate and effective framework against corruption.

The failure to fundamentally understand the complexity of corruption, as a consequence of a lack of a serious study of this field, makes the fight of corruption namely impossible. Such a study would not only avoid legal and institutional conflicts, but it would also ensure greater independence and effectiveness of the Agency against Corruption, as well as other mechanisms in this field.

The infrastructure against corruption should have been reviewed in a package and through a proper coordination in order to avoid some of the fundamental problems that exist since it was first begun to be created in 2004.

The existence of the Agency against Corruption alongside other institutions which are also mandated to fight corruption requires a serious treatment of the identity that this institution should have, as well as the interdependence and its competences alongside other institutions. In other words, if a successful fight against corruption is sought, there should be a serious process of reformation of the legal and institutional framework in this area.

4. THE LAW ON THE ANTI-CORRUPTION AGENCY – (nr. 03/L-159)[29]

The Law on the Agency against Corruption (The Law) has invalidated the Law against Corruption no: 2004/34[30]. Despite the fact that this Law marks a minimal improvement, it does not contain provisions which in essence add to the competences of the Agency in fighting and preventing corruption. In general, the Law limits the mandate of the Agency within the so-called document ***"preliminary investigation"*** while penal investigations remain the exclusive competence of Prosecutions. Practically, some of the main articles [31] of the Law, which in appearance seem to empower the Agency in preventing and fighting corruption, in fact either are not detailed enough and properly complete with additional articles, or are in direct contradiction with KPPC, and as such are unenforceable.

In principle, there is a conflict of interest regarding the mission of the Agency, as a specialized institution in preventing and fighting corruption, and its mandate/competences. It is paradoxical how the Agency is responsible to prevent and fight phenomena which according to the Penal Code of Kosovo[32] are defined as

[29] http://www.ks-gov.net/gazetazyrtare/Documents/shqip-240.pdf

[30] http://kuvendikosoves.org/common/docs/ligjet/2004_34_al.pdf

[31] Some of the articles in this Law which in appearance seem to empower the Agency with additional competences are either not detailed sufficiently (article 5 act 1.1), or are in contradiction with KPPC (article 5 act 1.1; article 18 act 1.1 and act 2.2).

[32] The Interim Kosovo Penal Code sanctions 13 different types of corruption under the **Chapter - - XXIX: PENAL ACTIONS AGAINST OFFICIAL DUTY: Article 339** ABUSE OF OFFICIAL POSITION OR AUTHORIZATION; **Article 340** APPROPRIATION DURING EXERCISE OF OFFICIAL DUTY; **Article 341**FRAUD ON DUTY; **Article 342** UNAUTHORIZED USE OF WEALTGH; **Article 343** TAKING OF BRIBE; **Article 344** GIVING OF BRIBE; **Article 345** EXERCISE OF INFLUENCE; **Article 346** ILLEGAL ISSUING OF COURT DECISIONS; **Article 347** REVEALING OFFICIAL SECRETS; **Article 348** FALSIFICATION OF OFFICIAL DOCUMENTS; **Article 349** ILLEGAL COLLECTION AND PAYMENTS; **Article 35**0 ILLEGAL FREEING OF AN IMPRISONED

penal actions, whereas on the other hand, the mandate, competences and mechanisms that the Law prescribes the Agency limit it to mainly administrative investigation of corruption! In reality, the competences and methods/mechanisms allowed to the Agency are limited within the aspect of administrative investigation of corruption and thus do not empower the Agency, especially in the area of fighting political corruption.

Article 5[33] of this Law defines the competences of the Agency, and act 1.1 allows the Agency to initiate and conduct the procedure of ***detecting*** and of ***preliminary investigation*** of corruption. Although at first glance this article advances the position of the Agency compared to the previous mandate, when explicitly the Agency was limited to ***administrative investigation***[34] of corruption and to forwarding ***informative letters***[35] in the prosecution regarding cases suspected of corruption, nonetheless, the power of the Agency in the aspect of detecting and investigating corruption remains the same from the qualitative aspect. None of the articles of the new Law prescribes the ***procedures*** or ***methods*** available to the Agency in the filed of ***detecting*** corruption. In principle, the new Law should explicitly define the procedures and methods which the Agency is entitled to use in order to prevent and fight corruption.[36]

