

# LAW DRAFTING MANUAL

## A GUIDE TO THE LEGISLATIVE PROCESS IN ALBANIA

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## INTRODUCTION

The fundamental changes in the Albanian political and economic systems have been accompanied by a thorough legal reform aiming at creating a legal system in conformity with the requirements of democratic pluralism, rule of law and human rights. Compared to other European countries undertaking similar reform, the Albanian legal reform has required not only a complete revision of the existing legislation but also the introduction of a whole series of new legal domains and institutions that did not even exist under the former totalitarian regime. A significant legislative effort was necessary to support this comprehensive rebuilding of the Albanian legal system.

Analysis of the legislation enacted to achieve this reform would show that many of its provisions did not fully achieve their objectives. This ineffectiveness of legislation and delegated legislation has been attributed, in part, to deficiencies in its preparation and drafting. Because of the financial constraints, the priority of the Albanian public administration in terms of human resources and finances has mostly been the implementation and enforcement activity, whereas the part of its work related to the law making receives, in practice, far less attention than would be necessary to ensure a higher quality of legislation.

Inadequately prepared legislation reduces its legal certainty and stability, which are essential preconditions for advancing the economic reform and improving the living conditions of the Albanian people. In addition, badly drafted legislation may not achieve its objective, or may achieve it expensively, or may lead to expensive litigation to resolve textual ambiguities. Further, such unsatisfactory implementation of legislation may also reduce its ready acceptance by citizens. Importantly, the legal vacuum created by the dismantling of the former legal system when coupled with inadequate enactment of new legal norms may disorientate the people, the courts and the public administration and thus undermine the rule of law.

Law drafting techniques and procedures thus play an important role in ensuring success of the legal reform. This has been recognised in legislation, furthering the relevant provisions of the Constitution. See Appendix I, listing the relevant acts, notably:

- Rules of the Assembly of the Republic of Albania, approved by Decision No. 166, dated 16.12.2004, amended by Assembly Decision No. 15 of 27 December 2005 (Rules of the Assembly);
- Law No. 9000 of 30.01.2003 on the Organisation and Functioning of the Council of Ministers (“Law on the Council of Ministers”);
- Council of Ministers Decision No. 584 of 28.8.2003 “On the approval of the Rules of the Council of Ministers,” amended by Council of Ministers Decision No. 201 of 29.3.2006 “Some changes and amendments to Council of Ministers

Decision No. 584 of 28.8.2003 “On the adoption of the Rules of the Council of Ministers” (Rules of the Council of Ministers)

- Law No. 8678 of 2.11.2000 on the Organisation and Functioning of the Ministry of Justice, amended by Law No. 9112 of 24.7.2003 (Law on the Ministry of Justice).

Within this context, the Albanian Government has undertaken several important initiatives in order to improve the quality of legislation, among which an important step has been the preparation and adoption of the present *Law Drafting Manual* including *A Guide to the Legislative Process in Albania*<sup>1</sup> (which is hereinafter referred to as the Manual).

### **Objective and addressees**

The objective of this Manual is to facilitate consistency and uniformity of Albanian legislation and to guide and assist Albanian officials in the process of considering, drafting, and adopting legislation.

The legislative work implies the participation of various stakeholders and requires diversified knowledge. For this reason, the Manual is addressed to all persons who participate in the preparation of draft legislation. Depending on the nature of the particular principles and guidelines concerned, it targets both law drafters and civil servants responsible for the technical conception of the law texts and other state officials responsible for legislative planning and policy. The Manual should be of use to them and serve as a source and reference guide for improving and maintaining the high quality of legislation in Albania.

The Manual is conceived as a tool constituting a collective memory about these matters and as a means of facilitating the communication of collective experience and best practice.

### **Scope**

This Manual deals with some of the key questions that are relevant to maintaining the quality of legislation. It provides guidelines concerning law drafting techniques, the legal conditions and limitations applicable to legislative activity and the organisation of work related to law making, including institutional and procedural issues. However, it only addresses a limited number of questions, and often then only in general terms. It does not seek to be in any way an exhaustive treatise on all the issues which may arise in the course of law making.

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<sup>1</sup> The Manual (initial version) was prepared in 2002-03, in the framework of the Joint Programme between the Council of Europe and the European Commission for Albania with the assistance of the independent expert Professor St. John BATES (United Kingdom). The Manual was updated in 2006-07 with the assistance of EURALIUS (the European Assistance Mission to the Albanian Justice System).

The Manual should not be taken to imply that the drafting of legislation is merely a matter of selecting appropriate standard words or phrases. Drafting requires much more than this. First, legislative drafting commonly addresses and regulates new circumstances. Secondly, and equally importantly, it requires the application of a wide range of other skills and attributes, which include objectivity, creativity, common sense, and pragmatism and conflict resolution.

The Manual does not cover the drafting of delegated (subordinate) legislation, including governmental and ministerial regulations. However, much of what is set out in the Manual may be applied by analogy to the preparation of delegated legislation and it is obviously just as important that such legislation is also of high quality.

The Manual deals with the preparatory work on draft laws that are prepared and submitted to the Assembly by the Government – the Council of Ministers. The Manual does not cover the parliamentary legislative process or the drafting of legislation flowing from the exercise of the right of legislative initiative by Members of Assembly or citizens. However, for the sake of uniformity, it would be desirable that the law drafting guidelines in this Manual are meanwhile taken into account by the Assembly’s legal drafting services, and that its guidelines are considered in the preparation of any legislative drafting guidelines that the Assembly may issue.

### **Status**

The Manual consolidates and elaborates applicable Albanian law and regulations on legislative functions. It is not intended to lay down new binding legal norms; nor does it extend to matters of policy. The Manual does provide guidelines and best practice on the uniform application of existing rules in the field of law making. Subject to exceptional administrative circumstances, it should be observed by all government institutions.

Drafting technique and legislative procedure will, of course, evolve. Language, for example, changes and this affects the way legislation is drafted; what is now commonly accepted language may become archaic or change its meaning over time. Changes may also occur in such matters as the structure and competence of the public institutions or in the way they carry out their functions. In consequence, the Manual may be supplemented by circulars and recommendations issued by the Ministry of Justice and other responsible Albanian authorities on specific aspects of law making. Also, the Ministry of Justice, in coordination with other competent Albanian authorities, will keep the Manual itself under review and this may result in the publication of amendments to the Manual and revised versions of it.

### **Structure**

The Manual is divided into four chapters.

*Chapter I* deals with the general principles of legislation, including the constitutional and legal framework of law drafting; the delegation of powers to legislate; the need and

justification for legislative intervention and possible alternatives to it; the evaluation of the effects and impact of legislation; and codification.

*Chapter II* outlines the legislative procedure, including planning and organisation of the preliminary law drafting; internal and external consultation and the legislative response to its results; consideration of draft laws by the Council of Ministers and their submission to the Assembly; and the promulgation, publication and subsequent review of enacted legislation.

*Chapter III* considers legislative drafting techniques, including the structure of law texts; the system and order of legislative provisions and drafting style. It also sets out the principles relating to the preparation of explanatory memoranda to draft laws.

*Chapter IV* analyses the preparation of domestic legislation relating to international legal obligations, including drafting legislation on the acceptance of international treaties; the implementation in national law of treaties binding on Albania; and the implications of the approximation of Albanian law with the *acquis communautaire*.

A checklist for the preparation of legislation and a summary of law drafting rules is enclosed in the sleeve of this Manual for ease of reference.

## **I. GENERAL PRINCIPLES OF LEGISLATION**

### **1.1 Objectives of legislation**

The objective of each law should be to provide its users with as precise and comprehensive regulation as possible of the matter addressed. Its provisions should be limited to regulating objectively determinable societal circumstances by reference to their identifiable characteristics. It should contain a clear and accurate statement of obligations, rights and duties.

The law should seek the most durable and sustainable solution, which is:

- (i) constitutionally competent;
- (ii) otherwise consistent with fundamental notions of reason and logic;
- (iii) practicable and minimises undesirable side-effects; and
- (iv) the most cost-efficient relationship between the legislative objective and the means used to achieve it.

To the extent that a law fails to meet these objectives, it undermines legal order and the authority of the state.

### **1.2 Constitutional framework**

#### 1.2.1 Hierarchy of legal norms

The Constitution provides for the hierarchy, status and effect of legal norms. In particular, Article 4/2 declares that “the Constitution is the highest law in the Republic of Albania.”

Article 116 of the Constitution reflects the hierarchy of legal norms by providing that “normative acts that are effective in the entire territory of the Republic of Albania are:

- a. the Constitution;
- b. ratified international agreements;
- c. laws;
- ç. normative acts of the Council of Ministers.”

International agreements come after the Constitution in the ranking of norms and thus they have an important place in our legal system. Article 122 emphasises this idea by providing that international agreements, ratified by law, prevail over incompatible laws of Albania.

Article 118 provides that a law may specify that an organ has the competence to make delegated legislation on specified matters according to specified principles, but that organ cannot further delegate such competence. Otherwise, rules issued by the Council of Ministers, ministries and central state institutions, and orders of the Prime Minister, are only binding on subordinate administrative entities and may not serve as the basis for taking decisions that affect individuals and other subjects (Article 119).

Exceptional procedures for issuing normative acts in emergency situations are provided in Article 101 of the Constitution that states that in cases of necessity and emergency, the Council of Ministers may issue, under its own responsibility, normative acts having the force of law for taking temporary measures. These normative acts are immediately submitted to the Assembly, which is convened within 5 days if it is not in session. These acts lose force retroactively if they are not approved by the Assembly within 45 days.

The Constitutional Court has interpreted the meaning of key requirements of Article 101 of the Constitution.<sup>2</sup> The Court considered that necessity and emergency are mutually dependent and situation specific conditions with effects upon the validity of the normative act and that Government is obliged to reflect their existence “in the content of every normative act with the force of law that it issues, at a minimum in its preamble.” The drafter should be attentive to this requirement when preparing a normative act.

As the Constitution determines the hierarchy of norms it is not necessary to indicate specifically in a law that it is in compliance with the Constitution, as this will normally be treated as self-evident. However, the articles of the Constitution pursuant to which a law is issued are stated in its introduction, and delegated legislation should always specify the legal authority under which it is made (see further 1.4.1).

### 1.2.2 Status of laws

Article 78 of the Constitution provides that the Assembly adopts laws by a majority of votes, in the presence of more than half of its members, except where the Constitution provides for a qualified majority.

One such case is Article 81 of the Constitution, which lists categories of legislation that require the vote of three-fifths of all members of the Assembly to be adopted:

- “a) laws for the organisation and operation of the institutions provided for in the Constitution;
- b) a law on citizenship;
- c) a law on general and local elections;
- ç) a law on referenda;
- d) codes;
- dh) a law on a state of emergency;
- e) a law on the status of public functionaries;
- ë) a law on amnesty;
- f) a law on administrative divisions of the Republic.”

Meanwhile there are articles in the Constitution that require laws to be adopted by the Assembly with an absolute majority of its members, for example: article 12, paragraph 3, of the Constitution, which stipulates that the Assembly must approve by an absolute majority laws concerning the stationing of foreign military forces in, or their passing through, Albanian territory as well as laws to send Albanian military forces abroad, or

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<sup>2</sup> See Constitutional Court Decision No. 24 of 10.11.2006.

article 172/2 of the Constitution, which stipulates that the Assembly decides on the President's decree establishing a state of the war with the absolute majority of its members.

All laws, however, have an equal hierarchical status regardless of the procedure for their enactment. The Constitution does not give any consequential special status to legislation that requires an enhanced majority to be enacted under Articles 12, 81, 172 or otherwise.

### 1.2.3 Implications for the drafter

The drafter must ensure that draft laws and delegated legislation respect the hierarchy, status and effect of legal norms laid down in the Constitution. Thus, the provisions of a draft law or delegated legislation must not conflict with the Constitution. Similarly, delegated legislation must not go beyond the power given in a law to make the delegated legislation, nor should its provisions conflict with the provisions of laws.

Also, the fact that all laws have equal hierarchical status places particular responsibilities on the drafter, and has implications for legislative drafting. The more significant of these responsibilities and implications are set out below.

- (i) To protect the importance attributed to them under the Constitution, laws subject to an enhanced majority procedure for their enactment must be modified by laws enacted by the same procedure and not by the simple majority generally required by Article 78 of the Constitution.
- (ii) A number of Albanian laws, such as the law on the preparation and implementation of the state budget, are of a more general character and have significant effects on a wide range of other laws. Derogating from such laws, which lay down general principles, in drafting other laws should be undertaken with caution. Such derogations may undermine the uniform application of these general laws, and the coherence of the law which they regulate. There may, of course, be certain areas that require distinctive regulation rather than the application of an existing principle contained in a law of general application. In such cases, however, a detailed explanation should be given in the explanatory memorandum to the draft law.
- (iii) Similar legal issues should be regulated in the same law rather than being spread over several laws. The legislation should be viewed as a programme of action where questions and answers, facts and legal consequences are defined as closely as possible to each other. It is therefore not advisable to adopt a range of laws concerning the same problem or to supplement a general law with numerous special laws. Instead, codification should be considered or appropriate legislative powers for making delegated legislation should be used.

- (iv) More generally, the drafter should ensure that a law is consistent with the existing legal order and ensure, by amendment or repeal, the coherence of legislation by eliminating conflicts between different legislative provisions as they arise in the course of the legislative process.
- (v) Traditional rules of interpretation can be used to reconcile conflicts between laws despite their equal hierarchical status. For example, unless there are provisions to the contrary, a later enactment will be interpreted as prevailing over an earlier one, and an enactment expressed in specific terms will prevail over one in general terms. However, the drafter should not rely on rules of interpretation when it is possible to provide in the drafting for the relationship between different legislative provisions. Thus it is, for example, good practice to state expressly that a specific provision prevails over a general provision in the same or other legislation.

### **1.3 Justification for legislative intervention**

#### 1.3.1 Legislative initiative

The need for a legislative intervention can arise for many different reasons. A need to modify the law may become apparent when applying the existing law or as a result of public debate between interest groups and political institutions. It is, in fact, the duty of all ministries to follow closely the development of the legal system in their respective fields and initiate amendments when appropriate or repeal legal norms that have lost importance or have been effectively replaced by more recent legislation.

Accordingly, the demand for legislation may come from various sources, such as:

- the Government's legislative programme or the legislative programme of an individual minister;
- a request by the Assembly or individual Members of the Assembly;
- demands from non-governmental organisations and interest groups;
- requirements of an international treaty or of an international organisation;
- court decisions;
- opinions expressed in legal doctrine;
- the Euro-Atlantic integration processes.

#### 1.3.2 Assessment of need for legislative intervention

Every law-drafting project should be preceded by evaluating and ascertaining the reasons why the law should be adopted, in particular its political and legal justification. The drafter should determine what should be regulated by the law, who is the addressee of the law and how and in what conditions the given law will function. The necessity for, and the effectiveness and comprehensibility of, the contemplated draft act should be established.

In assessing the need for legislation, and in complying with these constitutional and legislative requirements, the drafter may find the following OECD Reference Checklist<sup>3</sup> of general questions to be helpful:

1. Is the problem correctly defined?
2. Is government action justified?
3. Is regulation the best form of government action?
4. Is there a legal basis for regulation?
5. What is the appropriate level (or levels) of government for this action?
6. Do the benefits of regulation justify the costs?
7. Is the distribution of effects across society transparent?
8. Is the regulation clear, consistent, comprehensible, and accessible to users?
9. Have all interested parties had the opportunity to present their views?
10. How will compliance be achieved?

Careful consideration should be given to whether the nature of the problem is such that it calls for legislative intervention. This may not be the case if the extent of the problem is relatively limited, or if the problem might solve itself in due time, or through means other than legislation. When defining the problem, one question to be asked is whether further legislation is at all likely to resolve matters or to influence the situation in the desired direction. The character of a given issue may mean that it is unrealistic to expect that the legislation, even if enacted, could be enforced efficiently or without disproportionate cost.

Proper identification of the problem is also a precondition when formulating the purpose of legislation. Clear definition of purpose is crucial to ensure respect for, and compliance with, the legislation as it will enable citizens and businesses to understand better the proposed measures.

The law drafter should review the entire existing legal framework in the given field and decide whether a new law, or alternatively an amendment to an existing law, is necessary. It must be established to what extent and in what way the proposed law would change the existing legislative scheme; what will be its consequences for different affected interests; and what will be its cost for both the public and the private sector. Steps should be taken to ensure that the interests that would be affected by the proposed law and its expected positive effects are balanced against any foreseeable negative effects. If, for example, a draft law is expected to entail great expense for the public sector, citizens or businesses, or is expected to result in radical changes, careful consideration should be given to whether the expected positive effects are important enough to proceed with drafting the law.

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<sup>3</sup> Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, 9 March 1995, available on the OECD Internet site [www.oecd.org](http://www.oecd.org)

It is always worthwhile to examine comparable experience in other countries when deciding on a new legislative project.

### 1.3.3 Alternatives to legislation

Legislative intervention may be justified and useful to clarify the law to allow those affected by it to determine more clearly their rights and obligations. New legislation may also result in a simplification of the work of the courts and the administration.

On the other hand, a legislative provision that is too detailed may reduce the flexibility in applying it. So, when considering new legislation, the question may arise whether it is expedient to regulate by statute, by other forms of regulation, by leaving the courts to determine the matter by the interpretation of existing legislation, or by means other than the adoption of legal norms. This may be particularly true in the regulation of some aspects of business and industry. Legislation may not be required because the policy can be achieved by self-regulation, or there may be existing legislation which addresses the matter. Alternately, the policy might be achieved by more informal means, for example by codes of practice. Such codes may or may not have a statutory basis; and, if they have a statutory basis, they may have varying legal effect.

However, even where there is existing legislation or case law, a political decision may be made to legislate for the specific issue if it is a significant public concern. In addition, there may be some external standard against which the question of whether to legislate or not has to be addressed. Domestic legislation may be required to carry out legal obligations arising in domestic law, or from the terms of a treaty or provisions of European Union law.

It should be noted that several alternatives to legislation may be initiated without specific legal authority, such as:

- Self-regulation: certification and other forms of self-regulation may be an advantage both for the public and the business sector. The public sector would not need to apply extensive resources to exercise control and businesses would be relieved of a number of administrative burdens arising from public control;

- Voluntary agreements between the state and relevant groups (e.g. private companies, local governments, labour organisations), leaving it to the groups themselves to choose the preferred means. Such agreements would oblige the groups to realise the goals that have been agreed but leave them free to choose which means to apply in order to reach these goals. This may allow flexible planning of work in an individual company, thereby reducing its costs;

- Information or public relations campaigns to persuade people to change their behaviour in certain respects. This method tends to be most widely used in fields such as health, energy and traffic regulations;

In addition, certain objectives may be better achieved through creating economic incentives, such as introducing taxes and subsidies, to motivate citizens and businesses to behave in a desired way. In this case the market is used as an instrument of regulation, prompting citizens and businesses towards certain conduct by economic means;

It may also sometimes appear more efficient to regulate the process that should lead to the intended result rather than to determine the result in advance. This may, for instance, imply laying down a requirement that certain parties must be involved in the process and that the result must be reached by consensus. Boards, councils and committees with equal representation of parties concerned are examples of this type of regulation.

#### 1.3.4 Amending legislation

A substantial number of the draft laws introduced in the Assembly every year are amendments of legislation already in force. Frequent amendment of a law should be carefully examined. It may have the effect of reducing certainty in the application of the law, create doubt over its stability and undermine confidence in it. However, the enactment of legislation is a continuing activity that must keep pace with social developments. Amending laws is therefore inevitable, but should be exercised with some care.

