

An anti-corruption assessment of legislation, a
report on the Law on Takeover of
Administrative Officers employed through the
K5 Program at the Ministry of Political System
and Inter-Community Relations

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Introduction

One of the obligations assumed by the state with the signing of the Ohrid Framework Agreement was to ensure adequate and equitable representation of the minority ethnic communities in the bodies of the state and local government. In line with these efforts, a number of measures for inciting the employment of minority ethnic communities in the bodies of the state and local government were carried out, a number of programs and action plans were adopted as the years went by, and a Secretariat for implementation of the Framework Agreement was established, which was later on developed into a Ministry of Political System and Inter-Community Relations, as the authority in charge of implementing the measures for building trust and promoting coexistence.

On the other hand, bearing in mind the commitment to join the European Union, the Republic of North Macedonia has also launched a number of reforms in different sectors in order to harmonize them with the European standards for professional, expedient and efficient operation. Bearing in mind the scope of the reform processes itself and the various fields and sectors in encapsulated, the effects of the reforms were quite varied. Along these lines there were attempts to introduce reforms to the administration, which would reduce it in number and thus boost its efficiency and expediency, but these reforms were rarely assessed in terms of their effect and degree of practical implementation.

For this reason, the public administration in the state continues to receive criticism both at home and internationally, and it is accused of being sluggish

and inefficient, a result of the severe misuse of public sector employment for personal or political purposes. These doubts were confirmed with the disclosure of the illegal wiretaps, which revealed an entire tradition of misuse of executive power for personal or political purposes. The shift in government in 2017 was followed by a number of reports and revealed cases of employees in the public sector who, despite being employed and receiving salary, failed to show up at work; one of the more impressive cases was the one involving the Secretariat for Implementing the Framework Agreement (now called the Ministry of Political System and Inter-Community Relations), where it was discovered that between 1300 and 1400 employees failed to show up at work, and received regular salaries, which in fact puts the spotlight on an issue that had obviously been plaguing the public administration for tens of years¹.

In an attempt to diminish the negative effects of the situation, the Government proposed, and in 2020 the Assembly, using a summary procedure, adopted the Law on Takeover of Administrative Officers Employed through the K5 Program in the Ministry of Political System and Inter-Community Relations. The law in question aims at redistributing the unallocated administrative officers from the Ministry of Political System and Inter-Community Relations, employed through the Program for Adequate and Fair Representation, the K-5 Program, in the bodies of the state and local authority and other state bodies established in line with the Constitution and in line with the law, and in institutions that carry out activities in the fields of education, science, health, culture, labor,

¹ <https://pina.mk/4209-regrutatsija-na-3-509-mladi-administrativtsi-vredna-100-milioni-evra/>

social protection and protection of children, sports, as well as in other activities that are of public interest as regulated by law, and organized as agencies, funds and public enterprises established by the Republic of North Macedonia or its municipalities, the city of Skopje, as well as by the municipalities of the city of Skopje².

The methodology of the State Commission for Prevention of Corruption³, for anti-corruption screening of the legislation, the comparative analysis and methodology of the Regional Cooperation Council of Southeast Europe, as well as the Regional Anti-corruption Initiative were used for the needs of the analysis⁴.

² <https://www.sobranie.mk/materialdetails.nspx?materialId=6a7d67d7-794e-4a87-8140-ac694e0f0fbb>

³ https://www.dskmk.mk/fileadmin/PDF/Metodologija_za_antikorupcijska_proverka_na_legislativata.pdf

⁴ http://rai-see.org/wp-content/uploads/2015/06/Comparative_Study-Methodology_on_Anti-corruption_Assessment_of_Laws.pdf

Risks of corruption and conflict of interest discovered in the Law on Takeover of Administrative Officers employed through the K5 Program at the Ministry of Political System and Inter-Community Relations

The law was enacted with a specific goal in mind and regulates an exceptionally narrow field, which is in fact already regulated by the existing provisions in the Labor Law, the Law on Administrative Officers and the Law on Public Sector Employees, which are applied in the areas not covered by special provisions of the Law on Takeover of Administrative Officers. This means that this law is *lex specialis* when it comes to the procedure for takeover of officers and derogates the other provisions in that direction, even though it offers only a handful of provisions, namely just 10 Articles. This precise and purpose-built regulation of a specific field using a special law is a practice that is generally avoided in law, since it may cause various side effects, but also because it may make the public more suspicious of the intent behind such a law.

First of all, it must be stressed that this law in essence clashes with the Law on Administrative Officers as well as with the Labor Law, which impose disciplinary liability and full termination of the labor relations in cases when the employee fails to show up at work. In this context, the Law itself poses a risk of corruption and conflict of interest, because it leaves room for circumventing positive legal provisions for the purpose of illicit gains for a third person, and it simultaneously clashes with the principles

of good management and governance, since it encourages the public administration to keep its unproductive employees.