Moreover, the new Law stipulates that the Agency should conduct ***"preliminary investigation***[37]***"*** as concerns the prevention and fighting of actions suspected of corruption. Nonetheless, neither according to the Law on the Agency nor according to KPPC, there is no category of "preliminary investigation" for actions supposed as penal. The categorization of preliminary investigation as "pre-penal investigation", not only is not defined by the Law on the Agency, or KPPC, but it is also in contradiction with KPPC[38] itself. Moreover, the right of the agency to do ***"penal charges"***[39] in the prosecution regarding actions suspected of corruption does not mark any qualitative improvement, since according to KPPC, the right of penal charges for penal actions prosecuted according to official duty (ex officio) belongs to ordinary citizens as well[40]. Additionally, as regards preliminary investigation, this Law does not stipulate as up to which phase of penal procedures this investigation lasts. Whereas, it is known that according to KPPC, the ***preliminary investigation*** starts from the moment of the beginning of investigations, up to the confirmation of the charge.

The Law on the Agency against Corruption contains some provisions which in essence are in direct contradiction with KPPC, and which could practically make the Law unenforceable.

PERSON**; Article 351** ILLEGAL APPROPRIATION OF WEALTH DURING A RAID OF EXECUTION OF A COURT DECISION.

[33] Article 5 Competences of the Agency: act 1.1: initiates and conducts a procedure on **disclosure and preliminary investigation** of corruption and forwards **penal charges** for cases suspected of corruption to the competent public prosecution, if for the same case a penal procedure is not conducted.

[34] See Article 14 of the Law against Corruption 2004/34 – The Agency may initiate administrative investigation which concern disciplinary measures against civil servants.

[35] See article 23 act a) Law against Corruption 2004/34.

[36] Most effective Agencies, as intrinsic part of them, have also methods and procedures of detecting corruption. For more on these Agencies as well as methods and procedures of detenction, see http://www.oecd.org/dataoecd/7/4/39971975.pdf.

[37] During interviews that ÇOHU! has done with heads of Agencies, they define preliminary investigations as **pre-penal investigation.** However, neither the law on the Agency against Corruption, nor KPPC has any category "pre-penal investigation".

[38] As concerns investigation, there are only: **1)** Penal investigation; **2)** Administrative investigation and; **3)** Civil investigation. However, none of the legal acts determines or defines preliminary or pre-penal Investigation.

[39] Article 5 act 1.1.

[40] KPPC, article 198, act 1.

Organization ÇOHU! only during this year has filed 10 penal charges to the Special Prosecution, and for almost all of them it has received information from the Prosecution that investigation and processing of the case has begun.

Article 18, act 1.1 of this Law says that the Agency conducts preliminary investigation in the case of suspicion of corruption according to ***official duty*** or according to ***information by physical or legal persons.*** KPPC determines that the right of beginning of investigation according to ***official duty*** belongs only to the public prosecution and court police with an order by the prosecution[41]. Also, act 2.2 of this article says that the Agency can require information from persons involved in this case, which means interviewing of witnesses or suspects, and this is in total contradiction with KPPC, since the right to questioning belongs only to the court police and public prosecutions[42]. In this respect, even Article 20[43] of the Law has been formulated in a generalized manner, thus allowing space for interpretations and qualifications by the side of the Agency, and thus putting it in direct contradiction with KPPC. This article allows the Agency various interpretations regarding the definition of private authorities which are obliged to provide information for the Agency by a request from it. This is because none of the articles of this Law determines as to which are the private authorities which are obliged to give access to the Agency. In this respect, this article in principle enables the Agency access to bank accounts or tapping of phone conversations among others, measures which according to KPPC are defined within the area of ***"Secret measures or techniques of observation and investigation´*** and as such are in total contradiction with KPPC[44].

The other drawback that ÇOHU! has identified in this Law concerns the relation of the Agency and the Supervising Commission of the Agency[45]. The new Law has removed the Council as an internal body supervising the Agency following the permanent conflict between it and the director of the Agency.[46] The Law on the Agency against Corruption has settled one of the conflicts that has existed between the Council and the director regarding access to cases investigated by the Agency[47]. Nevertheless, conflicts and other uncertainties, which existed in the old Law are still present in the new one. The Agency, through a special Law[48] is obliged to supervise the wealth of high public officials, whereas the wealth of the employees of the Agency is overseen by the Supervising Commission on the Agency. In this respect, there is a clear conflict of interest since

[41] **Article 220-KPK** and; **Article 221-KPK.**

[42] See **KPK- CHAPTER XXVIII: INVESTIGATIVE ACTIONS: INTERROGATION OF THE DEFENDANT.**
Article 231; **act (1)** The defendant is interrogated by the public prosecutor. The public prosecutor can entrust the interrogation to the court police or, in extraordinary cases, the regular police. **Act (4)** When acting according to this article, each interrogation of defendants may be audio or visually recorded in compliance with article 90 of this Code. In cases when this is practically impossible, the written record of interrogation is done in accordance with articles 87, 88 and 89 of this Code, and it should be noted there regarding the reasons why the interrogation was not possible to be recorded visually or in audio.