When it does prove necessary to amend an existing law, the question arises whether to achieve this by drafting an amendment or instead by drafting an entirely new law.

If the changes are minor and do not affect matters of principle it is generally advisable to draft the law as an amendment. The preparation of an amendment will be also less costly in resources as well as in time compared to the preparation of a completely new law.

A new law should be envisaged if the proposed changes involve establishing new principles in current legislation or would affect a large number of current legislative provisions.

A new law should repeal all the previous relevant legislative provisions and replace them to the extent necessary. Drafting a completely new law may be advantageous because it implies a confirmation of provisions in the existing law that are not amended, but are simply re-enacted in the new law. It also creates an opportunity to make necessary modifications and settle any questions of interpretation that may have arisen in the course of the implementation of the existing law. Also, it will commonly enable the Assembly to have a better and clearer basis on which to evaluate the area of law concerned and the changes proposed.

In addition, the risk of errors can be high in drafting amending laws and great care must be taken in this respect because substantial practical problems can arise from such drafting errors when the enacted law is applied.

A deficiency that frequently occurs in drafting amending laws is that the consequential amendments that are required to other provisions of the law or to other legislation are not made. Great care should be taken over this. A comprehensive examination should be made of the existing law in order to establish what consequential changes in it are required. This is particularly important where it is intended to introduce new articles or paragraphs into the text of an existing law or to repeal provisions of an existing law without re-enacting them, because this tends to dislocate the structure of a law.

When it is necessary to amend more than one law, the drafter must consider whether the amendments are best made in just one amending law or whether separate laws should be drafted for each law to be amended. On the one hand, a law amending existing legislation should normally not relate to more than one law unless there is coherence in content between the amendments affecting several laws. On the other hand, amendments to several laws both could and should be implemented in one draft law where they are uniform amendments or where they concern closely related subject matter.

## **1.4 Delegated legislation**

### 1.4.1 Need for delegated legislation

The main underlying principle of the Albanian constitutional and legal system is that all legislation is adopted by the Assembly. However, in certain instances the Assembly may delegate to the Government the duty to provide more detailed and technical regulations. Taking into account the increasing number of legal rules in a modern state, it is unrealistic for the legislature to enact all legal norms. The growing size and complexity of legislation often requires delegation of powers to the executive to make regulations. For this reason, when passing a law, the Assembly can decide to delegate to the Government the power to make legislation within the scope defined in the law. Such delegation empowers the Government to make delegated legislation (subordinate legal acts) within the overall legal framework established by the law in question.

In accordance with Article 118 of the Constitution:

- “1. Subordinate legal acts are issued on the basis of and for implementation of the laws by the organs provided in the Constitution.
2. A law shall authorise the issuance of subordinate acts, designate the competent organ, the issues that are to be regulated, and the principles on the basis of which the subordinate legal acts are issued.
3. The organ authorised by law to issue subordinate legal acts as specified in paragraph 2 of this Article may not delegate its power to another organ.”

In providing for a delegated legislative competence, the drafter should consider the balance between the legislative function of the Assembly and the delegated legislative function of the Government. The inclusion in a law of provisions that are normally in delegated legislation can create complexity and an unnecessary rigidity because if they then need to be amended this would require time-consuming legislative procedure in the

Assembly. The reasons for providing a delegated legislative competence should be outlined in the explanatory memorandum to the draft law (see further 3.8.6).

Where the executive makes delegated legislation it must declare in the text of the legislation the specific statutory authority for making it. This is in contrast to a law. The Assembly enjoys a general legislative competence derived directly from the Constitution and so does not have to declare any specific authority to legislate, but laws should also give the legal basis for their enactment; see 3.3.2.

It is a matter of policy to what extent the Assembly scrutinises and controls delegated legislation made by the Government.

#### 1.4.2 Scope of delegated legislation

The question often arises as to which rules to include in the text of a law and which to leave to the regulations by the executive.

The Constitution contains no general provisions limiting the degree of detail which may be contained in the provisions of a law, nor does it limit the extent to which a law may grant delegated legislative competence to the executive. However, the Constitution does specify that legislating for certain purposes and in certain areas is exclusively reserved to the Assembly and cannot be delegated to the Government. This is the case for legislation restricting human rights (Article 17), imposing taxation (Article 155) and other matters.

In deciding whether a norm should be a matter of law enacted by the Assembly or a matter of delegated legislation made by the Government, the following factors should be the considerations.

- If the norm is one of general principle, or general principle within a given field of law, or is a generally applicable guideline in the application of such principles, a law enacted by the Assembly is to be preferred. It is, for instance, established doctrine that, in accordance to the principles of the rule of law and of democracy, a law enacted by the Assembly is required for most state actions affecting the fundamental rights of the citizen.<sup>4</sup>
- However, it is necessary to distinguish between a norm that establishes principle and one that will merely be of wide effect. A norm only in the latter category does not necessarily require a law rather than delegated legislation.

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<sup>4</sup> The jurisprudence of the Albanian Constitutional Court has stressed that restrictions of individual rights and freedoms can be effectuated only by means of a law of the Assembly as provided for by Article 17 of the Constitution and that any interpretation contrary to this provision would render its guarantees devoid of their purpose. The Court has distinguished in its jurisprudence the legislative competence of the Assembly under Article 17 and the legislative competence delegated to the Council of Ministers under Article 101 of the Constitution (see Decision No. 20 of 11.07.2006).

- Sometimes practicality may play a part in the decision. So, for example, if it is anticipated that frequent amendment of a legislative provision may be required, delegated legislation may be appropriate, because the delegated legislation procedure is relatively simple and swift.

Therefore, when deciding on the extent of delegated legislative competence to the executive, it is important that the evaluation be qualitative rather than quantitative. It should not be a concern that a law contains many delegation provisions as long as each provision is duly considered and justified. As an institution with delegated legislative competence can only act within the limits of that competence, the draft law must express that delegation clearly and precisely. Also, as a practical matter, before delegating legislative competence to an institution, it is important to be sure that it has the capacity to discharge it.

## **1.5 Evaluation of legislation**

A major element in the legislative process is determining the effectiveness of existing or proposed legislation. This covers not only financial impacts, required by the Constitution to be considered, but also other elements that will be discussed below. The evaluation of legislation can be done in different ways, but always based on some analysis. Recently a new concept has been developed, known as regulatory impact assessment (RIA), which summarises in an organised manner the necessary analytical steps for performing this evaluation.

### 1.5.1 Regulatory impact assessment (RIA)

Regulatory Impact Assessment (RIA) is an analytic method developed in recent years in many countries (Europe, USA, Canada). It is used for improving the quality of laws, in terms of efficiency, effectiveness and impact in the society after their approval. RIA forms an integral part of the legislative process, and it serves the better transformation of a given policy and problem into a normative act. If a problem is not analysed in all its components, an analysis that this method can assure, the clarity of the provisions regulating that problem might be compromised and so would their impact and implementation.

RIA is widely used in developed countries and less so in developing countries, since the method entails costs; it requires expertise, techniques for conducting empirical analysis and collecting necessary data, as well as consultation with interested parties in society. Nevertheless the part of RIA that involves consultation can and should be included even in developing countries.

Applying the RIA method requires the drafters and policy makers to answer a list of questions (see 1.3.2), such as those below, during the legislative process and to develop an impact assessment of the costs and benefits of that law (see 1.5.2 to 1.5.5).

More specifically, a real RIA includes the following steps:

- Identification and clear determination of problems and political objectives that the normative act aims to regulate.
- Identification of the form of intervention (legal and non-legal forms) and selecting one for addressing the problem.
- Collection of information and identification of interested parties.
- Consultation with interested parties.
- *Ex ante* and *ex post* impact assessment that includes a cost and benefit analysis after and before the implementation of the law (see 1.5.1).
- Publication of the documents drafted as a result of RIA.

Although it might seem that the steps mentioned above are already regulated in some senses by legal acts on the legislative process in Albania, formalising the above mentioned steps in a comprehensive legal act<sup>5</sup> should be done in the future to improve the legislative process and truly apply the RIA method.

Acknowledging that, it is still early for the Albanian institutions to apply RIA fully. This Manual tries to address the importance of the elements underlying RIA and clarify some of its steps.

#### 1.5.1 Prospective and retrospective evaluation

Evaluation of the effectiveness, enforceability and cost of legislation should be treated as an integral part of the law-making process. As we have noted, providing a statement with each draft law justifying the costs of its implementation is a requirement of the Constitution (see 1.3.2, and further 1.5.3), and the general results of evaluation are an important element of the explanatory memorandum presented with the draft law (see further 3.8.5)

Evaluation of legislation should be made both before and after the formal enactment of legislation. Two different perspectives, or types of evaluation, should therefore be distinguished: prospective (*ex ante*) and retrospective (*ex post*) evaluation.

Prospective evaluation is made before taking formal decisions about legislating in order to have a better insight into the possible or potential effects of the proposed legislation. This evaluation may also assist in determining the appropriate legislative instrument and technique to be used.

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<sup>5</sup> After a legal act implementing a full RIA is adopted, it will be required as a follow up to establish an office within the classic ministries involved in the legislative process, such as the Ministry of Justice, Economy, and Finance, or the establishment of this office under the Council of Ministers. Such office would be meant to monitor and control the application of RIA. As a general rule, RIA should be conducted by the institution that will draft the act, and the documents produced after its implementation need to be published in a manner that is transparent for all the interested parties.

Retrospective evaluation is made following the adoption of legislation and while it is still in force; in some cases, especially if the legislation is only to be in force for a limited period, it may be undertaken shortly before or after the end of the period in which it is in force. The purpose of this evaluation is to acquire a greater understanding of what have been the practical effects of introducing the legislation and applying it.

These two types of evaluation are largely complementary. In assessing methodically the possible effect of draft legislation, prospective evaluation facilitates retrospective evaluation. The more explicit and differentiated the prospective evaluation is, the easier it is to undertake reliable retrospective analysis, because prospective evaluation increases awareness of existing information deficiencies and stimulates the demand to respond to them. It is also possible for the legislation to require that data be collected and published on the working of its provisions. Similarly, good retrospective evaluation helps to create a more solid basis for prospective evaluation, because it produces useful data for comparisons or analogies and favours the development of theoretical insights that permit a more accurate prognosis of the effects of future legislation. For these reasons, the same attention has to be paid to both types of evaluation and they have to be developed simultaneously.

Evaluation of legislation, whether it is prospective or retrospective, is an indispensable element of any methodical, rational approach to law making. Effective evaluation contributes to the material quality of legislation. To be effective, such evaluation must be used reasonably, in a pragmatic and selective way, with a degree of awareness of its methodological and practical limitations.

### 1.5.2 Evaluation criteria

Evaluation is concerned with the effects of legislation. Such effects can be considered from various perspectives and assessed according to a variety of criteria. The most frequently mentioned evaluation criteria are effectiveness, efficacy and efficiency.

Effectiveness is the extent to which the observable attitudes and behaviour of the target population (individuals, enterprises, public officials in charge of the implementation or enforcement of legislation) correspond to, and are attributable to, the normative model, that is, the attitude and behaviour prescribed by the legislator. Thus, with regard to this criterion, two questions have to be asked: (i) is the norm respected or implemented? (ii) can the correspondence between the observable degree of respect or implementation be attributed to the norm? For some types of norms, in particular for orders, injunctions or prohibitions, the word “compliance” may be used at least for the first question. For others, such as norms concerning the granting of permits or subsidies by state authorities, the word most frequently used is “implementation.” From a traditional legal perspective, it is the effectiveness of legislation that is very clearly the focus of interest.

Efficacy is the extent to which legislative action achieves its objectives. This criterion has particular significance from a political perspective. It shows how important it is to define clearly the objectives of the decision to legislate. If the legislator fails to define those

objectives it is virtually impossible to assess objectively the efficacy of legislation. This does not necessarily mean that the objectives have to be explicitly stated in the law itself. They may instead be set out in the explanatory memorandum accompanying the draft law or specified during the Assembly debate on the draft law. Where there has been no such politically “authorised” intimation of the objectives of a law, those having to evaluate it must decide themselves what they consider to be its objectives.

Effectiveness is a condition, but not necessarily a guarantee, of the efficacy of legislation. It contributes to the efficacy of a law only to the extent that the assumptions about causation, which implicitly underlie the legislator’s choice of legislative approach, are accurate. On the other hand, the simple fact that the objectives of a particular law are achieved does not necessarily prove the efficacy of the legislation; achieving the legislative objectives may be the result of other factors.

Efficiency is the relationship between the “costs” and the “benefits” (in their broadest sense) of legislative action. Here “costs” include not only the direct financial consequences of implementing the provisions of the legislation, but also non-material factors such as psychological or emotional inconvenience, and even perhaps all the negative effects of the implementation of the law. Similarly, “benefits” can include all the direct and indirect effects of realising the objectives of the legislation. In short, evaluating the efficiency of legislation means balancing the extent to which its objectives are achieved against the costs, in the broadest sense, of their achieving them. This analysis facilitates deciding between different legislative strategies as measured by the extent that they are a proportional response to achieving their objectives.

These three criteria (effectiveness, efficacy and efficiency) highlight some aspects of the effects of legislation; they emphasise aspects that are particularly important in the law-making process. However, of course, they do not exhaustively elucidate the complex causal relationships that are the social reality. They do not necessarily encompass all relevant effects of particular legislative action, which is sometimes described by the word impact.

There are also other related evaluation criteria that can be seen to assist those responsible for making, and advising on, strategic decisions in the preparation of legislation. One of the more important of these is the enforceability of the legislation. Is the nature of a provision of the draft law such that it can be enforced? This may have a drafting aspect. For instance, is a criminal offence drafted in a way that is both fair to the citizen and also does not impose such onerous evidential burdens on the prosecution that convictions are going to be difficult to achieve? It may also have a resource perspective. For instance, does a regulatory regime contained in a law have sufficient and qualified personnel resources to make it an effective control mechanism?

### 1.5.3 Cost of legislation

The direct financial cost of implementing legislation is a clear element in estimating the cost of legislation. Article 82/1 of the Constitution specifies that a law must always be

accompanied by a report that justifies the financial expenses for its implementation. This requirement is also specified in the Rules of Assembly, Article 68.

Article 25, paragraph 1 of the Law on the Council of Ministers provides that all draft laws submitted to the Council of Ministers for approval must be accompanied *inter alia* by an explanatory memorandum whose content is specified in paragraph 2 of the article. For draft laws that have an economic and financial nature, the explanatory memorandum must include the expected financial impact arising from their implementation.

There are, of course, many costs of legislation. First, there is the cost to the public sector. Increased bureaucracy will have staffing and, therefore, financial implications. There may be other direct public sector costs, for example, if the legislation provides for grants for housing or small businesses.

The assessment of the administrative implications for the public sector should analyse especially whether the draft law requires the establishment of new administrative structures or the expansion of existing ones. New legislation should, as far as possible, aim at using existing administrative structures. It is inexpedient if the public sector becomes unnecessarily complicated through administrative inflation. Such a development may also mean that the public sector becomes more confusing and less accessible to the individual citizen.

Instead, it is advisable to consider administrative simplification, for example, by merging several functions into one administrative unit. If it is necessary to establish new administrative units, efforts should be made to ensure that economic and administrative costs are kept to a minimum, for example, by transferring staff between administrative units.

There are also costs to the private sector. Legislation that imposes taxation, or fees, is an obvious direct cost. Extensive regulatory or compliance provisions are also a cost, because they absorb private sector human resources, which are ultimately paid for by the customer. If regulatory or compliance provisions impose excessive demands, they will finally be a burden on the taxpayer (because less profit will mean less tax revenue) and the community (because less tax revenue will eventually have a deleterious impact on public services).

The evaluation of the costs to the private sector should be a particular priority in the case of draft laws that will affect the way in which business operates. The determination of the costs for the private sector may be based on the evaluation of the proceeds from it to the public sector. For example, the anticipated revenue from a new tax may be used as an indicator of its financial implications for business.

Draft laws may also have other implications for business costs. A law may require, for example, that certain technology is introduced or that certain safety or security standards are applied and such derivative costs must also, as far as possible, be taken into account. A draft law may also affect the way companies and consumers act within the market. For

example, draft laws, if adopted and possibly even before adoption, may have an impact on market competitiveness as a result of provisions affecting education, infrastructure, access to know-how or access to capital. It should be established whether a draft law is likely to enhance or restrict the competitiveness of enterprises and, if so, to what extent.

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

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

#### 1.5.4 Evaluation tools and methods

Evaluating the effects of legislation means, as a first step, developing sensible assumptions and hypotheses concerning the potential or real causal connections between legal norms and observable attitudes, behaviours and situations; and, as a second step, testing the validity of these assumptions by using all the relevant experience, information and knowledge that is available, or can be made available in time and with reasonable effort.

One of the most important questions is, of course, what are the practical means of evaluating legislation. This varies according to, among other things, the distinctive circumstances of each case, the specific criteria that are to be considered, the perspective (*ex ante* or *ex post*) and the degree of plausibility and reliability of the results. So, for instance, prospective evaluation of the effects of a change in fiscal legislation on private savings does not call for the same techniques as retrospective evaluation of the

effectiveness of newly introduced safety standards in the construction industry or of the efficacy of new procedural rights creating equal treatment for disabled persons. Also, an evaluation that requires a scientific or quasi-scientific analysis will obviously be more expensive than one which seeks to underpin an impressionistic political assessment by a systematic use of practical knowledge and experience available within the responsible administrative service.

Evaluation relies principally on such techniques as practical investigations, modelling, simulations, forecasting, systems analysis, and scenario building. In other words, a large variety of sophisticated tools can be used separately or, better, in combination (“triangulation”) in order to get the most reliable and accurate results.

However, even these sophisticated techniques have their methodological limitations. They can rarely establish absolute causal connections. Nonetheless, they undoubtedly sharpen the drafter’s and the law-makers’ appreciation of this crucial aspect of the legislative process. They may additionally reduce uncertainty and contribute, in this way, to improving the quality of substantive legislative provisions. These evaluation techniques also have practical limitations because applying them needs time, money and personnel resources that are, in practice, not always available.

Drafters do not necessarily themselves need to be able personally to use these evaluation techniques, but they should at least know in which situations it would be possible and helpful to use them. For practical reasons, the drafter often has to choose more modest tools. Two such tools merit mention, particularly in the context of the typology of the effects of legislation and the graphic presentation of the causal connections.

The typology of the effects of legislation distinguishes different categories of effects; for example, intentional and non-intentional effects, expected and unexpected effects, positive (beneficial) and negative (adverse) effects, direct and indirect effects, immediate and delayed effects, visible and symbolic effects, and anticipatory and retroactive effects. These distinctions are able to sharpen the drafter’s awareness of the complexity and the multiple dimensions of causal relations in social reality.

The graphic presentation of the causal links between a legal norm and the observable social reality is a way of visualising the causal hypothesis. It helps to reconsider and examine these hypotheses critically. Of course, the graphic modelling inevitably simplifies the complexity of the potential or real causal connections. In practice, however, it helps considerably to become aware of certain weaknesses and shortcomings of the hypotheses that have been developed or of the analysis of causal connections. Analysis of the relevant social and institutional actors, the objectives of the legislation and of the activities addressed by the legislation are all useful starting points for creating a graphic presentation.