In line with Article 4 of the Law, the Ministry of Political System and Inter-Community Relations drafts a Takeover Plan of the unallocated administrative officers, that is then adopted by the Government, while the body competent for the budget of the institution that takes on the employee gives consent to the Plan. This Article reveals that the Ministry has broad discretionary powers for drafting the Takeover Plan of administrative officers and complete freedom for deciding which body or institution would take on the officers and in what manner, which inevitably poses a corruption risk. In this context, no special provisions are foreseen for specifying the way the Ministry would make its decisions, the procedure used to draft the Plan, the participation of the stakeholders (such as the employees that need to be taken over, as well as the legal entities which would accept the officers), and so these discretionary powers are posing an even greater risk of corruption and conflict of interest, mainly as they are misused when choosing the positions of the officers that are being taken over.

As it was mentioned, in line with this law, the only authority that is required to give consent for the takeover is the authority competent for the budget of the institution which takes over the employee. For the sake of comparison, in line with Article 44 of the Law on Public Sector Employees, the officers are to be taken over only if consent is given by:

- 1) the officer himself,
- 2) the supervisor in the institution that the officer is taken from,
- 3) the supervisor in the institution that takes over the officer
- 4) the Ministry of Information Society and Administration and
- 5) the authority in charge of giving consent for the annual employment plan of the institution in regards to the budget.

Thus, the absence of all these actors in the procedures in the Law on Takeover of Administrative Officers greatly increases the risk of corruption, mostly because the decision-making power is focused in the Ministry of Political System and Inter-Community Relations and the authority competent for the budget of the institution which takes over the employee. This method completely circumvents the Ministry of Information Society and Administration and the legal entities that are influenced by the change in human resources, which restrains most of the safety mechanisms for preventing corruption, but also the good governance and management in the public sector.

On the other hand, in line with Article 4, paragraph 8, the employee that is to be taken over signs a statement that transfers them to another job permanently, and if they refuse to do so, in line with paragraph 9 of the same Article, his position at the Ministry of Political System and Inter-Community Relations is revoked and he is entered into the transfer list for potential takeover by the Ministry of Information Society and Administration. In a situation where there are absolutely no criteria, conditions and acts that regulate the method for adopting the Plan for reassignment in greater detail, in conjunction with the extensive discretionary decision-making freedom of the Ministry of Political System and Inter-Community Relations, such provisions may easily be misused in order to harm a third person (specifically, the person that is to be taken over), or, so that the person that needs to be taken over is forced to make illegal payment.

The fact that the Law foresees the consent to be given solely by the authority in charge of the budget of the institution which takes over the officer, without the need of the institution which releases the officer, poses a special risk. In certain cases the institutions, or legal entities may be completely different, so the request for consent only from one of the entities, in a case when the taking over may have influence on both legal entities, may lead to inequality in the process of taking action in practice, even complete misuse of the provisions and disregard of the needs and will of the legal entity which takes over the employee. In a worst-case scenario, these provisions may be misused and the legal entities that take over the employee may be in fact forced to accept the takeover by being threatened with a misdemeanor penalty for failure to implement the job classification in line with the Plan for takeover of employees. In other words, the

institution must accept the employee, regardless of its human resources needs and the person's specific qualifications, as well as to introduce radical changes to its job classification acts irrespective of its real needs and possibilities. For that reason, as the criteria for consent for the takeover are lessened and as they do not comply with Article 44 of the Law on Public Sector Employees, there is a considerably larger risk of corruption in this regard, and the Ministry of Political System and Inter-Community Relations assumes the main role in the process, i.e. a large amount of decision-making power is again focused in one spot.

Bearing in mind the fact that the law is quite brief, it is to be expected that all possible situations are not foreseen in it, which may increase the risks of corruption and conflict of interest. Specifically, Article 4 of the law does not foresee any ramifications if the Government does not adopt the Plan proposed by the Ministry of Political System and Inter-Community Relations, or if the authority in charge of the budget of the institution that takes over the employee fails to approve the Plan, i.e. the takeover. The issue becomes even more convoluted if we take into account that paragraph 4 of the same Article specifies that "the Government shall adopt the Plan within 30 days of the entry into force of this law," which does not clarify whether the deadline may be extended in a case when there is no consent, or if there are any sanctions in case the Government does not take action within the legal deadline. This legal loophole leaves room for misuse and manipulation in the takeover procedures in order to cause harm or gain benefit for the person in charge or another person, for stalling the procedures, or even for completely different interpretation of the

provisions in practice and for double standards when taking action.