[43] **Article 20 – Acces to documents:** Public and private authorities, local authorities and official persons are obliged to provide the Agency, by a request from it, particular documents within a reasonable time determined by the Agency.
The old law against Corruption 2004/34 contained the same definition, only that it lacked the word **"private authorities".** See article 15.

[44] **Article 256-KPK; Article 258-KPK.**

[45] The Overseeing Commission on the Agency is a permanent commission of the Assembly of Kosovo which oversees the work of the Agency in general. The Commission consists of only the deputies of the Assembly and is led by one deputy belonging to an opposition party.

[46] See more on the conflict between the Council and the director of the Agency. **Organization ÇOHU!;** "Monitoring of Responses regarding Cases against Corruption", March 2008. http://cohu.org/raporte/COHU_Infrastruktura_ligjore.pdf.

[47] **Article 14 Competences of the Commission: 1.4.** After submitting the report by the Agency, the Commission may request a special report regarding cases on which the Agency has terminated the investigations; **1.5** the report should contain explanations regarding the reasons of terminating such cases without mentioning the identity or personal information of the persons investigated.

[48] The Law on Declaration, Origin and Control of Wealth and on Gifts for all High Public Officials no.04/L-050.

in one hand, the Agency oversees the wealth of the members of the Commission, whereas on the other, the wealth of the employees of the Agency is overseen by the Commission.

The Law on the Agency against Corruption fails in at least two aspects in generating solutions for particular situations. These situations concern the mandate of the director of the Agency, as well as the overseeing of the work of the Agency, due to the lack of establishing the specific parliamentary commission in supervising the Agency.

In one hand, none of the articles of the Law determines a situation in the case of non-electing the new director of the Agency within the time period specified by the Law. The Law does not provide solutions as to who is responsible for running this institution when the mandate of the current director expires and when the new director is not elected within the time period specified in the law.

In reality, such a situation happened in 2011, when the mandate of the current director had expired and a new director had not been appointed yet, and this situation pushed the Parliamentary Commission on Legislation to appoint the director of the Administration of the Agency as acting director of the Agency until appointing the new director. In practice, this decision generated a conflict between the director of the Agency and the Parliamentary Commission on Legislation, where the former did not accept the decision of the Commission in appointing the director of the administration of the Agency as acting director, stating the violation of the laws in power[49].

Additionally, the Law on the Agency determines the establishment of a special parliamentary Commission for overseeing the work of the Agency. Despite the fact that the Law has been in power for more than a year, the Parliamentary Commission on overseeing the work of the Agency has not been established yet. The Law on the Agency does not stipulate as to which of the permanent parliamentary commissions is responsible for overseeing the work of the Agency, in case the special parliamentary Commission is not established.

Even the new Law prohibits the public from access to archival case files[50] which have been a subject of investigation by the Agency, and additionally, the new formation of the Commission has removed one representative of civil society which was part of the Council of the Agency[51].

Through this Law, the Agency against Corruption is not empowered in the aspect of investigation of private subjects as well, investigation of bank accounts of high public officials outside of the Country, as well as the investigation of finances of Political Parties. Every institutional undertaking to effectively fight corruption, if not equipped with the so-called ***"special techniques of investigation"***[52]**,** is

[49] **Koha Ditore**; "Preteni heads anti-corruption without a mandate"; 18.08.2011. http://kohaditore.com/index.php?page=1,13,65497 (with access on 26.10.2011)

[50] Article 22, act 2.1.

[51] According to the law against corruption 2004/34, the Council of the Agency consisting of civil society as well, was an internal supervising body. See article 19. The Law against Corruption 2004/34.

[52] A look at the most successful Agencies against Corruption shows to be the one from Hong Kong (Independent Commission against Corruption – ICAC http://www.icac.org.hk/en/home/index.html); of Indonesia (Indonesian Commission for the Eradication of Corruption –KPK- http://www.kpk.go.id/); of Singapore (Investigating Bureau of Criminal Practices - CPIB http://app.cpib.gov.sg/cpib_new/user/default.aspx?pgID=21&action=clear#); of Lithuania (Special Investigating Service – STT http://www.stt.lt/en/) and; of Latvia (Bureau on Prevention and Fight of Corruption – KNAB http://www.knab.gov.lv/en/), in general cover both the public sector (public institutions, political subjects) and the private one, and are equipped also with **"special investigating techniques"**.

destined to fail. A comparative analysis shows that every serious effort in an uncompromising fight against corruption implies the empowerment of the Agency with these additional competences. Otherwise, the current competences of the Agency mainly enable the fight against a soft type of corruption (**petty corruption**), while fighting of **grand corruption/political corruption** becomes impossible.