## 1.6 Codification

Codes do not have the same objectives, and are not subject to the same dynamics, as ordinary legislation. Laws establish norms and operate within a limited time frame. Codes, however, assemble the norms and are intended to have a degree of permanence, to be coherent and comprehensive.

The traditional formal underlying concept of codification is that of *consolidation*, aimed at gathering together existing all statutory provisions in a given area, but not altering the substance of the provisions, or indeed their drafting, except to ensure that they are coherent as a collected text and reflect the existing hierarchy of legal norms. However, if there is a substantial conflict with that hierarchy, formal amendment of the text of a provision may be required before it is made part of the consolidation.

Codification is accordingly an activity that aims at responding to the complexity of law by simplifying access to its norms. But legislative work does not stop when a code is published. The legislature continues to draft laws, either modifying the code or ignoring it. There is consequently the risk that a code will only be a statement of the law at the time it is published, but will be little use as a continuing accurate statement of contemporary law or as a vehicle for the development of a legal system.

### 1.6.1 Objectives of codification

The legislation of modern states is characterised by several shortcomings.

Firstly, there is the proliferation of law. Commonly, it is not known how many, or sometimes even approximately how many, operative legal texts there are in a given country. These texts will encompass many forms of law: international treaties, European law (directives and regulations), national law, legal norms of local authorities, ministerial orders, regulatory circulars and so on.

Next, there is the accumulation of legal texts. When new laws are enacted, there may be a failure to take stock of the existing legal texts and to repeal contradictory or useless provisions. It would certainly require a detailed legal analysis to check the conformity of the extant texts with, for example, the Constitution, international treaties or European law. Sometimes slight transformations of a concept across various legal texts make it difficult to replace them easily; this can arise, for example, in the context of decentralising power or allocating responsibility or even compiling a database. The number of laws thus continues to increase. The user may get lost in a maze of laws, there may be administrative uncertainty in the application of laws, and the number of disputes can increase.

Finally, laws are unstable. Some laws or an article of a law may be modified frequently, sometimes several times in the course of a single year. It may thus be difficult to know what legal text is in force, and this is very harmful to legal certainty.

There are a number of causes of these phenomena. Some are related to the evolution of society: changes in habits, scientific discoveries, new technology and globalisation. Others stem from political factors; for example, a new government may feel the need to significantly alter the legislative framework created by the previous government. Sometimes the causes can be traced to factual or legal misconceptions or inadequate legislative drafting.

These three major shortcomings of laws – proliferation, accumulation and instability – undermine the effectiveness and coherence of the law generally. Furthermore, in a democracy, law should be easily accessible and readily available to the user.

Codification is one solution to these problems. It aims at achieving the classification and organised integration of norms within a particular field of jurisprudence. This certainly has the advantage of reducing the proliferation of legal texts. However, codification is sometimes criticised for having a restricting effect on the drafting and organisation of laws and, where the code is not sufficiently flexible in its structure, for unduly complicating an area of law.

#### 1.6.2 Procedure of codification

Codification may have two rather different objectives.

One is to reform the law as well as to organise it systematically. This is attractive because it is innovative. It consists of redrafting and reformulating a legal domain with the integration of new concepts and the creation of new norms. This ambitious codification requires a great deal of time and application, and it is not always successful.

Secondly, there is codification of the existing law by simply consolidating the texts. This is more modest in its aims, consisting of gathering and structuring the law in force as it stands and not as it should be. It does not involve creating new rules, but a stocktaking that paves the way for any necessary reform. This type of codification has the advantage of simplifying access to law.

The rule is that codification observes parallelism of forms, which means that the body competent to adopt a norm is also competent to codify it.

Codification is systematic. It involves the codification of an area of the law in accordance with a programme drawn up in advance. This programme permits the classification of laws according to their subject matter, which may be codified in different codes.

It is thematic, in the sense that it aims at constituting a system of law, containing a coordinated collection of laws and delegated legislation within the same corpus. In each system an interdependence of elements aims at a common goal. It is therefore necessary to create, for each code, a homogeneous and coherent collection without bottlenecks or overlapping.

Codification is a difficult intellectual, political, legal and philosophical exercise because it fundamentally involves structuring the law by deciding in which code a given legislative text should be included. For example, should the law on commercial tribunals appear in the code on judicial organisation or in the commercial law code? All codes are confronted with such classification issues.

A code gathers and incorporates all relevant national primary and delegated legislative provisions. Accordingly, international and European norms, acts of local authorities, jurisprudence, and circulars would not normally be included. Such a delimitation allows the code to gain in homogeneity and clarity and these are qualities which might be lost if the scope of a consolidation was expanded.

Sometimes it is suggested that codification should include evaluating the legislative norms in the field of law to be codified. According to this notion, there are fundamental laws and others, and fundamental laws should not be brought into a codification. In reality, there is no sense in selecting laws according to their reputation, superiority or quality. Nevertheless, in the interests of simplicity, it is wise to preserve the unity of great fundamental laws in a given area, particularly if these laws are well known to users. So, obviously, provisions of the Constitution even if they were relevant to the subject matter of a code would, for this reason amongst others, not be included in the codification.

First and foremost, a codification contains the contemporary law in force, that is, the applicable law. To achieve this, laws that have been repealed (explicitly or implicitly), and transitional or temporary provisions that are no longer effective, must be identified; so must norms that are useless, that have never been applied or have become obsolete. This exercise may be difficult since the administration itself does not always know whether a text continues to have utility, in the sense of whether it still has any contemporary practical application, for instance in the case of granting social assistance. It is therefore important to maintain the coherence and continuity of law in order to avoid contradictions and deficiencies. This can raise serious analytical problems where there are many layers of laws.

Codification is carried out in the context of the inevitable developments in the computerisation of law and in information technology. It should be recognised that information technology, through its rigour and virtually inexhaustible memory capacity, contributes significantly to the quality of codes by facilitating their updating.

The Albanian Constitution acknowledges the importance and special nature of codes by requiring a qualified majority vote for their approval in Parliament (see article 81.2 of the Constitution).

## II. LEGISLATIVE PROCEDURE

### 2.1 Complexity of the legislative procedure

Laws result from a complex process of interaction and coordination of the various players involved in the legislative process. The quality of laws therefore greatly depends on the organisation of the legislative process and the co-operation among these players.

The process of preparing draft legislation may take a variety of forms and methods. Draft laws may be developed by the administration, by the ministers' offices, by the research centres of the political parties or sometimes by organisations outside government, such as universities or law offices.

When a government authority prepares a draft law, it must consult other relevant state authorities on the draft text. A draft law together with its explanatory memorandum must be sent to ministries and other institutions with an interest in it (Law on the Council of Ministers, Article 24, paragraph 1), and to the Ministry of Justice, which is required to give an opinion on the legality of its form and content (paragraph 2; and see further 2.4.2 below). Failure to comply with these provisions may result in the Secretary General of the Council of Ministers returning the draft law to the proposing ministry for the required procedural action to be taken (paragraph 3).

Often, consultations extend to a wider circle of external interested parties. If the draft legislation is initially prepared by bodies such as commissions, inter-ministerial committees (Law on the Council of Ministers, Article 11) or expert working groups (Law on the Council of Ministers, Article 12), interested parties commonly have the opportunity to be represented in them. Such bodies can also invite relevant organisations or individual experts to present their views directly to them.

The legislative process itself generally involves the following stages:

1. Preliminary drafting;
2. Internal consultation among governmental authorities;
3. External consultation;
4. Discussion and approval by the Council of Ministers;
5. Parliamentary process;
6. Promulgation by the President and publication;
7. Follow-up to the implementation of the law.

The total preparatory work on legislation often takes place over quite a lengthy period. It is therefore expedient, as early as possible in the process of preparing legislation, to establish a timetable covering each phase of the task, up to the introduction of the draft law in the Assembly. The timetable serves to ensure that adequate time is allotted to the individual phases within the total period of time available. This has important implications for the quality of laws. Without a timetable, it is the common experience that

the time made available in the preparation of legislation for the actual drafting of the legislation often proves to be insufficient

## **2.2 Governmental legislative programme**

The coherence of the legal system may be greatly facilitated by establishing short, medium and long-term legislative priorities by means of appropriate planning and programmes. Such programmes give an overview of the sequence of the legislative activity, thus avoiding the situation that a particular law cannot be enforced because of the absence of some other enabling legislation. The basic framework norms have to be adopted in advance of the special norms, and laws that empower the making of subordinate legislation must obviously precede it. Such planning and programmes also facilitate the coordination of the drafting work between various ministries, especially in the preparation of complex laws.

Efficient law drafting requires a scrupulous planning of the legislative work at the governmental level. The principal planning tool for the legislative activity of the Government is the annual legislative programme providing a structured presentation of the draft laws that the Government intends to prepare and introduce during the given year. This programme is prepared in co-ordination with the legislative programme of the Assembly (Law on the Council of Ministers, Article 27/2).

The Prime Minister co-ordinates the process of the preparation of the annual analytical programme and of that of its subsequent submission to the Council of Ministers. See Chapter II of the Rules of the Council of Ministers.

Apart from a planning function, the legislative programme provides the Assembly and all interested parties with an overview of the draft laws through which the Government intends to implement its policy during the year. Furthermore, the legislative programme and the process of preparing and implementing the programme serve as instruments of control for governmental work.

## **2.3 Preliminary drafting**

### 2.3.1 Organisational arrangements

It is desirable for the appropriate organisational arrangements for preliminary drafting to be decided at the beginning of the legislative project; the decision is normally taken by the responsible minister but it may be by order of the Prime Minister.

The drafting task may be assigned solely to officials from the ministry concerned, to an inter-ministerial committee (see Law on the Council of Ministers, Article 11) or to an expert working group, which may have a membership from both within the administration and outside it (see Law on the Council of Ministers, Article 12; and 2.3.3 below). There are some other methods used in other countries for handling

organisational matters, such as, for example, entering into a contract with a party in the private sector for the preliminary drafting according to a specific mandate.

### 2.3.2 Drafting within the administration

In general, the administration will carry out the preliminary law drafting itself where it has the necessary personnel resources and when the topic of the draft law does not require recourse to external resources and knowledge.

Accordingly, draft laws that, from a factual and political perspective, are regarded as uncomplicated will be prepared solely within the responsible ministry or ministries. This may also be the case in other circumstances, such as when the legislation is urgent.

A responsible ministry may also take the lead in drafting where it appears that a sufficient consensus or representation may not be achieved during the preliminary drafting stage, and that this is likely to impede the smooth progress of the legislative initiative.

In practical terms the drafting work should be assigned to a single or a limited number of the ministry's officials. If necessary, these persons may maintain informal contact with officials from other authorities.

### 2.3.3 Expert working groups

Expert working groups, which may include members from outside the administration, tend to be established where the scope of the proposed legislation is extensive or if it seeks to establish or modify fundamental principles.

Such working groups may have significant advantages. Providing that the group is set up in an expedient way, it will ensure that the interests of other affected authorities are represented, and that the necessary and relevant knowledge is available within the group. In this way the views that should be taken into consideration from the outset of the law-making process can be put forward openly and discussed. This reduces the risk that the draft law will be rejected or strongly criticised at a later stage. There is also a perception that draft laws prepared by working groups are often more thoroughly prepared than draft laws which have been drafted solely within the administration.

Working groups may also have their disadvantages. They may, in practice, be time-consuming. The general experience is that a working group often takes longer to complete a task than an organisational structure entirely within the responsible ministry. This may be a consequence of practical factors such as the size of the working group and the difficulty of getting the members together for regular meetings. It is also a general experience that a working group absorbs significant resources of its members, especially those of its president and secretariat. These factors can be mitigated by an expedient composition of the group and a carefully prepared and flexible organisation of the group's and the secretariat's work.

A working group is established by order of the Prime Minister or an act of the responsible minister. The instrument establishing the group should contain the following elements:

- the terms of reference of the group and the period within which they are to be executed;
- the members of the working group, including specifying its president and vice-president;
- the reporting obligations and procedures for informing the general public;
- questions relating to copyright in the materials prepared by the working group;
- the requirements of professional confidentiality;
- the relationship between the working group and other organisations;
- the designation of a secretariat;
- the budget, in particular, credits for specific tasks and important expenditure items;
- the duty of the administration to provide information to the working group.

The working group may determine further details of its operation and organisation in its own internal regulations.

In addition to representatives from other ministries and state authorities with a direct interest, a working group may include as members (or, where permitted, co-opted members) politicians and experts, including foreign experts, on the matter in question. These experts may come from other authorities, universities or the judiciary, as well as from private organizations.

The members of working groups should be chosen on the basis of their knowledge of the subject matter, their aptitude for teamwork and their availability. The membership of a working group should have a balanced representation of the sexes, regions, age groups, the scientific community and persons active in the area concerned. A working group should also be composed of members representing the principal disciplines related to the operation of the proposed law to encourage an interdisciplinary approach.

There are other arrangements which can be adopted by a working group to involve those with a particular knowledge of the subject or who are likely to be affected by the proposed legislation. Working groups may hold meetings with experts, for example to clarify detail. Experts may be approached for their comments once the working group has drafted its proposals. Similarly, it is possible to consult officials of other authorities, who are not members of the group, on an *ad hoc* basis.

The secretariat of a working group should be provided by the ministry responsible for the legislative project, and it is normally assumed by the person in charge of the project. The secretariat functions include:

- maintaining a list of members of the working group (name, position, authority/organisation, profession, contact details);
- drafting and keeping the minutes of the working group's meetings and decisions;

- drafting working documents presenting, *inter alia*, the initial situation, advantages and disadvantages of various options, and other documents facilitating the proceedings of the working group;
- carrying out other tasks requested by the working group.

A working group reports to the authority that established it, normally the responsible minister. However, it may be established with a degree of independence from the ministry by imposing on it a duty to report directly to the Council of Ministers.

On the basis of the report, the body receiving the report decides on the follow-up procedure and whether the report of the working group is published.

#### 2.3.4 Alternative solutions

In some cases it may be appropriate to adopt other organisational arrangements for the preliminary drafting of legislation.

For example, it may be recognised as desirable to have the benefit of opinion from outside the administration time but time constraints may not make it feasible to establish a working group.

In such a case, an alternative would be to prepare a background note on the proposed legislation within the ministry, which contains an account of the issues and outlined various models for addressing them. The note could then be submitted for comment to relevant authorities and organisations prior to the drafting of the law. By this means, salient opinions and arguments would be available within the ministry when the first drafts of the law are being prepared.

Another arrangement would be to establish an informal consultative group to which draft laws promoted by a ministry could be submitted. The group could meet as required to form a view on the drafts which it received.

In special circumstances it may be appropriate for the ministry to hold oral hearings with a view to clarifying issues that it intends to address by legislation; such hearing could be held before a text was drafted or at some later stage of the preparatory process.

## **2.4 Internal consultation**

### 2.4.1 Consultation of other governmental departments

A ministry proposing a law must send the draft law and an explanatory statement about its object, purpose and content to other ministries and institutions with an interest in it (Law on the Council of Ministers, Article 24, paragraph 1). Such bodies may request that this material be sent to them if they have an interest and have not been consulted by the promoting ministry.

The proposing ministry must also submit the draft law to the Ministry of Justice for it to give an opinion on the legality of its form and content (Law on the Council of Ministers, Article 24, paragraph 2; and see further 2.4.2 below).

A draft law with economic or financial implications must also be submitted by the proposing ministry to the Ministry of Finance, or the Ministry of Economy, or both ministries (Rules of the Council of Ministers, chapter IV, paragraph 23).

Draft laws should also be sent to the Ministry of European Integration, which will assess their compatibility with the *acquis communautaire* (see 4.5).

Consultation with the administration may also involve referring the draft law to standing expert bodies, such as the Legal Reform Commission, an advisory organ to the Minister of Justice.

Where significant difficulties or differences of opinion arise during internal consultation, they should be resolved by direct discussion.

Following internal consultation, the proposing ministry should review the draft law in the light of the comments received, and should inform those consulted of the outcome of that review.

It should be noted that a draft law submitted to the Council of Ministers that fails to comply with the provisions of the Law on the Council of Ministers may be returned by the Secretary General of the Council to the proposing ministry for the required action to be taken (Law on the Council of Ministers, Article 24/3).

#### 2.4.2 Opinion of the Ministry of Justice

Draft laws must be submitted, without any exception, to the Ministry of Justice for it to give an opinion on the legality of their form and content (Law on the Council of Ministers, Article 24/2). This is one of the activities undertaken by the Directorate of Legislation and Legal Assistance in performance of the statutory duties of the Ministry (Law on the Ministry of Justice, Articles 6 and 10/2). As the Ministry of Justice is often pressed for time in giving its opinion, the draft law should be submitted, in a sufficiently complete form for the evaluation to be made, well in advance of the meeting of the Council of Ministers at which it is expected to be discussed. Again, it should be noted that a failure to submit the draft law to the Ministry of Justice before submitting it to the Council of Ministers will almost certainly result in the draft being returned by Secretary General of the Council to the proposing ministry for the required action to be taken (Law on the Council of Ministers, Article 24/3).

The examination of draft laws by the Ministry of Justice serves two main purposes.

Firstly, the draft law is examined to establish that it complies, and is consistent, with the Constitution, general legal principles, laws of general application and applicable

international law. See also 4.5 below on the approximation process. Where the proposing ministry considers that a draft raises complex questions in relation to these matters, this should be specifically mentioned in the covering letter when submitting the text.

The Ministry of Justice does not address the political need and policy requirement for draft laws emanating from other authorities, but often does consider whether consequential amendments to other laws, or the draft law itself, are required, or whether the formulation of a proposed amendment has been duly adapted to other legislative provisions.

Secondly, there is a technical evaluation of the way in which the law has been drafted. This should include whether the text of the law has been prepared correctly (perhaps referring to the rules set out in this Manual), whether the structure of the draft is effective and whether the explanatory memorandum is adequate.

However, it should be noted that it is the primary responsibility of the proposing ministry to ensure the quality of its draft laws. This can be best discharged in that ministry, where the necessary technical and legal knowledge should be available. It is, therefore, important that the legal units of ministries have sufficient resources to perform this task.

## **2.5 External consultation**

### 2.5.1 Purpose and value

The preparation of legislation should not, in principle, be confined to state bodies. The legislative process should be transparent and should seek to allow for the consultation of external experts, interest groups, and non-governmental organisations, as well as of the civil society and the public in general.

External consultation allows for expression of the maximum range of legislative proposals from institutions and citizens. It provides political exposure of social issues and puts them on the agenda of the policy makers. Consultation is of particular utility in the evaluation of the effects of legislation, determining its real impact and possible side effects (on evaluation see 1.5). The involvement of interest groups with knowledge and experience in the relevant field will supply the drafters of the legislation with crucial information that may otherwise not be available.

In general, external consultation enables a broad range of persons and institutions to contribute to the preparation of legislation and provides an opportunity to ascertain the views of those who are likely to be affected by the legislation. It should thus increase the opportunities for constructive dialogue and so improve the policy and the substance of the legislation.

A primary reason for seeking greater levels of consultation is the need to ensure stronger general acceptance of the legislation. In order to promote open, transparent and

democratic decision-making it is important that the citizens have broad access to, and information about, legislation.<sup>6</sup> Consultation in the legislative process has an important democratic potential in that it gives civil society the opportunity to have a greater say in the design of legislation. By allowing the expression of different opinions, the legislation will gain in acceptance, as the awareness of being part of the process will raise consciousness among the addressees of the legislation about the need to respect legal norms. The feeling of being able to influence the legislative procedure will contribute to a higher level of compliance.