This is linked to the provisions from Article 5 of the law, which states that the managers of the institutions mentioned in Article 1 of the same law (the institutions that carry out the takeover, author's note), are obliged to initiate the procedure for achieving compliance between the job classification acts and the provisions of this law within 30 days of the adoption of the Takeover Plan. In line with Article 6, after taking over the employees, the Ministry of Political System and Inter-Community Relations will make changes to the job classification act so that it complies with the needs of the ministry. In this context, it is important to note that the State Commission for Prevention of Corruption (SCPC) itself points to the frequent changes to the job classification acts as a specific corruption risk, especially in terms of the necessary education degree and the number of employees, the changes made without any explanation, as well as the changes to the job classification acts moments before the employment . Consequently, in line with Articles 5 and 6 of the Law on Takeover of Administrative Officers, this approach results in legalization of the bad practice of adjusting the job classification acts to the needs of a specific person or persons, instead of the real needs of the institution, which constitutes a serious risk of corruption by itself. Thus, the integration of provisions that allow for and encourage such actions greatly increases the risk of corruption in the takeover procedures and is contrary to the SCPC recommendations.

If the competent persons fail to act in line with the provisions from Articles 5 and 6, which pertain to job

classification in line with the Takeover Plan, Article 7 foresees a misdemeanor fine of 2000 euros as a sanction for the person in charge in the institution. This makes the officer takeover procedure even more complicated, mostly in the sense of the fact that the institutions that have to carry out the takeover have to give their consent. Bearing this in mind, especially in conjunction with the fact that the ramifications of missing the prescribed deadlines for action are not clearly defined, as well as the risks of different interpretation of the legal provisions related to the procedure for drafting and adoption of the Takeover Plan, the misdemeanor provisions may be used to compel the competent person in the institution to accept the Takeover Plan and adjust the job classification acts to the Plan that was imposed, instead of adjusting them to the real needs of the institution. In this sense, these misdemeanor provisions leave room for corruption, that is they may be misused in order to compel certain institutions or persons to design human resources management policies tailor made for certain personal or political purposes. In this way, not only is the change to the job classification in order to employ or takeover a certain officer legalized, but the law also introduces coercion mechanisms, i.e. misdemeanor sanctions, that bolster and encourage such actions even further.

An additional aspect that attracts attention in terms of Article 7, which contains the only misdemeanor provision, is the fact that it clashes with the misdemeanor provisions in the Law on Public Sector Employees. Specifically, Article 46 of the Law on Public Sector Employees foresees a 2000 - 3000 euro misdemeanor fine for the competent person in the institution if they fail to implement the procedure for

adoption of the job classification act in line with the provisions of Article 17, that is if the job classification act was not adopted on an evidence-based functional analysis, as well as if this person does not get approval from the Ministry of Information Society and Administration in terms of the compliance between the job classification acts and the provisions of the Law on Public Sector Employees. Bearing in mind the fact that both laws foresee different action, competences and requirements in terms of the job classification acts, the following questions arise:

- Could the competent person in the institution be fined in line with the misdemeanor provisions of the Law on Takeover of Administrative Officers Employed through the K5 Program at the Ministry of Political System and Inter-Community Relations if this person abides by the job classification act procedure in line with the Law on Public Sector Employees, that is if the person does not adjust the job classification acts because that cannot be justified by the functional analysis and because they cannot get consent from the Ministry of Information Society and Administration? and
- Could the competent person in the institution be fined in line with the misdemeanor provisions of the Law on Public Sector Employees if they act along the lines of the provisions of the Law on Takeover of Administrative Officers and adopts the job classification acts outside the boundaries of the procedure foreseen by Article 17 of the Law on Public Sector Employees, that is if they fail to carry out a functional analysis that supports the changes to the job classification

act and if the Ministry of Information Society and Administration does not agree with the changes to the acts?

Such legal discord by itself poses a serious challenge for the rule of law, the legal security and the predictability in the actions, and consequently it increases the risk of corruption and misuse of the provisions in order to compel a specific institution to act in a certain way, which may conflict with certain legal provisions of the two main laws that pertain to the takeover of officers in the public sector.

In Article 8 of this law, it is foreseen that the implementation of the law is supervised by the management body in charge of ensuring adequate and equitable representation of the citizens that belong to all of the communities in the bodies of the state administration. This authority is not defined precisely in the law itself, but if we look at the competences that are foreseen, we can conclude that it is the Ministry of Political System and Inter-Community Relations, so it would have the liberty to interpret and execute the provisions of this law. Thus, this Ministry is positioned as the authority that would, inter alia, be also competent for supervision of its own actions, but also as an authority that would be supervising the work of any other state and local government authorities, as well as of the other state authorities, the institutions that carry out activities in the fields of education, science, health, culture, labor, social protection and protection of children, sports, various agencies, funds, public enterprises founded by the Republic of North Macedonia or by the

municipalities, by the city of Skopje, as well as by the municipalities within the city of Skopje. This gives broad and discretionary powers to the Ministry for implementing the provisions from the law, including the authority to impose misdemeanor penalties, which, in conjunction with legal vagueness and equivocation, discussed above, poses a specific risk of corruption and conflict of interest.