Apart from these drawbacks, the Law does not stipulate that the Agency in itself, through qualitative and quantitative investigation, to generate data on the level, form of appearing as well as the extent of corruption in different sectors. The new Law reduces the Agency to a passive institution regarding the processing of data on the state of corruption in the country, since it is limited only to "collection, analysis and publication of statistical data on the state of corruption in Kosovo", but not in generating these data itself[53].

Furthermore, the Law does not stipulate that the Agency, in a periodical manner, to analyze the working methods and procedures of departments and public bodies which are more prone to corruption, or to identify administrative weaknesses which allow corruption and abuse to flourish.

The Law on the Agency has not determined any situation if the next director of the Agency is not appointed within the time specified in the law, who heads the Agency during this period?

For more,see: **OECD;** "Specialized Anti-corruption Institutions – Review of Models"; February 2007. http://www.oecd.org/dataoecd/7/4/39971975.pdf.

[53] Article 5 act 1.14.

In this context, see more on the nature of the reports that the Agency against Corruption publishes.

a) **Annual reports of the Agency**; http://www.akk-ks.org/?cid=1,16 and;

b) "**Analysis on Prosecution and Verdicts on Cases of Corruption in Kosovo"**; July 2011. http://akk-ks.org/repository/docs/Raporti_me_statisikat_12072011.pdf

5. THE LAW ON DECLARATION, ORIGIN AND CONTROL OF WEALTH OF HIGH PUBLIC OFFICIALS, AND ON DECLARATION, ORIGIN AND CONTROL OF GIFTS FOR ALL OFFICIAL PERSONS – (Nr. 04/L-050)[54]

The law on declaration, origin and control of wealth and of gifts of high public officials (The Law), has been considered as one of the basic laws regarding the legal codification of the fight against corruption. The declaration of the wealth of high public officials, in principle has been considered as a tool for preventing and fighting corruption, especially in the aspect of fighting political corruption[55]. Nevertheless, only the approval of the Law, which contains a strong title, does not mean anything, since the content is extremely weak and does not provide an effective infrastructure to fight corruption.

The main weakness of the Law, which practically makes it an ineffective mechanism in efforts to prevent and fight corruption, is the lack of penal provisions for non-compliance with the obligations deriving from this Law. Neither KPK, and consequently nor the Law stipulate the penalties of ***"false declaration of wealth"***[56] or ***"non-declaration and/or refusal***

[54] The Law on Declaration, Origin and Control of Wealth of High Public Officials and on Control of Gifts for all Official Persons – (Nr.04/L-050) http://gazetazyrtare.rks-gov.net/Documents/Ligji%20per%20deklarimin%20e%20pasurise%20se%20zyrtarve%20te%20larte%20(shqip).pdf

[55] **Transparency International TI** – Source Book 2000. http://www.transparency.org/publications/sourcebook

[56] **KPK**, contains the category **"false declarations"** but this is limited only on: Witness, expert on behalf of witness, translator or interpreter in court procedure and is not related to false declarations of data on wealth of high public officials. See Article 307 of KPPC: **FALSE DECLARATIONS:** (1) The Witness, expert on behalf of witness, translator or interpreter who, during court procedure, minor offence procedure, administrative procedure, procedure before public notary or in disciplinary procedure,, gives a false declaration, is fined or imprisoned up to one year. (2) If the false declaration is taken as basis for a final decision on the procedure, the defendant is imprisoned with three months up to three (3) years. (3) If the penal action from paragraph 1 of this article results with serious consequences for the acccused person, the defendant is punished with imprisonment of one to five years.

of declaration of wealth" of high public officials. In reality, without making these categorizations part of KPK firstly, and then also of the Law, we cannot pretend that this Law provides an effective infrastructure for preventing and fighting corruption.

Moreover, heading **VI Penalizing Provisions, article 17 act 1** says *"Anyone who violates the stipulated provisions of this law,* ***which are not penal actions,*** *the public official commits a minor offence and is punishable".* It is not described here as how it can be determined ***when*** a violation is penal action or minor offence and ***who*** can make this classification, the Agency as a competent body for supervising the enforcement of this Law, or the Minor Offence Court, as an authority responsible for issuing fines for violations of the provisions of this Law.