Law is not merely a command imposed by force and inherently legitimate, it is also a process for regulating social behaviour. Its effectiveness depends on the support it receives from those concerned with it, and accordingly this implies a need for broad consultation. It is important to be aware of the attitude towards the draft laws of those affected by it. Consultation also gives the opportunity for the addressees of the future legislation to learn about its provisions and adjust their behaviour accordingly. Legislation will thus be more easily accepted and, consequently, more effective.

External consultation also plays a role in maintaining the technical quality of legislation. Because of the increasing diversity of social and economic processes the corresponding legal regulatory framework is rapidly increasing in complexity. Those preparing legislation are faced with increasingly higher risks of error or miscalculation in the design of legal norms. Consultation of interested parties during the legislative process is one obvious way of remedying this.

Finally, external consultation in the legislative process facilitates the democratic scrutiny of the work of the executive by the Assembly. Analysis of the results of public consultations will provide the Assembly with an opportunity to understand better the issues raised by a legislative proposal.

These advantages suggest that it should be normal practice to submit draft laws to external consultation, and that such consultation should be an inherent part of the activities of institutions involved in the legislative process throughout the law-making cycle – from the shaping of policy to final adoption of a law and its implementation.

That said, it should also be recognised that there may be practical limits to the use of external consultation. So, as previously indicated, time constraints on the drafting of legislation, or the urgency of enacting it, may simply preclude effective consultation.

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<sup>6</sup> In this respect, the Council of Europe Recommendation No. R(2002)2 on access to official documents underlines that “public authorities should commit themselves to conducting an active communication policy, with the aim of making available to the public any information which is deemed useful in a transparent democratic society.” Principle XI of the Recommendation lays down, in particular, that “a public authority should, at its own initiative and where appropriate, take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.”

There are democratic limits to its use. Ultimately, enacting legally binding legal norms is within the competence of authorised state institutions, that is, the Assembly and in some circumstances the Government. Consultation can only be a complement to this legislative competence but cannot be allowed to replace it. Interest groups should not determine the public agenda, and certainly should not be given a *de facto* veto over legislative proposals being considered by the democratically elected representatives of the people. Consultation should not become a tool for substituting the general interest with the narrow interest of interest groups. However, it is not necessary to view wide public participation and the functioning of the representative democracy as conflicting processes.

As a final practical matter, where consultation is undertaken, it should as far as possible be completed prior to the introduction of the draft law in the Assembly. There are considerable drawbacks if time constraints make it necessary to undertake consultation later than this. For the consultation to have any real meaning the ministry will be faced with the difficult task of preparing its considered comments on the submissions within a very short period before the Assembly's first reading of the draft law. Similarly, there will be little time for the ministry to draft amendments, if it is decided to adopt some of the proposals resulting from the consultation.

### 2.5.2 Consulted Parties

It is naturally not possible to specify all the external parties who should be consulted on draft legislation. However, as a general rule, all those who are likely to be affected by the draft law at a practical level, or at a more general level in respect of its principles, should be consulted. In any event, it is better to consult too many rather than too few.

Where external consultation is to be undertaken, it is necessary to decide whether the consultation should be targeted by limiting it to invited persons and organisations that are known to the ministry as either expert in the subject matter of the legislation or representative of interests likely to be affected by it. An alternative strategy is to open the consultation to the public at large. It is also possible to combine the two strategies by having wide public consultation and also inviting responses directly from specific persons and organisations, possibly inviting responses from the two groups on parallel but different issues. The strategy adopted will depend on the nature of the legislative initiative and may also be influenced by factors considered in later sub-paragraphs, such as the nature of consultation documents (see 2.5.5) and the use of information technology (see 2.5.7).

Consultation by invitation is more focussed and can be structured in a manner that is most helpful in furthering the legislative initiative. The response rate from the invited participants is likely to be higher than in a broad public consultation, and the responses received are likely to be more informed and sophisticated. It is also easier to administer and process the responses because their number can be predicted. However, it has the weakness that the proposing ministry may limit the value of consultation by its decisions on the appropriate persons and organisations to invite. For targeted consultations, it is

very important to ensure that the invitation to participate in the consultation is addressed to a wide and representative range of stakeholders, those likely to be affected by the proposed legislation or to be required to apply it.

An authority conducting a consultation should give an indication of the target group of the consultation and also provide sufficient information to enable those consulted to assess the issue under consultation. A practical solution for identifying stakeholders in targeted consultations is that institutions and organisations be invited to specify to the administration the subjects on which they would wish to be consulted. The institutions and organisations could also be invited to specify persons within the organisation to whom consultation requests should be addressed and who would be responsible for distributing the requests to the most appropriate individuals within the organisation to respond to them.

Wide public consultation is less focussed, but the participants are not predetermined by the ministry. This may result in a wider range of views being received, but the general experience is that the responses are likely to be less well-informed and more voluminous. Where there is a high response rate, the responses may tend to be somewhat repetitive and may also prove to be difficult to administer and process.

Another strategy is to combine the two types of consultation. This may often impose quite a severe administrative burden on the ministry, because two parallel but different management systems have to be established to process the responses. However, it does have advantages. The proliferation of consultation, which has increased in the Internet environment, may also bring about negative effects, as consulted parties may find themselves overwhelmed by consultation requests and may not be able to pay sufficient attention to them. So, as well as general public consultation with no specified target groups, it may also be desirable to conduct targeted consultations among bodies and organisations most affected and interested in the initiative in question.

### 2.5.3 Transparency

Consultation is a key precondition for transparency in decision-making and, where undertaken, should itself be implemented in accordance with the highest transparency standards. Badly organised consultation may be counterproductive and may inhibit the acceptance of legislation.

Consultation should ensure adequate and equitable treatment of all parties in the consultation process. The authority conducting consultation is inevitably faced with contradictory opinions generated by the different interests of those participating in the consultation. The administration must therefore demonstrate impartiality and integrity in its policy choices, providing for appropriate distance between the legislator and those who are particularly interested in the adoption of the legislation in question.

Where consultation is to be undertaken, the following should normally be publicly available to those who may wish to participate in the consultation by making submissions:

- A summary of the context, scope and objectives of the consultation, including a description of the specific issues that are open for discussion or questions with particular importance for the Government;
- Details of any hearing, meeting or conference, where relevant;
- Contact details and deadlines for submissions;
- Explanation of the government's processes for dealing with submissions, of feedback arrangements, and of the subsequent stages involved in the development of the policy;
- If it is not made directly available, there should be references to supporting and ancillary documentation.

#### 2.5.4 Timing

Consultation should be organised sufficiently early to allow for its results to be considered and taken into account. It is at the pre-parliamentary drafting stage of the legislative process that consultation is likely to have the greatest influence on the draft law. It may, however, be desirable, particularly in lengthy legislative initiatives, to undertake consultation at various stages of the process. This might, for instance, be particularly apposite to the preparation of a code.

Where there is a prospect of using consultation, it should be included in the timetable established at the beginning of the legislative project, so that sufficient time is allocated to conducting the consultation process and evaluating its results, thus maximising its value. For instance, care should be taken to set a deadline for submissions that is appropriate for the subject of the consultation and for those stakeholders likely to make submissions. So, the time allocated for consultation should take account of the internal institutional structure of these stakeholders, which may affect the time they require to prepare and agree on a submission.

The delay that is occasioned by an extended consultation period does not necessarily prejudice the effectiveness of a legislative project. Investment in good consultation may produce better substantive quality than if the legislation were to be adopted more rapidly, and it may also prove easier to apply and to enforce. The timing of consultation should strike a reasonable balance between the need for adequate input and the need to advance decision-making. So, for instance, the complexity of a given proposal or the diversity of affected parties might well be good reasons for extending consultation periods. It should also be borne in mind that an intensive consultation procedure will often ensure that subsequent consideration and adoption of the act can proceed more rapidly because many of the questions and problems have been discussed and resolved at an early stage of the procedure.

### 2.5.5 Consultation documents

To increase the efficiency and usefulness of consultation, it should be based on a concrete text, preferably supported by an explanatory memorandum. On such a basis, specialists who are consulted can make well-informed specific comments.

However, a different approach is recommended where the consultation takes place before a draft legal text is available or where the consultation is directed to the general public. In such circumstances, it may be appropriate to make available an analysis of the various policy options, or an analysis offering a range of policy options but indicating a preferred policy, and seek comments. The consultation document should be as clear and concise as possible. It should also include a summary, in two pages at most, of the main questions on which views are sought.

### 2.5.6 Evaluation of comments

It is essential that there is a careful analysis of comments submitted in response to consultation exercises. The comments may prove to be valuable in improving a draft law, in particular if they relate to a legislative text.

In evaluating a submission it is useful to consider the objective feasibility of its proposals, how they relate to other submissions received, and how easy it would be to incorporate the proposals in the structure, or proposed structure, of the draft law. It may also be pertinent to bear in mind the qualifications and experience, representative status and any obvious motivation of the author of the submission.

The analysis should be made known to the appropriate authorities responsible for considering the legislation, primarily the Assembly and the relevant ministries and central state institutions. There should also be adequate feedback provided to those who have made submissions. In particular, the explanatory memorandum accompanying the draft legislation might incorporate an analysis of the consultation submissions as well as a statement of the executive response that has been made to them.

### 2.5.7 Information technology

Information technology, in particular the expansion of the Internet, has opened up new avenues for consultation in the legislative process. Internet consultations are easily accessible. Providing responses to consultation on the Internet is also more convenient and efficient than through the traditional media, thus encouraging more people to participate rather than just a narrow circle of experts.

Where necessary, the Internet also provides the government with the possibility of targeting those especially concerned by the initiative in question, in addition to a more general consultation. By allowing electronic interaction between citizens and the government and enhancing the opportunities for citizens to participate in the decision-

making processes, information technology allows for greater transparency and better quality legislation.

This is why it is a desirable objective to make proposed legislation and information on public consultation accessible on the Internet, thus enabling all interested parties to make comments. Government authorities should have a point of contact on the Internet for organising consultations, reviewing the comments received and providing further detailed information about the matter under consultation. Interested parties should also be able to submit their comments by e-mail.

Creating a well-publicised Internet site as a central access point for all consultations would facilitate transparency as well as the efficiency of consultations. The Government should publish on this site a list of public consultations undertaken by each relevant state institution providing a brief description of the legislative initiative concerned, the period for consultation, and the direct link to the Internet site of the relevant institution on which the consultation documents are electronically available and which should provide a means of electronic transmission of submissions. The central government site (portal) or the relevant institution site should also contain guidelines for citizens on how to contribute effectively to a consultation process and how to access relevant background information.

## **2.6 Submission to the Council of Ministers**

### **2.6.1 Government's Co-ordination Committee**

Prior to a draft law's submission to a Council of Ministers meeting, it is submitted to the Secretary General of the Council of Ministers, whose office is in charge of checking whether the formal rules of procedure have been observed, such as internal and external consultation, or whether the documents accompanying the draft are complete. At the same time the Secretary General evaluates whether the draft law results from a consensus of the interested ministries. Finally he assesses whether the quality of the draft is satisfactory from the point of view of legislative techniques and legal terminology.

In the case where the draft does not meet the procedural requirements such as consultation, the Secretary General rejects the draft forthwith and returns it to the proposing ministry, asking it to complete the necessary formalities (Law on the Council of Ministers, Article 24/).

If the required procedures have been observed, the Secretary General has to verify whether the submitted documents attest to sufficient coordination and absence of disagreements between authorities. In case of disagreements, the Secretary General assesses whether they are of a political or legislative nature. In the case of political disagreements the draft and accompanying documentation are forwarded to the Prime Minister's Cabinet. If necessary, after the political coordination mechanism, the draft law is submitted to the Inter-ministerial Committee. The final say in the co-ordination process rests with the Prime Minister.

In the case of legislative co-ordination the Secretary General organises technical consultations, and if there are only minor technical issues, he decides how the draft will be corrected. The draft is then submitted to the Council of Ministers meeting.

In the unlikely event of more extensive problems the draft is returned to the proposing ministry.

#### 2.6.2 Special rules concerning legislation providing for making delegated legislation

The ministry responsible for the preparation of a draft law providing for delegations to the same minister or the Government should, before the draft law is put on the agenda of the Council of Ministers, provide the Prime Minister's Office with a detailed report containing a provisional calendar on the preparation and submission of the envisaged delegated legislation to the Council of Ministers. This report should state their objective, the articles of the law that they will implement, the nature of the delegated legislation, a list of organisations whose consultation will be required and the expected dates of submission to the Council of Ministers.

The competent ministers must submit the draft delegated legislation required as soon as possible unless the time period for making the delegated legislation is specified in the law.

#### 2.6.3 Council of Ministers meetings

Draft laws are submitted to a Council of Ministers meeting for approval prior to their introduction in the Assembly. With a view to the discussion of the draft law at the Council of Ministers meeting, the draft law is forwarded with the explanatory memorandum. (Law on the Council of Ministers, Articles 19 and 25).

At the Council of Ministers meeting, the proposing minister is asked to give a brief oral account of the contents of the draft law and the other members are invited to comment (Rules of the Council of Ministers, Article 62). The minister should also discuss the draft law's possible connection to other legislation and its connection to the Government's programme. This account may also include a description of the preparations for the law, including results of the inter-institutional work and public consultations.

The explanatory memorandum to the law (see further 3.8.) should contain all necessary comments on the provisions of the draft law and also a description of the economic, social, commercial, environmental and international law related consequences of the draft law.

After being considered and approved by the Council of Ministers meeting, a draft law should be ready for immediate introduction in the Assembly. The Secretary General of the Council of Ministers should see that all the decisions and comments that have been

made and agreed upon by the ministers during the Council of Ministers meeting are reflected in the draft law.

## **2.7 Submission to the Assembly**

The Government's organisation of the legislative work must take place within the overall framework and according to the considerations jointly developed by the Assembly and the Government. The Assembly should be given the time necessary to conduct a thorough reading of the submitted draft. Simultaneously, the observance of the submission time limits is also a precondition enabling the Assembly to organise the legislative work in an expedient manner.

The Assembly has established the procedure for the enactment of laws (Rules of the Assembly, Articles 68-88).

## **2.8 Promulgation**

The President of the Republic has the constitutional power and duty to promulgate the laws after receiving them from the Assembly.<sup>7</sup>

## **2.9 Publication**

### 2.9.1 Role and effects of official publication

According to Article 117 of the Constitution, the normative acts of the Council of Ministers, ministers and other central state institutions acquire legal effect only after they are published in the Official Journal (see also Law on the Council of Ministers, Article 29). Laws enter into force after 15 days have passed from their publication in the Official Journal (Constitution, Article 84/3). The Official Publication Centre (OPC), which is under the authority of the Ministry of Justice (Law on the Ministry of Justice, Article 18) prepares and manages the Official Journal.

The publication of laws in the Official Journal has two functions. Firstly, it renders laws and delegated legislation binding and mandatory, and secondly, it brings them to the knowledge of the administration and the citizens. The publication in the Official Journal is therefore a prerequisite for legislative or regulatory provisions to produce a legal and a practical effect.

In cases of extraordinary measures, as well as in cases of necessity and urgency, when the Assembly decides with a majority of all its members and the President of the Republic gives his consent, a law enters into force immediately, but only after it is made known

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<sup>7</sup> Article 84 of the Constitution says: “1. The President of the Republic promulgates an approved law within 20 days from its submission. 2. A law is deemed promulgated if the President of the Republic does not exercise the rights provided for in paragraph 1 of this article or in paragraph 1 of article 85.” Article 85 of the Constitution permits return of the law by the President to the Assembly just once.

publicly. The law must be published in the first available issue of the Official Journal (Constitution, Article 84/4).

### 2.9.2 Publication of international treaties

According to Article 117 of the Constitution, international agreements that are ratified by law are promulgated and published according to the procedures provided for laws.

The texts of international treaties translated into Albanian, if the treaty has not been concluded in Albanian, must be published in the Official Journal. This requirement is mandatory for all international treaties ratified by the Assembly or signed and approved by the Council of Ministers only.

### 2.9.3 Organisation of the publication process

The Secretary General of the Assembly or of the Council of Ministers delivers to the OPC, respectively, the texts of laws or of delegated legislation to be published in the Official Journal.

To improve the efficiency of the official publications, the OPC should, at the same time, be provided with the relevant texts in electronic form. The use of the electronic form of manuscripts allows for the use of spell checkers and other more sophisticated software to help with validating the quality of texts.

With respect to voluminous legislative texts it is important that the Office of the President of the Republic, the Assembly and the Government establish a permanent co-operation with the OPC and, as the case may be, create *ad hoc* IT systems for special issues of the Official Journal.

In order to avoid errors in the Official Journal and multiplication of corrigenda, it is important to ensure strictly that copies of the texts of laws sent for publication are rigorously in conformity with the original.

### 2.9.4 Directory of legislation and index

To facilitate access to the laws published in the Official Journal, the OPC should produce yearly tables of publications, arranged in chronological order and according to a thematic classification.

A directory of all legislation in force would also be useful. Use should be made of indexation that will allow for attributing the legal acts to a particular legal domain (such as trade, agriculture, and so forth), attributing key words for search by subject and creating links between various acts, for example between an amending act and the basic act.

### 2.9.5 Use of IT in publication of law

Application of new information technology should be encouraged in order to facilitate access to law. Electronic dissemination provides easier access to law at a lower cost, because the law in electronic form reaches a much broader audience than the traditional printed media. Putting information on-line opens the way to areas of law that were previously inaccessible. Electronic legal databases provide wide-ranging possibilities for access to consolidated texts, use of search engines, thesauruses and other technological means facilitating retrieval of legal texts. Information technology tools help better structuring of legal information databases and easier navigation to improve the retrieval of legal information. They enable placing a particular piece of legislation within its context by the use of technological tools such as hypertext links. In the contemporary world of globalisation, electronic legal databases accessible via the Internet provide the possibility to consult legal texts across national borders.

A complete transition to electronic dissemination might, however, hinder access to law for those who cannot use, or have no access to, information technology. For this reason dissemination through printed media remains necessary. Printed media must also be retained for the reason that the electronic database information is still provided for information purposes only and remains subject to disclaimers of legal liability for damages that may result from inaccuracies in the electronic text.

### **2.10 Monitoring laws**

It is a central task of the Government and responsible ministers to monitor the effect of the legislation adopted in the field of its competence and to propose any necessary amendments. The minister must, among other things, ensure that laws fulfil their purpose, that the basis and practical need for them continues to exist, and that their objectives continue to be relevant in contemporary society. The minister should also monitor, on a regular basis, the technical quality of legislation produced by his ministry. This should include consideration of whether the legislative provisions are, in practice, ambiguous as a result of, for instance, a lack of clarity in the legislative text or its explanatory memorandum.

A ministry can gain such knowledge from a variety of sources. The best and most reliable retrospective evaluations use the different qualitative and quantitative methods and techniques familiar in the field of social sciences such as interviews, observation, text analysis and synchronic and diachronic statistical comparisons between target populations and populations not exposed to legal change. The minister may also ascertain the effects of legislation from sources such as case law, information from subordinate authorities, professional articles and studies, and approaches from interest groups, trade organisations and individuals with specific concerns. Furthermore, a minister may have the benefit of multidisciplinary analyses, reports and statistics which are frequently prepared on developments within particular fields of law. Finally, important material is often compiled in connection with the parliamentary control of the effect and

administration of the legislation, particularly through questions to the relevant minister and the tabling of private member's draft laws or proposals for parliamentary resolutions.