Finally, in Article 10, in the final provisions, it is foreseen that the law shall be applicable until the day on which the procedure for taking over the administrative officers from the Ministry of Political System and Inter-Community Relations is fully completed. This provision defines the end of the validity of this law quite vaguely and loosely, which by itself, since the deadline is not set precisely, poses a risk of corruption and misuse in a number of ways, and at the same time contributes to the reduction of legal security and predictability in the actions taken. Again, from the point of view of the broad discretionary powers focused in a single authority, the unclear definition of the validity, that is the limitation of time of the application of the law, becomes of greater importance in terms of the risk of corruption and conflict of interest, and it may even result in a completely wrong application of the law and different, or contradictory decisions, which can only reduce public trust of institutions and increase the perception of corruption in the country, especially in terms of employment in public administration and the misuse of this process in order to achieve political or personal goals.

Conclusions and recommendations

It is really strange and incomprehensible that this law was enacted using a summary procedure, without previous assessment of the influence on the regulation, and that there was no consultation with the public and the stakeholders while the law was drafted, while on the other hand it was touted as the solution to the complex issue of overemployment and misuse of employment in the public administration that our country faces. The law pushes us in a very specific situation, where in fact we have rehabilitation, that is all employees of the Ministry of Political System and Inter-Community Relations are being pardoned for failing to do their job and are given the opportunity for a fresh start on a new job in the bodies of the state or local government, which is also valid for the other legal entities that were founded by them. That is why a serious evaluation process needs to be launched along with an appropriate appraisal of the real effects it may have in practice, regardless of whether they are issues that stem directly from its application, or corruption and conflict of interest, adverse effects on the SIGMA Principles of Public Administration, undue influence on the management of human resources in public administration, or implied issues related to the public perception of the misuse of the law, increased perceptions of corruption in the state, reduction of trust of citizens in the institutions, and even a reduction of the quality of the services the citizens receive from the public administration.

In any case, interventions to a number of Articles in the specific law are required, starting with Article 4, which regulates the initiation of the takeover procedure. As it was already discussed, in this context it is necessary to add provisions that would appropriately foresee the situations in which the authority that should take over the officers does not give consent for the takeover, as well as the situations in which the Government does not adopt the Officer Takeover Plan, or, perhaps, it does not adopt it within the set deadline. The same article, in order to reduce risks of corruption and conflict of interest, as well as to avoid discrepancy in the actions taken in practice and inequality in the actions, must be harmonized with Article 44 of the Law on Public Sector Employees.

What is specific for Article 7 of the law is the fact that there is a misdemeanor penalty prescribed only for the managers that would fail to harmonize the acts for internal organization and the acts for job classification within 30 days of the adoption of the Takeover Plan. This is in fact the only deadline, but also the only action or lack of action that is sanctioned within this law, which begs the questions of whether this type of sanctioning is justified and how proportional is the severity of the punishment to the seriousness of the crime, especially if one takes into account that in the procedure as a whole the behavior of the other actors is much more important; namely, the Ministry of Political System and Inter-Community Relations needs to draft a Takeover Plan, the Government needs to adopt it, the

authority in charge of the budget of the institution which employs the officers needs to give consent to the Plan, and then again the Ministry of Political System and Inter-Community Relations needs to draft the decisions for taking over the officers. In this context, we would recommend that the misdemeanor provisions are abandoned altogether and replaced by disciplinary liability of the competent bodies because of unprofessional operation.

In Article 8 it is necessary to clearly define the authority that would be in charge of implementation of the law, its precise competences and the manner in which they are to be implemented, as well as the specific rights and obligations of the authority in the course of the supervision, as well as of the persons

and authorities that are being supervised, in order to prevent random action and extensive interpretation of the competences, especially in a situation when the authority already has discretionary powers in the application of the law.

In Article 10, which is the final one, the deadline for the validity of the law must be precisely set in order to avoid legal loopholes or, perhaps, random interpretation of the provisions, and even complete and unnecessary delays of the officer takeover procedure, in order to extend the validity of the legal provisions that give greater discretionary powers, which inevitably poses a risk of corruption, a reduction of legal security and a reduction of the public trust in the state institutions.