Additionaly, many provisions of this law, even if violated, are not sanctioned, since this law, according to article 17, determines sanctions only for the following categories: **a)** lack of regular annual declaration of wealth; **b)** lack of declaration of wealth on receiving official duty; **c)** lack of declaration of wealth through a request by the Agency; **d)** lack of declaration on termination of function and; **e)** for non-action according to article 15 act 3 of this law. Whereas, for violations of other provisions which could be acceptance of gifts or lack of their declaration and many other violations of this law which can be performed by public officials, the law does not foresee any sanctions.

The title of the Law also regulates the ***control of origin*** of wealth of high public officials. The Law, in principle, gives in a way the right to the Agency to request the origin/sources of the wealth from public officials and to order the verification of total control of the declared information.[57] However, none of the provisions of the Law foresees ***procedures*** as well as ***methods/mechanisms*** clearly defined which would enable the Agency the verification/control of origin of wealth of high public officials. In reality, the clear definition of methods/mechanisms and procedures for verifying the origin of wealth is the key element of this Law, and without this the Agency remains only a body for processing of declared information on voluntary basis from the public officials themselves.

Although **article 16** of the Law obliges all public institutions; public and private legal persons and; Banks and other subjects exercising banking and financial activities to provide information to the Agency, and determines the deadline when these requests should be responded to the Agency[58],

(4) If the Defendant of the penal action from paragraph 1 of this article voluntarily withdraws his/her declaration before a final decision, the court may free him/her from the penalty.

[57] The only articles which codify the right of the Agency to request the source/origin of the wealth and request the control of the declared information are extraordinarily general and do not clearly define the **procedures** and **methods** available to the Agency to be able to practically verify the wealth of the high public officials.

Article 9 - Declaration by a request from the Agency. The Agency, at any time, can request from the high public official to submit the requested information according to article 5 of this Law.

CHAPTER V CONTROL OF DECLARED INFORMATION: Article 15 – **1.** The Agency carries out the control of the declaration on the state of wealth of high public officials. **2.** The preliminary control is carried out for every form in order to verify the existence or non-existence of material mistakes or mistaken filling of the form. **3.** When after the preliminary processing, material mistakes or mistaken filling of the form are verified, the Agency informs the subject which has declared this information, which within fifteen (15) days from receiving the notification, is obliged to correct them. **4.** The full control is carried out to verify the accuracy and truthfullness of the information declared in the form.

[58] **Article 16 – The obligation of providing information: 1.** While carrying out the control and verification of the information declared in the form, **the Agency has the right to use the necessary information in all public information and private dhe public legal persons**. **2.** With a request by the Agency, the Banks and other subjects, which perform banking and financial activities in Kosovo, are obliged to provide information on deposits, accounts and transactions carried out from persons, which according to this law, are obliged to declare. **3.** The mentioned

nonetheless, this article for the most part, is in direct contradiction with **KPPC**[59] and as such, unenforceable in practice.

Article 13, act 1 of this law, determines the data of the declaration of wealth that have to be disclosed by the high public official.[60] But within the sanctions of this law, there are no penalties if an official fills in the form in an incorrect manner, as determined according to this article. In practice, whether disregarding the requiments foreseen by this article constitutes a violation, and should this be sanctioned is not clarified in the law at all. And this can result with a declaration of incorrect information in the form of the declaration of wealth.

In article 16[61] of this law has been stipulated the obligation for providing the information. Eventhough the in the title of this article unequivocally is stipulated the obligation to provide information, the sanctions of this law do not foresee any penalties for non-compliance with its provisions. What might happen if physical and legal persons do not accept to provide the information that the Agency requires? How can Agency oblige them to respond if no sanctions are determined for non-compliance?

The Law has removed the possibility of discharging a high public official by the institution where he/she works, if the official in question refuses to declare the wealth even beyond the predetermined deadlines. Non-declaration of wealth is sanctioned only with a fine or termination of exercising the function up to a year with a decision by the Minor Offence Court.

Despite the fact that the Law has included a larger number of public officials who are obliged to declare their wealth, it still does not contain some particular positions[62]. In this respect, the officials of procurement or different evaluating commissions of the local level, representing some of the lethargic points where corruption appears, are not included in this definition and consequently they are not obliged to declare their wealth.