The organisation and more explicit contents of an evaluation depend on the character of the given legislation. The appropriate model for monitoring a law will vary from law to law, but the technique to be used in each law should be detailed in its explanatory memorandum. Each ministry should regularly consider means for initiating monitoring schemes.

### III. LAW DRAFTING TECHNIQUE

Certain fundamental principles of law drafting always remain constant. One of them is that legislation should be consistent, coherent and clear. These requirements are best met by applying uniform drafting techniques that can provide clearly defined, consistent and predictable guidance for the structure and expression of legislation.

It is obviously impossible for the drafter to address all future circumstances. Nevertheless, the drafter should express the basic ideas and objectives of the law with a high degree of precision. It sometimes happens that laws are drafted in an intentionally vague manner and linguistic style, relying on the practical application of the legislation to give them the effect intended by the drafter. The result may well be that such essentially symbolic laws will have only a minor practical impact or are in effect declarative in character.

#### 3.1 Accuracy versus clarity

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

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

Laws should address the specific and not the hypothetical.

Legal concepts should be expressed in terms that are as absolute as possible in order to leave less room for alternative interpretations. This is particularly true of provisions that empower the state to interfere with the rights of the citizen (e.g. in the form of a penalty, confiscation, withdrawal of authorisation, levying taxes, rates and dues etc.). It is important that such provisions are certain and predictable.

The statement of a general legal rule should not be overloaded with exceptions, limitations or deviations. Where there is a need for the general rule to be qualified, the rule should be clearly expressed first and the qualifications expressed in the subsequent paragraphs of the article or in subsequent separate articles. The phrase “as a rule” should not be used, unless the exceptions or the grounds for exception are specified.

Legislation should be drafted in as plain a language as is consistent with accuracy. Plain language drafting assists efficiency; it is easier and faster to read and queries are reduced. It may also have a practical advantage for the drafter in that attempting to reduce complex legal language to more plain language may well expose legal and logical problems which were not easily identifiable in more opaque language and which need to be corrected.

That said, plain language drafting is not the general panacea claimed by some of its proponents.

First, technical language may express recognised and complex legal concepts more accurately and shortly.

Secondly, the text of a law should be as far as possible protected from legal challenge. When that is the case, plain language drafting may not be as effective as it first appears when it is tested against the criterion that it can be understood by the reader.

A balance between precision and comprehensibility should be struck depending on the type of the law in question and its addressees. It should, however, be recognised that legislation of general application has multiple categories of user. Thus, fundamental laws should be comprehensible to everybody, whereas laws regulating specialised matters may use more technical drafting language. Thus, constitutional provisions should be drafted in plain language; so should provisions at the other end of the legal hierarchy – for example, in the code of practice for driving vehicles – because a considerable number of people are likely to refer to them. On the other hand, legislation may be drafted for a limited highly technical audience where the drafter is excused or even encouraged to use language which would not be “plain” to the lay person; for instance, areas of financial regulation or the type approval for vehicles.

Ideally, laws should be both accurate and clear, but it is not always possible to achieve this, especially when dealing with complicated subjects. There are often other constraints, such as shortage of drafting time, that make plain language drafting an ideal difficult to achieve in reality. If there is a tension between accuracy and the use of plain language, accuracy must still be the primary objective. Ideally, legislation should be accurate and clear – but it must certainly be accurate.

### **3.2 Structure of law texts**

The *divisions of a law*, in descending order, are:

- 1) Parts;
- 2) Titles;
- 3) Chapters;
- 4) Sections.

The basic structural unit of a law text is the article.

The *divisions of an article*, in descending order, are:

- 1) Article;
- 2) Paragraph;
- 3) Sub-paragraph;
- 4) Sub-sub-paragraph.

### 3.2.1 Divisions of a law

*Parts:* These are used in the most comprehensive law texts, such as codes. They are numbered consecutively, either “First Part,” “Second Part” or “Part I,” “Part II” and so forth.

*Titles:* It may be necessary to divide Parts further into Titles (each containing several chapters), numbered consecutively with Roman numerals. For example, “Title I” of “Part I” of the Civil Code lists the subjects of the Code, “Title II” provides for the rules on representation, “Title III” governs transactions and so forth.

*Chapters:* In the case of an extensive law, generally of more than 15-20 articles, it is better practice is to gather articles with similar subject matter into chapters with appropriate headings. Chapters are numbered consecutively with Roman numerals, thus: “Chapter I,” “Chapter II” and so forth.

*Sections:* Articles of a chapter with a similar subject matter may be further grouped into sections. Sections are numbered consecutively with Arabic numerals, thus: “Section 1,” “Section 2” and so forth.

*Headings of divisions of a law:* The headings of divisions of a law form part of the text of the law. Consequently, like the rest of the text, they should be worded precisely so that they do not give rise to questions of interpretation. Headings should be brief but should indicate the subject matter of a division.

### 3.2.2 Divisions of an article

*Articles:* are the basic structural divisions of a law. The design of an article should assume that the article is to be read as a unit. Each article should be kept to a manageable length. Articles should be numbered consecutively with Arabic numerals, thus: “Article 1,” “Article 2” and so forth.

It is often expedient to provide a title for an article to facilitate the comprehension of the text; as with headings to divisions of an act (see 3.2.1), care should be taken with this as it may affect the interpretation of the article.

For the numbering of articles in the form of amendments, see 3.6.4.

*Paragraphs:* are the principal divisions of an article.

As a general rule, an article should not have more than three or four paragraphs. Where more paragraphs than that are needed, the drafter should consider dividing the text into a number of articles.

Individual paragraphs of an article are numbered with Arabic numerals followed by a stop: “1.”; “2.”; “3.” and so forth. When the article has only one paragraph, that paragraph should not be numbered.

A paragraph should comprise at least one full phrase. It can only be considered a paragraph when the text starts from a new line and the previous line ends with a full stop. It is also considered as a single paragraph when it starts with introductory words followed by sub-paragraphs.

On indicating the relationship between paragraphs, see below.

*Sub-paragraphs:* are the principal divisions of a paragraph.

Sub-paragraphs are referred to by lower-case letters with a bracket, thus: “a)”, “b)” and so forth.

Sub-paragraphs are used to clarify the text of a long paragraph, especially when it contains a number of different issues. However, there can be a danger that using sub-paragraphs may tempt the drafter into what is in fact a long sentence. The drafter should be alert to this and contemplate dividing the text into a number of shorter sentences rather than using excessive sub-paragraphing.

Sub-paragraphs should relate both grammatically and logically to the introductory words. For example, do not draft “the government agency has the following powers,” if these powers in subsequent sub-paragraphs do not themselves form a coherent list (for example “to appoint its own chairman,” “to issue licences,” “to own property,” “to report directly to the Minister,” “to meet monthly.”)

*Sub-sub-paragraphs:* a sub-paragraph should not be divided into sub-sub-paragraphs unless such division is indicated by numbers. The rules for numbering articles and sub-paragraphs in a progressive order apply to the numbering of sub-sub-paragraphs. The frequent use of sub-sub-paragraphs is not advisable, because it complicates the reading of the text.

### 3.2.3 Content of an article or a paragraph

It is desirable to state only one legal rule in an article or paragraph of an article. Experience shows that shorter articles and paragraphs are easier to follow than fewer longer ones.

### 3.2.4 Indicating the relationship between paragraphs

The relationship of paragraphs to one another in the same article is normally fairly clear if the article has been well ordered. Qualifications and internal cross-references may be

used to make it even clearer. However, if the drafter finds that there is extensive use of this technique, the structure of the provision should be re-examined.

*Examples* (where it is necessary to clarify the relationship between paragraphs (1) and (2)):

“subject to paragraph (1)”: paragraph (1) prevails over paragraph (2);

“notwithstanding paragraph (1)”: paragraph (2) applies even though it provides for rules different from those provided in paragraph (1);

“in accordance with paragraph (1)”: paragraphs (1) and (2) are of equal status and contain consistent principles, but perhaps paragraph (1) contains a broad principle and the drafter wishes to clarify that paragraph (2) falls within or is an application of the principle, rather than being an exception to it.

### 3.2.5 Indicating the relationship between sub-paragraphs

Sub-paragraphs may be independent propositions linked by the introductory words, such as:

“the court may do any of the following:

- a) adjourn proceedings after conviction and publicly determine the sentence at a later date;
- b) order the confiscation of the proceedings of the crime;
- c) allow the convicted person to appeal;
- d) release the prisoner from prison pending an appeal.”

These sub-paragraphs do not really require an introductory formula or words indicating how they are linked, because they are independent propositions and the “actor” (in this example, the court) may choose to act on one of them, for example c), or more than one of them, for example, c) and d). However, for certainty, it is acceptable to add the words “any of the following.”

Sometimes the independent propositions may exclude each other. That is, if the actor adopts one, this excludes the others. For example:

“the court may do any of the following:

- a) impose a fine;
- b) impose a period of imprisonment;
- c) impose a fine and a period of imprisonment.”

Again, an introductory formula or words indicating the relationship of the sub-paragraphs is not really necessary, and in this case the introductory formula “any of the following” does not contribute anything to legal certainty and should not be added.

Sub-paragraphs may also be cumulative in effect, for example:

“An applicant shall have all of the following attributes:

- a) be a citizen;
- b) be over 21;
- c) have no criminal convictions.”

This can be indicated, as above, by the words in the introductory formula “have all of the following attributes.” It would also be possible to use “and” between the last two sub-paragraphs, that is, after b); using both techniques simultaneously is too elaborate. Some drafters would place “and” between each sub-paragraph for certainty, but this is very clumsy.

On the other hand, sub-paragraphs may be alternative in effect, for example:

“A person shall have one of the following attributes:

- a) be licensed to practise law in Albanian courts;
- b) hold a university teaching appointment in law within Albania;
- c) hold such a licence or appointment within a member state of the European Union.”

Here the alternative effect can be indicated, as above, by the use of the introductory formula “have one of the following attributes.” It would also be possible to use “or” between the last two sub-paragraphs.

It should be noted that indicating the relationship between sub-paragraphs by relying on an introductory formula rather than “and” or “or” between sub-paragraphs, while more elaborate, has a more certain meaning. It is also more flexible. So, for instance:

“In the case of an adult, the court may adopt one or more of the following procedures; but in the case of a child it may only adopt either procedure a) or b)...”.

### **3.3 Ordering of law provisions**

A draft law should be arranged so that it is coherent and follows a logical order. It is the common experience that provisions of a law (whether it is an individual law or a code) should follow a consistent and logical structure. This helps the user of the law; it also helps the drafter, because it provides a checklist that everything has been dealt with.

Systematic drafting enhances clarity and comprehensibility. Laws vary and it is not possible to lay down a single model for the systematic drafting of legislation. Nevertheless, certain basic guidelines can be provided.

The provisions of a law are best organised with permanent provisions first and then the non-permanent provisions (such as amendments and transitional arrangements).

Substantive provisions should follow a logical order starting with the principal proposition and followed by exceptions. If the law is to include a main rule and exceptions to this rule, the main rule should be placed before the exceptions and the latter should be placed directly after the main rule in the following paragraphs or articles.

Provided that it is possible to make such a distinction, the provisions delimiting the rights and duties of citizens should precede other provisions which do not have the same direct impact on citizens (such as rules on competence, administrative procedure and so forth). Implementing provisions (allowing the substantive law to be implemented) such as delegation clauses should follow.

Accordingly, it is often expedient to structure a draft law in the following order:

- title;
- preamble and the legal basis;
- purpose clause;
- provisions on the scope of application;
- definitions;
- provisions on administrative procedures;
- evaluation clauses;
- delegation clauses;
- sanction provisions;
- repeal provisions;
- provisions on resulting amendments;
- transitional and expiry provisions
- entry into force clauses.

### 3.3.1 Title

Laws should always bear a title composed of the following elements:

- legal denomination of the act - “Law” ;
- sequential number;
- date of adoption - day, month and year;
- a descriptive name - for example, “On taxation.”

For the wording of titles of amending legislation and consolidation legislation, see, respectively, 3.6.2 and 3.7.3.

### 3.3.2 Preamble and the legal basis

Preambles can be part of the text of the law but this is not common practice. A preamble can include information on the background and purpose of the law, when because of its significance and drafting history, it is necessary to convey that information to the reader. Preambles other than those setting out in the legal basis are rare in Albanian laws except for the Constitution (“We, the people of Albania, proud and aware of our history, with responsibility for the future, and with faith in God and/or other universal values...”).

The most common component of a preamble is the indication of the legal basis for issuing the legislation (that is, “In reliance on article (number) of the Constitution, and if applicable of law no (number of the law), of (the date of the adoption of the law)...(title)).

This indication of the legal basis helps the drafter understand and evaluate the coherence of the legislation in relation to the Albanian legal system, and it is considered necessary.

### 3.3.3 Purpose clauses

Purpose clauses should be used with caution.

Legislative provisions are essentially a series of commands, rather than declarations of policy or intent. The objective of laws is to authorise, order, prohibit, and create rights and obligations addressed to specific legal or natural persons. Draft laws should not therefore contain provisions without normative content, or be limited to a declaration of principle, or to a statement of the underlying philosophy of the law. These are matters that would often be better included in the explanatory memorandum, in explanations provided to the Assembly and to the public, and in commentary that the responsible ministry may provide after promulgation of the law.

In addition, apart from not being seen to be truly legislation, there is a practical institutional reason why purpose clauses are little used. That is the fact that it can delay the parliamentary passage of the draft law. Parliamentarians could not only debate the specific provisions but could also have a long debate on the purpose clause.

However, a purpose clause might guide the courts in the interpretation of the substantive provisions of the law; so a purpose clause that stated that the purpose of the law was X but not Y, or only had the purpose X, might well exclude a substantive provision being interpreted to further the purpose Y.

### 3.3.4 Provisions on the scope of application

These provisions delimit the field of action of the law, including the subjects of the law and limitations on the application of the law. For example, article 4 of law no. 9281 of 23.9.2004 “On security on board ships and in ports” provides that “This law applies to ships that undertake international journeys, commercial ships and movable drilling platforms in the sea.”

### 3.3.5 Definitions

Definitions specify the meaning of the main terms used in the text of a law. Definition provisions should be placed near the beginning of the law because it is important to have early knowledge of what the legislative words and phrases mean.

A balance must be struck between using definitions for these purposes and over-using the technique of definition, which may complicate the life of the reader. It will also complicate the life of the reader if words and phrases are defined differently from their normal meaning.

Definitions are used to define and should not be used in order to express the substantive law, such as in this example: “Y shall mean a person who acts in breach of X and such person shall be excluded from obtaining a licence....”.

Definitions should be limited to one concept or word in each definition.

Words and phrases that are the subject of a definition in the law may be indicated typographically in the body of the law (either by italics, bold, underlining etc). However, the result may appear rather confused, particularly if the defined word or phrase appears frequently in the same block of text.

There are various methods of drafting definitions on the basis of their function.

*Labelling:* defining a term or concept may be used to label it so that it does not need to be repeated tediously in the legislative text; for example, “‘The Regulations’ mean the XYZ Regulations of the year X,” or “‘state enterprise’ means an enterprise established under Title III of this Law.”

However, it is helpful to the reader to use a reasonably descriptive phrase when defining something for labelling purposes. For example, it would be unhelpful to define the ages at which children are normally admitted to primary and secondary schools as the “relevant age group;” because such phrase conveys very little to the reader.

*Delimiting:* the purpose of the definition here is to define the application of a word or phrase. It is particularly useful not only where the word or phrase may have several uncertain meanings, but also where it may have a number of different meanings and you wish to apply one of them to the legislation. For example, “‘employment agent’ means a person who assists other persons, whether for payment or not, to find employment,” or “‘company’ means a company incorporated in Albania.”

*Extending or Narrowing Meaning:* definitions can be used to extend or narrow the accepted usage of a word or phrase, and this can be achieved by compounds of positive or negative language. For example, “‘horse’ includes donkey and mule,” “‘animal’ does not include bird or fish” or “‘animal’ includes mammals, birds, fish, reptiles, insects and any other multi-cellular organism that is not a plant or a fungus.”

Non-conventional definitions that will mislead the reader should not be used. For instance, it is not recommended to define “animal” as “cats and dogs only” or to define “food” as “drink, chewing gum and other products of a like nature.”

*Referential:* sometimes a definition refers to another definition in the same legislation. For example, “‘zoo’ means an establishment where wild animals (as defined by Article X) are kept for exhibition to the public otherwise than for purposes of a circus (as defined in this law) and otherwise than in a pet shop (as defined in this law).”

*Use of “means” and “includes.”* “Means” is used when it is intended to provide a complete meaning . “Includes” is intended to provide an incomplete meaning; even a long list may still leave the door open to other meanings.

For example, “horticultural produce” means “vegetables, fruits, flowers or plants” or “horticultural produce” includes “vegetables and fruit.” In the second example, flowers and plants may be within the definition; they definitely are within the definition in the first example. Use of confusing formulae such as “means and includes” or “includes only” should be avoided.

Definitions should be listed in the alphabetic order of the Albanian language.

### 3.3.6 Provisions on administrative procedures

In general, administrative authority in the implementation of a law is exercised by the regular state or local authorities. If it is the intention of the drafter to confer the administrative power for the implementation of the law on bodies outside the usual hierarchy of authorities, such as independent boards or councils, or, in rare instances, to private institutions, the provision on authorisation should be precisely formulated.

### 3.3.7 Evaluation clauses

A law may include evaluation clauses that impose an obligation to evaluate and to produce periodic reports on the operation of a law.

A particular form of evaluation clause is the so-called “sunset clause.” A sunset clause limits the period in which an act is in force, and provides that the act can only be extended by the Parliament, after the law has been evaluated positively.

Institutionalising evaluation through evaluation clauses presents certain advantages. However, such clauses have not generally been used in the Albanian practice.

### 3.3.8 Delegation clauses

Delegation clauses should normally be as precise as possible.

Article 118 of the Albanian Constitution requires that a delegation clause specify the authorisation to issue subordinate legal acts, the authority charged with issuing the subordinate legal acts, the issues that are to be regulated, as well as the principles on the basis of which these subordinate legal acts are issued. The power acquired by delegation cannot be delegated to another authority.

Especially in these cases, it is important that the actual delimitation and specification of the authorisation is stated in the explanatory memorandum (see further 3.8).

### 3.3.9 Sanction provisions

Criminal offences and their respective sanctions are codified in the Criminal Code of Albania. The establishment of criminal responsibility should be based on a clear view that it is necessary to criminalise an action to be prohibited by statute, instead of applying other less radical sanctions. Provisions involving criminal liability must be phrased as precisely as possible in accordance with the principle of legality. As provided in Article 7 of the European Convention on Human Rights, this should include whether commission of the offence requires a mental element (*mens rea*) or whether it is an absolute offence.

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

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

#### 3.3.10 Repeal provisions

Repeal provisions should specify laws, or provisions of laws, that are repealed and cease to have effect, normally on the entry into force of the law.

There should always be a precise reference to a law, or provision of a law, that is to be repealed.

General provisions repealing unspecified laws or provisions (such as, for example: “all laws contrary to (or inconsistent with) this law are repealed”) are not good practice. They should be used only in exceptional circumstances when it is not possible to identify in an accurate manner all the provisions of the legal acts that are to be repealed.