Regarding the right of accepting gifts by the high public officials, the Law does not specify the ***amount of gifts***[63] which the officials can accept. This lack of definition of the value of

subjects in paragraphs 1 and 2 of this article, are obliged to provide the requested information within thirty (30) days from receiving a written request by the Agency.

[59] In reality, **KPPC** clearly defines the right and procedure for access to bank accounts, where the Agency has no right in any form to have access to bank accounts. See **Article 256-KPPC; Article 258-KPPC.**

[60] **Law – (Nr.04/L-050), Chapter IV, article 13.**

1. The data on the declaration of wealth by high public officials includes: name, position, name of institution, address of institution, date of appointment in the function, date of submitting the form, functions or other activities that the official performs apart from the public function, real estate and its type, origin, year of benefit, its estimated value, and ownership, shares in trade associations or other institution, possession of credit letters, cash, financial liabilities that the official has towards physical and legal persons and annual income. All of these should be published in the internet webpage of the Agency within sixty (60) days from the day of the expiry of deadline for the declaration of wealth by high public officials.

[61] **Law – (Nr.04/L-050), Article 16**.

1. The Agency requests the declaration of wealth and the origin of its sources and can perform the control to verify the truthfulness of them.

2. During the performing of control and verification of the declared information regarding the wealth, the agency may request or use the information from all physical and legal persons according to the Law for the protection of personal information.

3. With a request by the Agency, Banks and other subjects are obliged to provide information regarding deposits, accounts and transactions undertaken by persons who according to this law are obliged to declare.

4. Subjects mentioned in paragraphs 1. dhe 2. of this article are obliged to provide the requested information within fifteen (15) days from the day of the written request by the Agency.

[62] Article 3 Definitions.

[63] **Law – (Nr.04/L-050), Chapter III**, **Article 11**, defines Receiving of Gifts, and **Article 12** defines the Registration of Gifts, but this law does not define anywhere the **value** and **number** of gifts that a high public official can accept from another person or or an institution during one year.

gifts allows for abuse of official duty by the side of high public officials. Furthermore, **article 11 act 3** of this Law says: *"the official cannot accept more than one gift a year from the same person or institution"*. This implies that the official can accept ***a number of gifts within a year,*** but from ***different persons and institutions***. And doubtless, with the provisions it contains, this Law allows and encourages officials to receive undefined gifts **a)** a number and **b)** amount from different persons or institutions, and thus creates a space for abuse of official duty.

In this context, the Law has marked a regress since the old law on declaration of wealth (**Law No. 03/L-151)** defined both the amount, as well as quantity a high public official can receive within a year[64].

In articles 11 and 12[65] of this law, provisions are foreseen which concern the acceptance and registration of gifts by public officials. Regarding violations of the provisions of these two articles, there are no stipulated sanctions, except that according to the act 7[66] of article 12 of this law, if the Agency concludes that the public official has violated the provisions of this law, and if the violations is not suspected of being a penal act, it informs the institution where the public official exercises his duty and demands that disciplinary measures are taken against him. The institution in question should inform the Agency regarding the disciplinary measures that have been taken against the public official. In cases of suspicion of penal acts, after concluding the investigation, the Agency files a penal charge in the competent prosecution.

Here not only there are no sanctions foreseen for the violation of these two articles of this law, but furthermore, no explanation is provided as to what happens if the institution does not undertake any disciplinary measures against the violatiors of these provisions. This implies that if the officials do not declare the acceptance of gifts in compliance with this law, not only they are not sanctioned, but they can excused without any disciplinary measures, since this law does not oblige the institution

[64] **Law No. 03/L-151**; **CHAPTER III; GIFTS; Article 10; Accepting of gifts.**
1. The official person cannot request or receive gifts or other benefits for himself/herself, or for family members, which are related to exercise of official duties which influence or can influence in exercising of official duties, except for protocol gifts and random gifts with small value.
2. Protocol gifts are considered gifts brought by representatives of foreign countries and international organizations during random visits, and gifts brought in similar circumstances.
3. Random gifts with small value are considered gifts given in certain momenbts, the value of which does not exceed fifty (50) Euro for year, if given by the same person.
4. The official person cannot accept random gifts the overall value of which exceeds five undred (500) Euro within one year.
5. The official person cannot accept monetary gifts.
6. When the official person is in doubt, whether he/she can or cannot accept a gift, he/she should obtain the approval of his/her superior. In the case when the official person is head of an institution, he/she should directly obtain the approval of the Agency.
7. The official person should inform in written his/her superior, if he/she has been offered a gift without notice and under specific circumstances. In the case when the official person is head of an institution, he/she should inform the Agency.
8. If the value of the gift exceeds the value determined with the above-mentioned provisions, the gift becomes property of the institution, in which the official person exercises the official duty.
9. Protocol gifts with a value exceeding one hundred (100) Euro become property of the institution in which the official person exercises the official duty.

[65] **Law No. (Nr.04/L-050)**, **Chapter III; Gifts; Article 11 – Acceptence of gifts. Article 12, Registration of gifts.**

[66] **Law No. (Nr.04/L-050)**, **Chapter III; Article 12; "Registration of gifts"; point 7.**
If the Agency ascertains that the official person has breached provisions of this law but such a breach is not considered a criminal offence, it shall inform the institution where official person exercises his/her duty and shall request disciplinary measures to be taken against him/her. Institution shall inform the Agency about disciplinary measures taken against the official person in question.

where the official works to undertake such measures.

Article 11 act 6 says: "*The official person should inform his superior in writing, if having received a gift without unexpectedly and under specific circumstances. In case the official person is head of an institution, he/she should inform the Agency"*. Under a hypothetic situation, this implies that even the President of the State, during any meeting, when offered a gift, should inform the Agency regarding the acceptance/offer of any gift or its refusal. This may be considered meaningless and unenforceable in practice, since during international meetings, or even meetings outside of the country, when offered gifts to the President, it is impossible to inform the Agency, especially in a context where the Law does not specify clearly the number and value of gifts presented by different persons or institutions.

Article 12 act 4 of this Law says: *"The register of gifts is public. The specific institutions are obliged to ensure access to the register for the public, in accordance with the defined procedures with the Law for access to official documents*". In reality, such a codification of the access to the registers of gifts for the public is contradictory, since it is unnecessary that the access to registers of gifts should be granted through the Law on Access to Official Documents (LAOD), while the register of declaration of wealth of high public officials is open to the public without having to undergo procedures of LAOD.

Finally, the sanctions of this law contain legal gaps and ambiguities which almost entirely make this law ineffective. This is due to the fact that the violations of this law end up non-sanctioned. The sanctions of this law should be structured in the same manner they have been structured within the Law on Prevention of Conflict of Interest in Exercising of Functions by High Public Officials[67], in order to determine sanctions for any violation of the provisions of this law.

6. THE LAW ON PREVENTION OF CONFLICT OF INTEREST IN EXERCISING A PUBLIC FUNCTION – (Nr. 04/L-051)[68]

The Law on Preventing Conflict of Interest in Exercising a Public Function (Nr. 04/L-051) –The Law, although aiming at clarifying this area, as well as creating conditions for identifying and preventing conflict of interest, it nonetheless will not achieve to do that in practice.

Again, the main flaw of the Law is **the lack of categorization of conflict of interest towards different levels/positions of public officials.** Although it provides some general principles regarding the rights and responsibilities of public officials, the Law does this through putting all levels of officials in one category.

Another major flaw of this Law is the lack of **"concealment of conflict of interest" or non-**

[67] **Article 20 Sanctions for violations of the provisions of this law**

1. Each violation of determined obligations with this law, when not a penal crime, consist of a violation and is sanctioned with a fine according to the limits determined as follow:

1.1. For violations of article 8 paragraphs 1, 2 and 6., article 9; article 11; article 12 paragraphs 1, 2 and 3 under – paragraphs 3.1 and 3.3., article 13; article 14 paragraphs 1, 2 and 5; article 15 paragraphs 1, 2 and 3., article 16 and article 17 of this law, the high public official is sanctioned with a fine of five hundred (500) to two thousand five hundred (2500) Euro;

1.2. For violations of article 14 paragraphs 2 and 4, as well as article 15 paragraph 5 of this law, the entrusted person is sanctioned with a fine of seven hundred (700) to two thousand five hundred (2500) Euro;

1.3. For violations of article 8 paragraphs 3, 4 and 5 of this law, the head or head of institution is sanctioned with a fine of one thousand (1000) to two thousand five hundred (2500) Euro.

[68] Law on Prevention of Conflict of Interest in Exercising a Public Function – (No. 04/L-051) http://gazetazyrtare.rks-gov.net/Documents/Ligji%20per%20parandalimin%20e%20konflikt%20(shqip).pdf

declaration/refusal of declaring the conflict of interest", as violation of the law and duties of the official. This is due to the fact that these two legal categories are not included in the Penal Code of Kosovo as penal actions.

Article 14 act 4 of this law says: *"If the entrusted person creates business relationships with central or local governmental institutions, social enterprises or private enterprises, where the capital of public property is more than 5% of the capital or shares, he/she is obliged to inform the highest official regarding such business relationships"*.