#### 3.3.11 Provisions on consequential amendments

Although it is not an established practice in Albania, laws may also provide for consequential amendments to other laws (see further 3.6). However, where there are significant amendments to other laws, the amendments should instead be enacted in a separate law.

**A law adopted by a three-fifths (3/5) majority in accordance with the procedure in Article 81 of the Constitution may not be amended by a law adopted with a simple majority.**

#### 3.3.12 Transitional and expiry provisions

*Transitional provisions* lay down the procedure for the transition from the previous legal regime to the new one. There is a particular need for a transition provision where, for instance, it is not clear which rules will be in force at any given time or as to which rules

apply to existing or abolished institutions and newly created ones. For example, Article 1166 of the Civil Code provides that “particular contracts entered into before the entry into force of the Code and which continue to be applicable will be regulated according to the provisions of this Code.”

*Expiry provisions* should be used when it is known from the outset that the law is only to be applicable for a certain period of time. This will usually arise where the law has been enacted to regulate special circumstances that are expected to be appreciated only for a specific anticipated period, or where it is considered for political reasons that the terms of the legislation require to be reconsidered after a specific period.

### 3.3.13 Entry into force clauses

There are two techniques by which a law is commonly brought into force. Either the law may stipulate a specific date of the entry into force or, in accordance with the Constitution, it may come into force after publication in the Official Journal.

Laws may be given retrospective effect only in limited and specified cases, for example, favourable criminal laws as provided in Article 29 of the Constitution. However, the retrospective effect of a law must not be in breach of Article 7 of the European Convention on Human Rights. In any event, if the retrospective effect of a law is prejudicial to its addressees, it is likely to be challenged as not satisfying the basic principles of the rule of law. It is also likely to attract criticism on the grounds that, in principle, those subject to a law should at any given time be able to establish its scope and implications so that they can regulate their affairs to comply with it.

It follows that a law, or a provision of a law, should only be given retrospective effect when this is necessitated by decisive considerations, and then for as short a time as possible. A retrospective law is not always prejudicial to its addressees (for example, a provision may provide an entitlement to a benefit in respect of a period before it comes into force) but, if it is, it should be avoided.

## **3.4 Linguistic style**

Generally speaking, it is difficult to provide precise guidelines for the language that should be used in legislative drafting. The crux of the matter is that the legislative language should be simple, brief and to the point, both as regards wording and linguistic style.

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

Unnecessary and superfluous words should be avoided. Do not say, for example, in Article 6 ... except for Article 5 *above* and Article 12 *below*,” because where else would you expect to find those articles in the same text?

### 3.4.1 Sentences

Sentences should be short and clear.

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

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

Follow established rules of grammar for good writing in drafting legislative sentences. Two principal rules are set out below.

- 1) Keep the subject-verb-object as close together as possible. For example, “A person shall not kill an animal on the highway.”
- 2) Keep modifying words and phrases as close as possible to the word or phrase that they modify and order the words and phrases for clarity. For example, in case of *adjectives*: “state hospital or school” [is it a state school? If so, “state hospital or state school”]; “married man or woman” [is it a married woman? If so, “married person”]; “public or private hospital, school or research institution” [if all of them can be private, “every hospital, school or research institution, whether public or private”].

### 3.4.2 Words

Choose contemporary words and use them in their normal primary meaning. Do not use archaic words which are not widely used or understood, or neologisms which have not found general acceptance or recognition in the language. Where it proves difficult to adopt this advice, consider defining the word (see further 3.3.4).

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

### 3.4.3 Foreign words and phrases

Words and phrases of foreign origin should be avoided if there is a generally known Albanian expression that is appropriate. Foreign words and phrases should only be used if they have been accepted in every day use in the Albanian language and there are no corresponding Albanian words.

Linguistic reasons to draft otherwise would be when such words and phrases would be recognised and generally adopted by the addressees of the legislation but not necessarily by the public at large. One such case is when technical terms are used; see 3.4.4. Foreign words or phrases can also be used when they are a convenient and recognised means of expressing something briefly and accurately (for example scientific names in Latin). Whenever foreign words or expressions are used, they should be written in italics.

A legal reason to draft otherwise would be when a foreign word or phrase (perhaps in combination with an Albanian equivalent) is used to ensure compliance with a treaty provision or the *acquis communautaire*.

#### 3.4.4 Technical expressions

Unless they are in common professional use by the addressees of the law, technical expressions (that is, expressions developed for and primarily used within limited fields) should, as far as possible be avoided. If such expressions are used in a law of wider application, they should be clearly defined.

#### 3.4.5 Legal terms

When using legal terms the drafter should take into consideration their legal meaning or meanings in contemporary jurisprudence. Sometimes the drafter may find it necessary to define a legal term, for instance where the term has a variety of meanings and it cannot be made clear in the context which one is intended (for definitions, see further 3.3.4).

Legal terms should be used in their exact technical sense; for example, in the case of a nomination, it should be drafted “X is nominated...” rather than “X is charged with the functions of...”.

#### 3.4.6 Repetitions

Articles in a law text are, certainly in a grammatical context, to some degree autonomous. Pronouns and adjectives, as well as pronouns referring to terms used previously in other articles, should be used with caution. Sometimes it may be necessary to repeat terms that have been used in other articles. However, particularly in the context of a single article, where it can be done without creating ambiguity, the drafter should consider using the narrative style to simplify the text and make it more accessible to the user (see further 3.4.11).

#### 3.4.7 Abbreviations

Abbreviations should be used only when permitted by well-established and generally recognised Albanian practice.

When it is necessary to repeat something that could be abbreviated in the same law text, the abbreviation can be used provided that it is explained when it is used for the first time by adding: “hereinafter referred to as... (abbreviation).” This technique may be used if the matter to be abbreviated first appears early in the law text. Otherwise, defining the abbreviation may be a better solution; for example, “ ‘U.N.’ means the United Nations Organisation.”

#### 3.4.8 Numbers

Numbers should be written out in letters within the legislative text, but numerals should be used in tables, mathematical formulae or in other contexts where it is the usual and recognised practice.

#### 3.4.9 Dates

The name of the month should be written out in letters and the other elements of a date should be written in Arabic numerals. The year should always be written in the full four-digit form. Note that in accordance with Albanian language spelling rules, the first letters of the names of months should not be capitalised.

#### 3.4.10 Use of positive and negative style

The use of negative words should be avoided as much as possible in the process of drafting a law. Drafting should be direct and positive; for example, “A person who has a child shall be entitled to...” rather than “if a person does not have a child, that person shall not be entitled to...”

However, a negative style may be required to specify or emphasise exemptions, for example, “This provision does not apply to legal relations created before....”

#### 3.4.11 Narrative style

As long as it does not create ambiguity, the adoption of a narrative style is a useful technique (particularly within a single article) to achieve a logical order, to avoid internal references and repetition, for simplicity of language, and consequently to produce a text that is more accessible to the user.

An example of this effect is the following:

Referential style:

- “1. A person may apply to the Ministry for a licence.
2. An application made under paragraph 1 must be in triplicate.

3. There must be four copies of an application made under paragraph 1 from a person who is under sixteen.”

Narrative style:

- “1. A person may apply to the Ministry for a licence.
2. The application must be in triplicate.
3. If the person is under sixteen, the application must be in four copies.”

#### 3.4.12 Singular and plural

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

In the second case, the plural form would leave open the question of whether the Minister must establish a different procedure for each type of appeal or must establish one single procedure for all the types of appeal, or whether the Minister has discretion to adopt either approach.

#### 3.4.13 Gender-neutral language

Laws should be drafted in gender-neutral language if possible. Use gender-neutral terms such as “person.” Alternatively, both feminine and masculine genders can be used when no gender-neutral terms exist in the Albanian language for a specific concept, for example, he/she. However, this makes law drafting more awkward, and it is not advisable because the legislation of a country should be unified. There should not be some laws that use “he/she” and others that do not.

#### 3.4.14 Politically neutral language

Laws should be drafted in politically neutral language. Such laws are less likely to attract unnecessary political opposition, and in some cases they can increase public acceptance of the law.

#### 3.4.15 Tenses

A law should be drafted in the present tense. For example, you should say “Every ship submits the following documents to the director before entering a port,” instead of “every ship will have to submit the following documents...”.

If it is necessary to express a time relationship, the facts concurrent with the operation of the law should be drafted in the present tense, and the facts preceding the operation of the law in the past tense.

If it is necessary to refer to events in both the past and the future, do this by reference to when the law is passed or comes into force, and refer to facts concurrent with the operation of the law in the present tense.

#### 3.4.16 Moods

Laws should be drafted in the indicative and not the imperative mood, avoiding the subjunctive. For example, “No person is entitled...” rather than “No person shall be entitled”; “If it is determined that...” and not “If it be determined that...”.

#### 3.4.17 Voices

Laws should be drafted in the active voice and not the passive unless the actor is unidentified or it is cumbersome. For example, “The Commissioner appoints the senior auditor of each department” rather than “The senior auditor of each department is appointed by the Commissioner.”

Avoid the passive voice whenever possible, especially when the legal subject to which the provision refers is not clear. The use of the active voice compels the drafter to indicate clearly the identity of the person who has a specific obligation.

#### 3.4.18 Conjunctions

The word “and” should be used to indicate the relation of coordination, for example, “The boulevards and streets shall be indicated by signs.”

For separation or to show an alternative, preferably use the word “or,” for example, “Streets may be indicated by round or square signs.”

An introductory formula can be used to show the relationship between words, expressions or sub-paragraphs (see 3.2.2). Such a formula could be “one (any) of the following” or “all of the following.”

#### 3.4.19 Nominalisations

Nominalisations should be avoided when possible. For example, “A person may apply....” rather than “a person may make application” or “The Minister consults...” rather than “The Minister enters into consultation with...”.

#### 3.4.20 Verbs

Be consistent in the use of verbs to indicate mandatory requirements and discretionary matters. Respectively, “should” or “is obligated to” and “may” are commonly used. An ungrammatical or inconsistent use of such verbs creates confusion over whether a matter is mandatory or discretionary.

### 3.4.21 Punctuation

It is good drafting practice not to rely on punctuation to communicate the meaning of the legislative text. If meaning is conveyed solely by punctuation, punctuation error or the failure to transcribe correct punctuation accurately could have significant legal consequences. Punctuation should be used only to reinforce meaning. A drafter who has relied on punctuation to communicate meaning should re-examine the length and structure of the sentence, and its word order – and try to change those elements to convey the meaning more clearly.

Punctuation is used as follows:

- full stop (“.”) is used in its usual syntactical meaning and especially at the end of articles, paragraphs and the last of sub-paragraphs;
- comma (“,”) is used in its usual syntactical meaning;
- colon (“:”) is used in its usual syntactical meaning and especially after the introductory part of a paragraph;
- semicolon (“;”) is used in its usual syntactical meaning and especially for the separation of sub-paragraphs;
- a question mark (“?”) and exclamation mark (“!”) should be avoided;
- quotation marks (“..”) are used in their syntactical meaning and especially for defined terms and the introduction of a new text by an amendment;
- hyphen (“-“) is particularly used for splitting words in syllables at the end of a line (which, as a matter of printing practice, should be avoided if possible) and to link compound words, for example, “well-established”;
- round brackets or parentheses (“(...)”) and square brackets (“[...]”) should be avoided;
- the percentage sign (“%”) may be used as needed, especially in tables, while the words “per cent” should be used in the text of the law;
- the paragraph sign (“§”) should be avoided;
- footnotes and endnotes should be avoided.

## **3.5 References**

References are used in cases when the text of the law refers either (1) to a provision in the same law (internal reference) or (2) to a provision in another law (external reference).

### 3.5.1 Internal references

The drafter should determine whether an internal reference actually assists the clarity of a provision, or whether it would be better to redraft the provision.

An internal reference should always indicate, as appropriate, the exact article, paragraph or sub-paragraph to which reference is made. In rare cases it may be necessary to include

a reference to an entire title or chapter of the law. This is only appropriate where the reference is to *all* the provisions of the title or chapter.

References to a chapter or a title must be avoided in cases when only some of their provisions are applied.

Chain references for example, a reference in Article 3 to Article 7 that contains a further reference to Article 10 or worse, back to Article 3 should be avoided.

### 3.5.2 External references

Where a reference is made for the first time to another law, that law should be identified by a full citation of its title, including its number and date of adoption. An external reference to a law that has been amended should only cite the original law and not the laws that have amended it (although it is helpful to the user to cite the amending provisions in the explanatory memorandum).

Where a reference is made to specific provisions of another law, it should additionally always indicate, as appropriate, the exact article, paragraph and sub-paragraph to which reference is made.

In subsequent references to the other law, the basic rule is that it should be identified only by its number of adoption (rather than the full citation) and an indication that it has been previously cited in the text.

For example:

“Article 3 of the above-mentioned law no. 8432 is repealed.”

If a text has references to a significant number of other laws for reasons other than amending or repealing them, in order to assist the user consideration should be given to giving each law a label (see 3.3.5).

For example:

“Tax Law” means...

“Companies Law” means...

This would allow the drafter to use a more free-flowing style in the text, such as:  
“The Tax Law applies to anyone who is subject to the Companies Law.”

## **3.6 Drafting amendments**

Amendments to a law may be express or tacit.

An express amendment alters an existing law by expressly stating so.

A tacit amendment alters an existing law without expressly stating so. While the general rule of statutory interpretation is that a later law repeals an earlier law, it is left to the user to compare the provisions of the two laws and determine the extent and scope of the implicit alteration of the earlier law. Tacit amendment is an obvious source of ambiguity and confusion and should as far as possible be avoided.

For this reason, the Manual only considers *express amendments*.

### 3.6.1 Types of amendments

A law is amended when another law inserts language into its provisions or adds to, replaces or repeals them.

It is important for the drafter to ensure that the grammatical and structural consequences of using these amendment techniques do not create ambiguity or unintended legal effect.

Insertion and addition are similar.

Insertion is placing text within existing text of a law, for example, placing a new sentence between the existing first and second sentences of a paragraph.

Addition is adding text before or after existing text in a law (for example, placing a new sentence at the beginning or end of a paragraph, or placing a new sub-paragraph at the end of an existing series of sub-paragraphs).

Both techniques involve adding new text without deleting existing text.

Replacement is substituting new text for some of the existing text of a law, for example, substituting a new paragraph for an existing paragraph.

Repeal is simply deleting some or all of the text of a law. Repeal may, of course, be accompanied by consequential amendments elsewhere in the same or another law. For example, in repealing Article 7 the drafter might replace text in Article 8 and insert or add text in Article 9, or the drafter might, repeal some of the provisions of Law X and completely repeal Law Y in drafting Law Z.

### 3.6.2 Title of amending laws

The title of an amending law should, as a general rule, indicate this objective by using an appropriate word such as “amendments.”

This rule applies where the law both amends and repeals existing laws. However, where the law *only* repeals previous law, the title should instead use the word “repeal.”

In drafting the title of an amending law it is generally sufficient to designate the amended law by its number, date and title without adding anything that would relate to the subject

of the amending law itself. For example: “Law no. 4523 of 9 December 1995 amending law no. 3531 of 15 July 1992 concerning ...”.

### 3.6.3 Extent and format of amendments

In determining the *extent* of an amendment, the drafter should keep in mind that the user of the legislation should be readily able to understand its effect.

Where several paragraphs of an article require amendment, it is therefore preferable to redraft the entire article. Likewise, if several sub-paragraphs of a paragraph require amendment, it is preferable to redraft the paragraph.

As a general rule, the minimum scope of an amendment should be a sub-paragraph. If the drafter seeks to alter a word or phrase in a single sub-paragraph it is preferable to replace the sub-paragraph.

If, however, a word or phrase which appears throughout a law requires to be amended the following formula can be used: “Wherever it appears, the expression X is replaced with Y.”

However, this formula has its dangers and drawbacks. The principal danger with such an amendment is that it may have unintentional effects; before using it the drafter should check very carefully each place in the text where that “X” is used and be satisfied that replacing it with “Y” is what is appropriate and required in each case. The drafter should also be aware that the formula, however convenient from a drafting perspective, is not helpful to the user. This could be ameliorated by including references to the provisions where the amendment will take effect in the explanatory memorandum to the amending law.

There are two elements to the *format* of an amendment.

The first element is that the amendment must accurately and fully cite the legislative provision that is amended, together with the nature of the amendment (insertion, addition or replacement), followed by a colon “:”. For example, “Article 1 is replaced by:...”.

Where the amendment is an insertion or addition, the first element must also clearly identify where the amendment is to be placed. For example, “after the first sentence of Article 1, paragraph 1, sub-paragraph 2, insert:..”, “after Article 2, paragraph 3, add...”.

If a new article is to be added after the last article in a chapter, it must be made clear whether it is to become the last article of one chapter or the first article of the next. For example: “after Article 27 insert the following Article [27/1] in [at the end of] Chapter 3”; “after Article 27 insert the following Article [27/1] in [at the start of] Chapter 4.” The same technique would be required if a new chapter were to be added after the last chapter of a title, or a new title after the last title of a part.

Note that it is normally sufficient to indicate the point where the amendment is introduced. It would be cumbersome and unnecessary to state that “in Article 2, after paragraph (3) and before paragraph (4) add...” (particularly as this should be evident from the numbering).

The second element is that the text of the amendment should be set out in quotation marks “...”.

When a law amends another law by replacing text, it is sufficient to refer to the process of replacement without also stating that the replaced text is repealed.

For example, it is sufficient to state: “Paragraph 5 of Article 7 is replaced with the following text:...”; it is not necessary to state “Paragraph 5 of Article 7 is repealed and replaced by the following text...”.

When a law amends several articles of another law, the amendments should be set out in the amending legislation in the order of the articles in the amended law. Each article of the amended law should be amended separately.

For example:

“Article 1

The second paragraph of Article 2 of law no. ... is amended as follows: “...”.

Article 2

Article 7 of law no. ... is amended as follows: “...”.

Article 3

The fourth paragraph of Article 17 of law no. ... is repealed.”

and so forth.

When amending a law that has already been amended, it is necessary to insert the new provisions in the original text of the law as it results from the various previous amendments, and not in the text of the law or laws that have amended the original text of the law.

However, when the intention is to amend the provisions that have been introduced by a previous amendment that has not yet entered in the force, the new amendments have to be made to these previous amendments.

When a law amends another law and transitional provisions are required, the transitional provisions should be contained in an article or articles separate from the article that

makes the amendment. This is the clearest structure for the user, and it also assists any later consolidation (see further 3.7).

#### 3.6.4 Numbering of articles

The numbering of the provisions of an amending law should be clearly linked to the text of the original law in order to facilitate consolidation and to allow the state of the law at any given time to be established.

Consequently:

- numbers, or alphabetical identification, of repealed provisions must not be re-allocated to amending provisions unless the whole provision is amended;
- renumbering and reformulating alphabetical identification of provisions of a law being amended should be avoided. Similarly, where a provision that contains divisions unidentified by number or letter is amended, the divisions should not be numbered or lettered. These matters should be addressed on repeal and complete re-enactment of the law, on consolidation (see further 3.7) or on codification (see further 1.6);
- where a provision is entirely replaced, however, it is permissible to renumber or reformulate the alphabetical identification. For example, if an article is replaced, the paragraphs of the article may be renumbered, or if a paragraph is replaced, the sub-paragraphs may be re-lettered, but the drafter should ensure that consequential amendments are made to internal and external references to such provisions.

In order to insert one or several succeeding articles in a fixed place in the amended text, the new article is given the number of the preceding article in the amended text followed by slash and a sequential number. For example, after Article 17, 17/1, 17/2, and 17/3, Article 17/4 is inserted, then Article 17/5 and so forth.

In order to insert one or several succeeding articles in a fixed place between articles whose titles already contain slashes because of earlier amendments, the new article is given a number of the preceding article in the amended text followed by a hyphen and a sequential number. For example, Articles 28/2-1 and 28/2-2 are inserted between Articles 28/2 and 28/3.

However, if the original law adopted a different identification system, such as an alphabetical one, that system should be followed in the amending law.

### **3.7 Consolidation**

#### 3.7.1 Objectives

A law amending an existing law may create difficulty, and possibly confusion. The user can no longer determine the state of the law by reference to one law. This problem is more acute in subject areas where there has been substantial legislative amendment, or where the amendments are particularly significant.

To address this, a text of the law should be prepared that consolidates the original law and the subsequent amending provisions.

Consolidation is a useful means of enhancing access to law, and it should be undertaken on a regular basis. This is particularly so where the legislation has an immediate practical relevance for the individual. Consolidation should be an ongoing process, and it can be facilitated by advanced computer techniques. Those involved in consolidating laws should take advantage of them.

### 3.7.2 Legal status

Consolidated legislation, in its simplest form, does not alter the law; it merely consolidates it by compiling existing legal norms. If such a consolidation is inaccurate, this does not alter the law; the provisions of the legislation compiled to form the consolidation apply. Consequently, the consolidation should be prefaced by a statement of its legal effect. Such consolidations may be prepared without specific legislative competence being granted. The Official Publication Centre does the consolidation of the codes in Albania.

### 3.7.3 Formal rules

The date before which all amendments to the law in question have been consolidated should be indicated immediately after the title of the consolidated law with the indication of the numbers and dates of adoption of these amending laws.

The consolidated text should comprise the original text of the law with all subsequent amendments and the references to the appropriate amending laws.

For example: “Article 23/2. Reorganisation (added by law no. 2545 of 10 March 1996 and in force since 30 April 1996.)”

Transitional provisions in the original or amending laws should not be incorporated in the consolidated text.

If provisions of the original text of the law have been subsequently repealed, this should be indicated in the consolidation with references to the laws repealing them; for example, “Article 35 (repealed by law no. 2545 of 10 March 1996.)” However, as indicated in this example, the title and text of a repealed provision should not themselves be included in the consolidated text.

### 3.8 Explanatory memoranda

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

Explanatory memoranda serve a variety of purposes. Their primary function is to inform the members of the Assembly and assist them in their parliamentary consideration of the draft law. Explanatory memoranda also perform an important function for the general public and, by extension, the media. Memoranda that set out their material in a complete and effective way enable public access to, and knowledge of, the proposed law.

After laws are enacted, their explanatory memoranda continue to have a significant role, in that they have an impact on the application of the law in practice. They remain a source of information to the public on the law, thus contributing to its effectiveness. Those who administer the law may turn to its explanatory memorandum to establish the object and intent of its provisions as an aid to administering them. Finally, and importantly, the courts may refer to the explanatory memorandum as an aid to interpreting a law. It follows that an obscure, ambiguous or superficial explanatory memorandum may result in legislation being applied and interpreted in ways different from what was intended.

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

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

- “a) The purpose of the draft act and the objectives that are intended to be achieved;
- b) A political evaluation and whether or not the draft act is related to the political programme of the Council of Ministers, the acts that have approved the principal directions of overall state policy or other documents about developmental strategies and policies;
- c) Argumentation for proposing the draft act, making an analysis related to the priorities and possible problems in implementing the draft act, the level of effectiveness, the ability of implementation, the respective effects, impact and efficiency, as well as the resulting economic cost in relation to the legislation in force;
- ç) A preliminary evaluation of the legality and conformity with the Constitution of the form and content of the draft act, as well as its harmonisation with the

legislation in force and the norms of international law binding on the Republic of Albania;

d) For normative draft acts, an assessment of the level of approximation and the table of compatibility with the *acquis communautaire* according to the annex attached to these rules;

dh) An explanatory summary of the content of the draft act;

e) The institutions and organs that are charged with implementing the act;

ë) The persons and institutions that have contributed to the preparation of the draft act.”

Sub-paragraph (d) of Article 19 of the Rules of the Council of Ministers has been enriched with “Instruments of Approximation” aimed at streamlining the process of checking the compatibility of draft acts with the *acquis communautaire*.<sup>8</sup> Thus, the explanatory memorandum should also meet the requirements of these Instruments of Approximation as described in 4.5 below.

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

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

In practice, the income and expense information is usually included in the explanatory memorandum, rarely in the detail required, and sometimes it is completely ignored. This should not be done; the requirements of the Rules of the Council of Ministers should be followed.

In order to meet the requirements of the Rules of the Council of Ministers and to produce a concise and easy to read explanatory memorandum, the information that should be included therein could be organised in three parts: the first part dealing with the background and general comments; the second part dealing with comments on specific provisions of the draft act; and the third dealing with financial implications of the draft act.

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<sup>8</sup> Decision No. 201 dated 29.3.2006 “Some changes and amendments to the COM Decision No. 584 dated 28.8.2003 “On the adoption of the Rules of the Council of Ministers.”

### 3.8.1 Background and general comments

This part of the memorandum should introduce the reader to the draft act. Therefore it should give an account of the overall objectives and principal reasons for the draft act as well as its lawfulness in view of the Constitution and other existing legislation. Information on the relationship of the draft act with international law and European Union law in the area concerned should be also incorporated in an organic way in this part of the memorandum (see sections 4.4 and 4.5.5). If legislation necessary for compliance with an international treaty is necessary, it should be stated explicitly in the memorandum to the draft act what kind of legislation this is and when is it going to be adopted. This introduction should be as brief as possible, since it mainly serves to give the members of the Assembly, and others, a general overview of the draft act.

A statement of impact evaluation of the draft act should also be included in this part. With respect to the methodology for completing the evaluation task see section 1.5.1.

Comments on the principal contents of the draft act are central to this part of the explanatory memorandum. They should describe the draft's main points. This is essential for comprehension of the draft. The description may be relatively brief, but should include all questions relevant to the understanding and evaluation of the draft act. It must be underlined that the description of the main points of the draft act constitutes the most important tool for members of the Assembly, who must acquaint themselves with it without necessarily having to know all its details.

When consultative action has been taken in the preparation of the draft act, this part of the memorandum should specify, as applicable, an account of advisory bodies that considered the legislative text and its underlying principles; their conclusions and recommendations; a list of authorities, organisations and others consulted, with an account of the responses received from them; and an indication of the changes made to the draft act that reflect the conclusions and recommendations received.

### 3.8.2 Specific comments

While the general comments provide an overall overview of the proposed changes, the purpose of the specific comments is to provide guidance on the questions that may arise from the provisions of the draft act in as detailed a way as possible. The specific comments should refer to individual chapters and articles in the text of the draft act and even, if necessary, to individual paragraphs of an article.

As a general rule, the specific comments should include information on the legal regulation in force, the changes proposed by the draft act, the reasons for the change, the expected effects of the proposed change, and the degree of their compatibility with principles and specific provisions of acts of the EU. The extent and nature of the

comments obviously depend among other things on the contents of the given provision. Depending on how extensive and detailed the general comments are, reference may also be made to those comments

It should be stressed that comments that merely reproduce or repeat the proposed provision are insufficient. What is required is to describe precisely the contents of a given provision and indicate its coherence with the other rules in the draft law.

Comments on provisions providing delegated legislative competence should describe how it is anticipated that the competence will be exercised.

Amending legislation should also be accompanied by explanatory memoranda. In practice, however, such explanatory memoranda are frequently briefer than those for the original laws. Nevertheless, they should satisfy the same basic requirements. They should also make reference to the proceedings that led to the drafting of the original law and subsequent amending laws of special relevance to the evaluation of the draft act.

### 3.8.3 Comments on financial implications

Article 81 of the Constitution and the Rules of the Council of Ministers are very clear on the necessity of evaluating the financial implications of the draft act and including a statement thereof in the explanatory memorandum.

The financial implications of the draft act should be presented both for the fiscal year in which the law comes into force and for subsequent years in case the full economic effect will not appear until later. Expenses incurred by possible preparatory measures necessary prior to the coming into force of the law should also be mentioned. It should be indicated whether the financial implications are for the state or local budget.

In connection with draft acts on major investment projects, consideration should also be given to stating the results of a socio-economic evaluation of the impact. An estimate should be given of the ensuing increase/decrease in expenses regarding administration, in respect of such matters as human resources, IT systems, and premises.

If the draft act contains a delegation clause, an indication should be made as to whether action taken under it can be expected to have economic implications.

## **IV. - INTERNATIONAL AND EUROPEAN UNION LAW IMPLICATIONS FOR LAW DRAFTING**

### **4.1 International law**

International law is an essential element of the Albanian legal order. International agreements or treaties have extensive effects on all activities of the state. They decisively influence the elaboration of the domestic legislation. International law has thus become as indispensable an instrument as domestic legislation for the realisation of the rule of law.

Albania is a party to numerous bilateral and multilateral treaties that are of importance in law making. Additionally, there are numerous non-binding international instruments that contain recommendations of potential relevance to the drafting of legislation.

#### 4.1.1 Legally binding nature of treaties

The term “treaty” denotes any sovereign act by which two or more subjects of the international legal order demonstrate their mutual willingness to assume certain commitments. The status of a treaty does not depend on the nomenclature of its title. Treaties may also be variously designated as, for example, “Agreements,” “Accords,” “Charters” or “Conventions.” The Albanian Constitution generally uses the phrase “international agreements.”

A treaty may also be contained in one or more separate instruments. In order to determine whether an agreement is a treaty binding in international law, it is necessary to consider the intention of the parties to it as well as its form and nomenclature.

#### 4.1.2 Other international law

Many other different types of instruments of international cooperation have been developed, such as “Joint Declarations of Intent,” “Memoranda of Understanding,” “Agreed Minutes,” and “Codes of Conduct.” They are usually political agreements without binding legal effect, unless the contrary is established by their terms or the declarations or practice of the parties to them. These instruments are often characterised as “soft law.” The recommendations of the Committee of Ministers of the Council of Europe are another example of “soft law.”

However, it should be noted that, through their general acceptance and recognition, instruments of “soft law” may eventually enter into the domain of the international customary law and become legally binding. In any event, the drafter should not draft in conflict with such instruments of “soft law” without good cause, even if at present they merely represent a political commitment undertaken by the state.

### **4.2 Status of international law in the domestic legal order**

Article 122 of the Constitution provides:

- “1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.
2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.
3. The norms issued by an international organisation have priority, in case of conflict, over the law of the country when the direct application of the norms issued by the organisation is expressly contemplated in the agreement ratified by the Republic of Albania for participation therein.”

The monist<sup>9</sup> approach to the relationship between domestic and international law, embraced by Article 122 of the Constitution, allows for the unity of all legal norms, both international and domestic. Accordingly, the ratification by Albania of an international treaty results in the treaty becoming automatically an integral part of the Albanian legal order, from the moment of its entry into force.

In addition, Article 122 provides for the supremacy of international agreements over domestic law. It also follows from Article 27 of the Vienna Convention on the Law of Treaties, 1969, that States Parties to the Convention may not invoke the provisions of their domestic law to justify a non-fulfilment of the provisions of an international treaty. This general principle of the supremacy of international laws means that declaratory provisions in individual domestic laws stating the priority of international law should be avoided. As the general principle of the supremacy of the international law has constitutional authority, such legislative provisions are superfluous.

Article 122 of the Constitution also declares the principal rules concerning applicability of international agreements. A treaty norm is self-executing, and can be directly applied by the state authorities and the courts, if it is sufficiently clear and precise to provide the basis for a decision in a particular case. If the international treaty norm is merely declaratory, in that it provides a mandate for the national legislator, it does not have the necessary clarity and precision on which a decision may be based and, accordingly, is not self-executing and cannot be directly applied by the state administration and the courts.

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<sup>9</sup> There are two theories of international law dealing with the relationship between the domestic and international law. The dualist theory maintains that there are two separate systems of law. This theory holds that international law and domestic law have different scopes of application and in case of conflict the domestic law prevails. The second theory, the monist one, maintains that there is only one system of law and that international law prevails over national law.

The official translation of international treaties is a function of the Directorate of International Judicial Cooperation of the Ministry of Justice (Law on the Ministry of Justice, Article 12).

### **4.3 Conclusion of international treaties**

#### 4.3.1 Competent authorities

The preparation of domestic legislation and of international agreements or treaties is subject to rules that are quite distinct. With respect to domestic law, the state is the legislator. Treaties, however, are the result of negotiation and cooperation between several states or international organisations.

Article 121 of the Constitution provides:

- “1. The ratification and denunciation of international agreements by the Republic of Albania is done by law when they involve:
  - a. territory, peace, alliances, political and military issues;
  - b. human rights and freedoms and obligations of citizens as provided in the Constitution;
  - c. membership of the Republic of Albania in international organisations;
  - ç. assumption of financial obligations by the Republic of Albania;
  - d. approval, amendment or repeal of laws.
2. The Assembly may, by a majority of all its members, ratify other international agreements that are not contemplated in paragraph 1 of this article.
3. The Prime Minister notifies the Assembly whenever the Council of Ministers signs an international agreement that is not ratified by law.
4. The principles and procedures for ratification and denunciation of international agreements are provided by law.”

It should be noted that a failure to comply with the domestic law of Albania on the conclusion of treaties does not affect the validity of the treaty in international law (Articles 27 and 46 of the Vienna Convention on the Law of Treaties, 1969). For example, the requirement of parliamentary approval cannot be invoked to oppose the application of a treaty. The same is true concerning the obligation, created by Article 117 of the Constitution, to publish international treaties.

The Council of Ministers can conclude international treaties on its own, without parliamentary approval, when such competence has been granted to it by law or by an international treaty approved by the Assembly. The Council of Ministers can delegate the competence to conclude international treaties to a ministry. The competence to conclude treaties of minor importance can also be delegated to a subordinate administrative unit. Every year the Council of Ministers presents to the Assembly a report on the treaties that have been concluded by the Council, ministries or subordinate administrative units.

If the Assembly considers that a treaty concluded by the Council of Ministers in fact requires ratification by a law enacted by the Assembly, it can request that the treaty be submitted to it for approval. If the Assembly does not approve the treaty as a result of this procedure, the Council of Ministers must denounce the treaty as soon as possible.

The Council of Ministers can conclude a treaty that it has negotiated on the basis of an express authorisation from the Assembly. It is increasingly common for the Assembly to authorise the Council of Ministers to conclude treaties. Such authorisation sometimes also provides that the Council of Ministers is competent to conclude a treaty whose provisions derogate from domestic law.

Where the protection of the essential interests of Albania or particular urgency so requires, the Council of Ministers can directly apply treaties on a provisional basis, before their approval by the Assembly. Such provisional application has the same legal effect as concluding the treaty by the normal procedure.

#### 4.3.2 Negotiation

Treaties are negotiated by the Council of Ministers and the competent ministries. The decision to open negotiations is taken by the Council of Ministers.

Although it participates in the determination of foreign policy, the Assembly does not intervene in the negotiation phase. The Council of Ministers is, however, obliged to inform and consult the Commission on Foreign Policy of the Assembly, which can bring its opinion concerning the negotiating mandate to the attention of the Council of Ministers.

Appropriate Albanian associations and non-governmental organisations may have an involvement here; they may be included in the national delegation to international conferences for negotiating treaties and in the preparatory work for such conferences.

The Assembly does not need to intervene in the conclusion of non-binding legal instruments. Such non-binding instruments are one of the mechanisms by which the Council of Ministers conducts the foreign policy of Albania.

#### 4.3.3 Initialling of international treaties

Initialling a treaty consists of appending the initials of the negotiators at the bottom of each page or at the end of the treaty. This formality is carried out when the negotiators have agreed on the definitive text of the treaty but they have been given no authority to sign it, or when the provisions of the treaty substantially differ from their received instructions. Initialling is decided upon by the head of the national delegation. The purpose of initialling is to attest that the text corresponds to the outcome of the negotiations, and it is normally followed by signature.

#### 4.3.4 Signature subject to ratification

Signature, subject to ratification, of a treaty is carried out on the basis of a mandate from the Council of Ministers that designates the official representative of Albania to sign the treaty. Signature subject to ratification merely attests the authenticity of the negotiated text without legally binding the signatory state.

Nevertheless, certain legal effects are attached to the signature; it does not commit the state to implement the treaty, but does mark its intention to become a party. According to Article 18 of the Vienna Convention on the Law of Treaties, signature entails the obligation not to defeat the object and purpose of a treaty prior to its entry into force, at least until the state has made its intention clear not to become a party to the treaty. It is generally accepted that an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a state that has signed a treaty subject to ratification.

Particularly as far as treaties with normative content are concerned, the signature may have a “chilling effect” on existing Albanian legislation and domestic practice which already conform to the standards of the treaty; subject to the qualifications mentioned, there should be no derogation from such legislation or practice after the treaty has been signed.

#### 4.3.5 Definitive signature

Definitive signature is carried out by an authorised representative of the Council of Ministers and it has the same legal effect as ratification, which means that it expresses the consent of the state to be bound by the treaty. This manner of consent is only admissible when provided for in the treaty or in the mandate of the representative.

#### 4.3.6 Ratification

In international law, ratification demonstrates the definitive will of a state to be bound by a treaty.

A distinction should be made between ratification as the internal procedure of approval by the Assembly and ratification on the international plane, which is carried out by the deposit of the instrument of ratification. As a general principle, before depositing an instrument of ratification of a treaty, it is necessary for the state to have adopted all the laws allowing it to implement the provisions of the treaty.

Ratification is carried out by the Assembly in the form of a law. This law should also contain any reservations to the text of the treaty by the state. There are a number of international treaties that provide for the establishment of implementing bodies that can decide on the modifications or complements to the treaty. The competence and procedures of such committees are generally laid down in the basic treaty. Normally, the decision and recommendations of these committees are adopted by unanimous vote.

In such cases it is necessary, at the time of the ratification of the treaty concerned, to decide on the procedures for the Albanian participation in the committee concerned. Firstly, the representative must be determined. Secondly, thought must be given to the domestic procedures for approving the decisions of these committees and whether they are to be published.

Ratification is not required if the Council of Ministers is empowered to conclude a treaty on the basis of a law or an international treaty.

#### **4.4 Evaluation of the compatibility of a draft law with international law**

Explanatory memoranda to draft laws submitted by the Council of Ministers to the Assembly must contain an analysis of the compatibility of the draft law with the international law obligations of Albania (Law on the Council of Ministers, Article 25/2).

When law drafting gives rise to questions in relation to international agreements, the draft law and its explanatory memorandum should contain reasonable guidance on the relevant international law obligations, including information about their relevance for decisions taken by the national authorities and courts. The provisions of the European Convention on Human Rights will normally have strongest impact, among other things because of the comprehensive and detailed case law from the European Court of Human Rights, which provides definitive interpretation of the provisions of the Convention and their scope and application.

#### **4.5 Approximation of Albanian legislation with the *acquis communautaire***

##### 4.5.1 Approximation process and institutional involvement

The approximation of Albanian legislation with the *acquis communautaire* is a demanding and complex process. It requires not only that Albania build a regulatory framework in line with its requirements but also that the administrative structures and other conditions necessary for implementation of the *acquis communautaire* be assured. Thus, the approximation process goes beyond merely legislative drafting tasks and, most importantly, calls for special attention to the policy development stage so that informed decisions can be taken and qualitative legal texts can be produced.