This article, which has reduced the aspect of public capital percentage from 20% as it was in the previous law to 5%, has not defined also the situation what happens when an entrusted person does not inform the high official if he/she enters into business relationships with central institutions, or even with the institution where this official exercises the function of a high public official? Apart from the fine prescribed as sanctions, the Law has not defined what else can happen in this case.

Article 15 act 5 of the Law says: *"The enterprise where the high official has ownership or part of the ownership, lead by the entrusted person, does not have the right to sign a contract or to benefit assistance from the central or local institutions, where the high official holds a decision-making position."* While, **act 6** of the same Law says: *"If the high public official is in violation of paragraph 5 of this article, then the Agency should request from the competent body* ***the annulment of the contract with the enterprise or the return of whatever material benefit from the enterprise*** *from the institution where the high official is in a decision-making position."* Even here, the Law has not defined as to what might happen in a hypothetical situation, if the company of the high official, led by an entrusted person, signs a contract with local or central institutions, and performs the work and benefits materially. Whereas, regarding this contract and the eventual benefits it is only found out later, for example, after a year or more. How can this situation be reversed to its previous state when already now for example, the contract has been executed?

Article 8 act 1 of this Law says: *"The high official is obliged to prevent and resolve himself, within the legal timeline, and in the most effective manner, any of his situation of conflict of interest* ". It is not mentioned here what the legal timeline is within which the high official is obliged to prevent conflict of interest, and it is not explained what is meant with the most effective manner possible. Also, in **act 3** of this article, it says: *"Every leader and leading institution should undertake all necessary measures in order to prevent and resolve cases of conflicts of interest*", whereas it is never determined as to which are the necessary measures that the leader has to undertake.

Article 12 act 1 of this Law determines that: *"If there is a tendency to influence in his will, the high public official should inform his superior or institution which has selected him in writing, in order to prevent any influence on his will*". Here it is not explained if efforts to influence the will of the official could be caused by the official himself, and in such a hypothetical situation, who should he inform in writing regarding efforts to change his will? **Act 4** of this article says: *"If it is concluded that the voting and the decision is in contradiction with the will of the high official, then it should be declared as null and void by the institution which has issued it*". Even this act does not explain as to what can happen in the situation where the decision

could have been already taken and executed, how can this decision be declared null and void?

Article 16, act 1 of this Law says: *The high public official cannot be Manager or member of the managing bodies in profitable and non-profitable organizations,* ***excluding political subjects*** *and cases when such a function is dedicated merely due to the function*". Realistically, this article of the Law is in direct contradiction with the Constitution of the Republic of Kosovo[69], since the President, as a high official, according to this Law is not allowed with the Constitution to be a leader or even a member in governing bodies of any political subject. Furthermore, this Law does not prohibit any high official to exercise leading functions in political subjects.

Apart from this, this provision of the Law enables also the establishment of frameworks for politicizing the public administration, since this provision does not prohibit any high official to be a member or leader of political subjects. According to the provisions, it means that even Chief Executives of Independent Agencies, Director of ATK, Customs, Head and Members of KQZ, Auditors in the General Auditor's Office, Board Members, Director of BQK, Members of the Judicial Council and Prosecution, Ambassadors, Police Officers, Deans and Dp. Deans of public universities, Judges of the Constitutional Court, Commander of FSK, Director of AKI, Ombudsperson, etc., can be members of political subjects. Essentially, this entire situation is a result of the lack of categorization of high public officials in different categories, in order to avoid this conflicting situation of this Law with the Constitution and other laws.

Article 20, act 2[70] of the Law stipulates also the right of the Minor Offence Court to issue the sanctioning measure: *"the termination of the exercise of public function in period of (3) months to one (1) year"*, for violating the defined obligations. But, the enforcement of this provision is questionable when it comes to exercising of a public function in the case of Deputies, the President and the Prime Minister[71].

[69] **Article 88 [Compliance]**
1. The President cannot exercise any other public function.
Article 106 [Compliance]
1. The Judge cannot perform another function in state institutions outside of the judiciary, be involved in any political activity or any other activity prohibited by law.

[70] **Article 20; Sanctions on violation of the provisions of this law, act 2.** For violations of obligations determined by this law, the high public official, leader or head of a leading institution, apart from the fine, the court may issue a sanctioning measure: termination of exercise of public function for three (3) months to one (1) year.

[71] For more regarding this context, see this Policy Analysis, page 5.