The obligation for approximating Albanian legislation with that of the EU derives from the Stabilisation and Association Agreement (SAA) signed on 12 June 2006.<sup>10</sup> Gradual

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<sup>10</sup> See Article 6 of the SAA: “In the field of legal approximation and law enforcement, the aim shall be for Albania to concentrate in the first stage on the fundamental elements, with specific benchmarks, of the *acquis* as described under Title VI.” See also Article 70 of the SAA, paragraph II: “This approximation shall start on the date of signing of this Agreement, and shall gradually extend to all the elements of the Community *acquis* referred to in this Agreement by the end of the transitional period as defined in Article 6.”

alignment of Albanian legislation with the *acquis* also constitutes one of the Copenhagen criteria for Albanian membership in the European Union<sup>11</sup>.

All stages of the legislative process, from policy development to the choice of instrument (statutory/secondary legislation) to the actual drafting of an act, are subject to the process of integration of the *acquis communautaire* requirements into Albanian legislation.

In general, the responsibility for policy development and for completing the transposition tasks lies in the first place with the ministry or ministries responsible for drafting a legislative measure in accordance with their area of competence<sup>12</sup>. The Ministry that proposes a draft act must analyse and do its own compatibility assessment and include it in the explanatory memorandum accompanying the draft act as described below.

As provided by recent amendments of the Rules of the Council of Ministers,<sup>13</sup> the Ministry of Integration coordinates and assures the approximation of Albanian legislation with the *acquis communautaire*<sup>14</sup>. In exercising this function the Ministry of Integration supervises the completion of the series of checks of compatibility of the draft act with the *acquis communautaire* in accordance with the “Instrument of Approximation” included in the Annex to the Rules of the Council of Ministers.

In this framework the Ministry of Integration plays two important roles in the process of approximation of legislation:

1. It verifies the level of compliance of Albanian legislation with the *acquis* (see Article 25 of the Rules of the Council of Ministers, as amended).
2. It has the right to send back to the responsible Ministry a draft act that does not contain the explanatory memorandum and the table of concordance in compliance with the Annex to the Rules of the Council of Ministers (see Article 25/).

The compatibility check does not end at the governmental level. Pursuant to the Rules of the Assembly, every draft law should have a written report attached concerning approximation of legislation, and the draft could be returned by the Speaker to the initiator if this requirement is not fulfilled.<sup>15</sup>

#### 4.5.2 General principle of EU law

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<sup>11</sup>Legislative alignment as a criterion for membership requires that all prospective members enact legislation in order to bring their laws into line with the body of European law built up over the history of the European Union known as the *acquis communautaire*.

<sup>12</sup> See Rules of the Council of Ministers, Chapter III, Article 12 and Article 19(ç).

<sup>13</sup> CoM Decision No. 201 dated 29.3.2006, “Some changes and amendments to CoM Decision No. 584 dated 28.8.2003 “On the adoption of the Rules of the Council of Ministers.”

<sup>14</sup> The MoI is responsible for developing the methodological instruments of compatibility with the *acquis*. See CoM Decision No. 580 dated 10.9.2004 “On the scope of activity of the Ministry of European Integration,” Article 2(c), and CoM Decision No. 201.

<sup>15</sup> Rules of the Assembly, Article 68/2, 68/4.

In order to cope better with the approximation process from the perspectives both of policy and of legal drafting, the drafters should acquaint themselves with some specific features of EU law and EU legal acts, as explained below. Although EU law principles do not have an immediate effect at this stage of the EU/Albania relationship, they are crucial to a proper understanding of EU law, also bearing in mind that the wording of the SAA mirrors the obligations deriving from EU Law. Such principles will be compulsory once Albania is part of the EU.

#### *Autonomy of EU law*

The *acquis communautaire* is an autonomous legal system, independent of the legal system of the EU Member States, even their constitutional principles. It constitutes a source of law and cannot be amended by the national legislation of the Member States. The *acquis communautaire* entails rights and obligations both for Member States and for their citizens.

#### *Supremacy*

The *acquis communautaire* has absolute supremacy over conflicting national legislation of any Member State. The status of the national provisions in the legislative hierarchy is not relevant, as the Member States have derogated some of their legislative powers to the community in the matters within its competence. A state cannot refer to any of its legal acts (not even to the Constitution) to justify breaches of the EU legal rules. Treaty provisions and other secondary legislation that are clear, unconditional and precise have direct effect in the national legal systems of the Member States, which implies that the national courts are obliged to enforce them in order to protect the rights of private individuals and undertakings that are based on these provisions.

#### 4.5.3 Sources of EU law

***What is the *acquis communautaire*?- *Acquis communautaire* is the French phrase usually used for the body of EU law that includes treaties, particularly the Treaty establishing the European Community and the Treaty of European Union, and secondary legislation such as regulations, directives, decisions and recommendations as well as cases of European Court of Justice.***

The *acquis communautaire* is made up of primary and secondary legislation.

The primary legislation consists of treaties, in particular those establishing the European Community and the European Union, as well as Treaties of Accession of the new member countries. They are the political and legal basis for all the decisions of the EU institutions. Treaties become part of the national legal system once a country enters into the EU. They do not call for means of transposition in order to be incorporated into the national legal systems. International agreements signed by the European Communities, such as the SAA, are in the nature of these treaties and are part of primary legislation too.

Secondary legislation includes, but is not limited to, regulations, directives, decisions, recommendations and framework decisions.<sup>16</sup> Each of these legal acts has its own features and is subject to different rules when it comes to its transposition into the national legal system.

*Regulations* have general application. They are binding in their entirety and are directly applicable in all Member States.

- They apply both to Member States and to individuals.
- They constitute the basic instrument of unification of the legislation in all Member States.
- Prior to a country's accession to the EU they are not directly applicable, but need to be transposed.
- After accession, Member States are not allowed to transpose the regulation (except when a Member State is required to adopt implementing legislation, for example, legislation necessary for establishing a competent national authority responsible for surveillance and other tasks in the specific areas covered by the relevant regulation).
- Their provisions have direct effect.

*Directives* are binding upon each Member State to which they are addressed as to the result to be achieved, but leave to the national authorities the choice of form and related matters.

- They apply to Member States and, after they are transposed, to individuals.
- They always require transposition (direct reference does not assure actual compliance, if the content is not properly transposed).
- They have direct effect when they are clear, precise and unconditional. (An individual can invoke the rights provided by a directive in this case, even if a state has not transposed them in a timely fashion).

*Decisions* are binding in their entirety upon those to whom they are addressed. They are individual legal acts in which the addressee is specifically determined (a state, a number of states, natural persons, legal persons). They are directly applicable except when the contents of their provisions require implementation by the adoption of national legislation.

*Framework decisions* are used to approximate laws and regulations of Member States. They are binding upon each Member State to which they are addressed as to the result to be achieved, but leave to the national authorities the choice of form. They have no direct effect in the domestic legal system.

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<sup>16</sup> The Treaty establishing the European Union determined that the EU is composed of three so-called "pillars," the European Community (first pillar), the Common Foreign and Security Policy (second pillar) and Judicial and Police Cooperation in Criminal Matters (third pillar). Regulations, directives, decisions and recommendations are issued under the first pillar and framework decisions under the third pillar.

*Recommendations* or *opinions* have no binding force. They are considered as “soft law.”

The methods for implementing these acts in EU Member States differ from the methods used in countries that are in pre-accession phase, such as Albania. Prior to accession, they need to be transposed in all cases, that is, through national legislation that transposes the EU legal act in question.

#### 4.5.4 Preparatory work for the approximation of legislation

When preparing acts in the process of approximation of national legislation with the legislation of the EU, the drafter should prepare the text in accordance with the national legal system principles and the basic principles of the EU, including rule of law, good governance, legal certainty and transparency, as well as taking into account the EU legal terminology. Legislative drafters as well as translators should be continuously educated and trained in the fields of EU legislation and EU legal terminology.

In order to organise the preparatory work in a more orderly manner, the following steps should be taken into account by the drafters.

- The ministries involved in this process should make sure to use the updated and consolidated versions of the *acquis communautaire* with all amendments. *TAIEX databases*,<sup>17</sup> which are available to all the ministries or can be accessed through the MoI, organise the *acquis communautaire* by sector. The National Plan for the Approximation of Legislation<sup>18</sup> is also a good instrument for identifying the *acquis communautaire*.
- The drafters should compare the existing national legislation with regard to the content of the EU legal act that is to be transposed.
- The drafters should check whether the issue is already regulated, and to what extent, in the national legislation. If it is not regulated at all, an appropriate national act should be prepared in order to transpose the content of the EU legal act accordingly. If the issue is already regulated, the drafter should compare whether the issue is covered fully or partially and whether it is done in accordance and in compliance with the EU legal act.
- The drafters should check whether the issue is contained in the SAA; if it is, they should check whether any additional legislation is necessary.

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<sup>17</sup> TAIEX is an abbreviation for the Technical Assistance and Information Exchange, a programme of the General Directorate of Enlargement of the European Commission. For more information visit <http://taiex.ccc.eu.int/>.

<sup>18</sup> The National Plan for the Approximation of Legislation comprises a short, medium and long term program for the approximation of legislation with the *acquis communautaire*. Albania has prepared two such plans, the latter replacing the former one. They are named, respectively, the National Plan for the Approximation of Legislation and SAA Implementation (NPAL-SAA) adopted by CoM Decision No. 317 dated 13.05.2005 and the National Plan for the Implementation of the SAA (NPI-SAA) adopted by CoM Decision No. 317 dated 13.5.2006. Drafters should, of course, refer to the latest version.

- The drafters should also check the annual programme of the Government, which contains the time schedule and the phases of legislative procedure for the adoption of legal acts in the year in question.
- The drafters might also find it useful to test their approach by using a checklist that combines checks of approximation and checks of compatibility with the requirements of the Albanian legal system. The checklist might include, but should certainly not be limited to, such questions such as:
  1. Is this a legislative measure that will set the general framework and main principles for a specific sector?
  2. How will this measure fit in the national legal system?
  3. Does this measure require the adoption of other more technical regulations?
  4. Does this measure set procedures that might affect the system of administrative procedures?
  5. Does this measure require setting up a supervisory and/or monitoring structure?

In addition to all these steps, *regulatory impact studies* (see 1.5.1) should include an assessment for purposes of approximation. This means, for example, an assessment of the practical capacities for implementing the legislative measure; an assessment of the practical capacities for completing the activities, for ensuring the institutional arrangements and for enforcing sanctions as required by the *acquis communautaire*; and an assessment of the extent to which the legislative measure meets the objectives of the *acquis communautaire* (see Annex to the Rules of the Council of Ministers).

#### 4.5.5 Drafting the legal text based on the Instruments of Approximation

During the approximation process, the first challenge that the drafters face is how to approximate national legislation with *acquis communautaire*. The main concern of the law drafter at this stage of the EU integration commitments of Albania should be that of incorporating *acquis communautaire* requirements into legal texts, also known as the process of transposition. The responsibility for completing the transposition lies with the line ministry (or ministries, when the EU legislation calls for more than one responsible institution. In such a case, it is advisable that a working group be established with representatives of the relevant ministries or other institutions to draft the new legislation that will transpose an EU act covering more than one area).

During the pre-accession phase, there is no difference between the process of approximating regulations, directives or other EU legal acts. However, in transposing a regulation, care should be taken to plan for the avoidance of double regulation. In other words, a national law transposing a specific regulation should be repealed or lose effect at the moment of accession into the EU, since that regulation will be automatically in force upon accession.

As stated above, in general, regulations do not need national legislation for their implementation. It is the directives that require transposition, that is, the enactment of national legislation regardless of the status of the country with respect to the EU.

There are two approaches for transposing EU legislation into the domestic legal system at the pre-accession stage, of which the second can be used only in exceptional situations as explained below:

- The basic approach is the transposition of the substance of the directive or regulation into the national legal order in accordance with normal national legal drafting techniques, in such a way and to such an extent that facilitates consistency and full transposition both as to the substance and for ensuring implementation. In all cases, an adequate translation of the EU legal act is needed; its provisions cannot be fully understood, or fully complied with, in the absence of such a translation.
- The second approach is the copying of selected parts of texts of the directives or regulation into a national legal act. This method is suitable in cases where there are technical and very detailed provisions, often in the form of lists, tables, formulas and numbers.

When national legislation transposes an EU act, the national legislation should contain an indication of the fact that it has been approximated with the *acquis communautaire*. This can be done in two ways:

- Insert an article at the end of the national act, in the chapter on “final provisions,” with a formulation such as “this law transposes Directive xxxx/xx/EC ‘On waste recycling’.”
- Use the asterisk (\*) method. Put an asterisk following the title of the law and corresponding citation of the Community legal act as a footnote.

Example of the latter:

“Law no. xxxx dated xx.xx .xxxx ‘On public procurement’\* ”

Article 1

.....

Article 2

.....

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\* This law transposes Directive xxxx/xx/EC”

Neither of these methods is required by any act, nor is either of them common practice in Albanian laws to date. However, in order to have a clear record of the relation of specific acts of the *acquis* to Albanian legislation, it is recommended that one of these methods be used. The drafter should note that the mention of the specific acts of the *acquis* in the explanatory memorandum described below is not sufficient, since once the law is enacted it stands on its own.

#### 4.5.6 Explanatory memorandum

The model of explanatory memorandum given by the Instruments of Approximation does not replace the ordinary model of explanatory memorandum explained in section 3.8 of this Manual, but it adds new requirements as to its contents that aim to regulate the approximation process. In addition to the requirements described in 3.8, the following elements should be included in the explanatory memorandum for a law approximated to an EU act (see Annex to the Rules of the Council of Ministers):

1. Names of the institutions with responsibility for drafting the legislation, including both the institution that has the lead in the process and other institutions involved in the drafting process, if any.
2. The status of the draft act or an indication of its position in the internal legal order, for example that the act has been drawn up for the implementation of an existing law or that it executes a decision of the Council of Ministers.
3. Identification of the relevant SAA articles and other important commitments deriving from the EU integration process, such as the NPI-SAA or the latest European Partnership.
4. The level of compatibility of the act and, if it is not fully compatible, the reasons for partial or non-compliance with the EU legislation.
5. Table of concordance (see 4.5.5.1 below).
6. Description of the implementing measure.
7. Confirmation by the Minister of Integration.

##### 4.5.6.1 Table of concordance

Tables of concordance as part of the Instruments of Approximation show the level of compatibility of national legislation with EU acts. They are filled out only in cases when the normative draft act approximates the concrete provisions of EU legislation.

The explanatory memorandum should contain two tables of concordance.

The first table requires that the natural number, full title, and the number of the Official Journal where the EU act was published (directive, regulation, decision) be indicated in its first row. The second row should indicate the title, subject and the object of the draft act that will be approximated. The third row deals with the level of approximation and is divided into five columns:

- Column (a) should identify the parts of the EU legislation that are approximated, (the corresponding articles, paragraphs, issues and in some cases citation and summaries of the *acquis*).
- Column (b) should identify the provisions of the draft act, title, section, paragraph and issues.
- Column (c) should indicate the level of compliance (full, partial or not applicable).

- Column (d) should indicate reasons for partial compliance or non-compliance.
- Column (e) should indicate the period contemplated for reaching full compliance.

The second table requires that the title of the draft act, its subject and object be indicated in the first row. The second row should indicate the natural number, full title, and the number of the Official Journal of the in which where the EU acts was published. As in the first table, the third row deals with the level of approximation divided in five.

- Column (a) should identify the provisions of the draft act, titles, sections, paragraphs and issues;
- Column (a) should identify the parts of the EU legislation that are approximated, their articles, paragraphs, issues and in some cases citation and summaries of the *acquis*;
- Column (c) should indicate the levels of compliance (full, partial or not applicable);
- Column (d) should indicate reasons for partial or non-compliance;
- Column (e) should indicate the period contemplated for reaching full compliance.

The two tables of concordance with their respective references both have the following purposes:

- Verifying whether the existing legislation or a proposal is in conformity with the requirements of the EU *acquis*;
- Systemising the process of the transposition of EU law into national legislation, since the tables might serve as a database for this process, meeting the requirements of the database of the TAIEX programme and at the same time serving as evidence of the process of approximation of the national legislation with the *acquis*.\;
- Showing the EU that the national legislation corresponds to its legislation;
- Supporting institutional preparation for meeting the further phases of the process of European integration (earning the status of candidate, the “screening” process and the negotiation of the chapters of the *acquis communautaire* required for membership in the EU);
- Supporting the interpretation of the national law that is approximated with the *acquis communautaire*.

#### 4.5.6.2 Different levels of approximation

According to the Instruments of Approximation, there are different levels of approximation, and in each case the level has to be indicated in the tables of concordance and justified by the drafters.

- “Fully compatible” – the normative draft act is in compliance (does not conflict) with the provisions of the primary and secondary sources of the *acquis*

*communautaire* and is in compliance with all the principles that come from these provisions;

- b. “Partially compatible” – the normative draft act is in compliance (does not conflict) with key principles of the primary and secondary sources of the *acquis communautaire*, but does not comply with all of its provisions.
- c. “Incompatible” – the normative draft act conflicts with the provisions of the primary and secondary sources of the *acquis communautaire* and is not in compliance with the principles that come from these provisions.
- d. “Not applicable” – no provision of the primary or secondary sources of the *acquis communautaire* exists that can be compared with the normative draft act in order to determine the level of its compatibility.

**APPENDIX I****Principal laws and other normative acts in the field of law making**

1. Constitution of the Republic of Albania, Law No. 8417 of 21 October 1998 as amended by law no.9675 of 13 January 2007
2. Rules of the Assembly of the Republic of Albania, approved by Assembly Decision No. 166 of 16 December 2004, amended by Assembly Decision No. 15 of 27 December 2005
3. Law No. 9000 of 30 January 2003 “On the Organisation and Functioning of the Council of Ministers”
4. Law No. 8678 of 2 November 2000 “On the Organisation and Functioning of the Ministry of Justice, amended by Law No. 9112 of 24 July 2003
5. Law No. 8502 of 30 June 1999 “On the establishment of the Centre for Official Publications,” amended by Law No 9091 of 26 June 2003
6. Council of Ministers Decision No. 584 of 28 August 2003 “On the approval of Rules of the Council of Ministers,” amended by the Council of Ministers Decision No. 201 of 29 March 2006
7. Council of Ministers Decision No. 580 of 10 September 2004 “On the field of the activity of the Ministry of European Integration”

## **APPENDIX II**

### **Model structure for explanatory memoranda**

#### 1. Background and general comments:

- names of the institutions with primary responsibility for drafting legislation, other ministries involved in the drafting process, working groups (if applicable);
- principal objectives of the draft law;
- specific objectives related to the implementation of the SAA;
- principal reasons for the draft law;
- current legislation in the area and the position of the draft act in the internal legal order;
- level of compliance with the Constitution and other legislation;
- relationship of the draft act with international law;
- principal characteristics and results of the consultation process;
- other issues as required by the Rules of the Council of Ministers.

#### 2. Principal contents

- comments on provisions of the draft act;
- level of compatibility of the draft act with the EU law.

#### 3. Impact evaluation:

- economic implications for the public and private sectors;
- cost-benefit analysis, including possible alternatives;
- description of implementing measures of the draft act.

#### Appendices:

- Relevant international treaties;
- Tables of concordance of the draft-law with EU law;
- Other tables related to financial evaluation.