

CORRUPTION °C

Report on Corruption and Anticorruption Policy in Latvia

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Abbreviations

CC	– Criminal Code of Latvia
CL	– Criminal Law of Latvia
CPCB	– Corruption Prevention and Combating Bureau
ECJ	– European Court of Justice
EU	– European Union
SRS	– State Revenue Service

Preface

The preface to this report is being written at a time when the Corruption Prevention and Combating Bureau has once again been left without a director appointed by the *Saeima*. The last days of June saw a culmination of the ruling coalition parties' persistent efforts to rid themselves of CPCB director Aleksejs Loskutovs with sometimes more and sometimes very much less convincing arguments. Although facts that became public this year justified criticism of the Bureau's director, the course of events was generally in keeping with a trend that can be observed throughout the so-called new EU Member States.

In many countries of the *new* Europe, various types of anticorruption structures were established as part of the pre-accession process to help demonstrate the readiness of these countries to join the EU. However, these special anticorruption institutions – some working more and some less effectively – began to inconvenience ruling parties, influential politicians, and business sharks whose interests involved legally dubitable access to public funds and influence on political decisions. Rumania's politicians, for example, showed undisguised animosity towards the head of the country's anticorruption bureau and, in August, dismissed him from office. In Slovenia, attempts to dissolve the Anticorruption Commission, which enjoys huge popular support, have been ongoing for several years now. And in Slovakia, the Constitutional Court is being petitioned to declare the country's special anticorruption court as being unconstitutional.

Finding themselves in constant confrontation with political parties or losing the battle against political pressure, anticorruption institutions become ineffective or even entirely inconsequential. Of course, each such case has its own specifics, but there is one truth that all have in common: one more or less isolated institution, even if it receives all the necessary resources and achieves a high degree of professionalism, cannot break the vicious circle of corruption if it does not have the support of a critical mass in the public administration, the courts and the political parties. In other words, long-term combating of corruption requires effective good governance standards at all levels of public administration and sufficiently honest people in a sufficient number of responsible positions.

For this reason, this issue of *Corruption '0C* is dedicated to questions of systemic nature. Transparency of public information, which is dealt with in two chapters, is traditionally considered a principle that limits opportunities for dishonest

officials to engage in abuse of office. This time, the report focuses less specifically on the situation in Latvia, but takes a closer look at trends in Europe.

Latvia's Freedom of Information Law formally guarantees a relatively high degree of transparency, but lack of a common policy hinders enforcement of the law. One reason for the difficulties seems to be the nonexistence of an institution responsible for the enforcement of access to information, which would treat this question as its priority. To show, with the help of a concrete example, that access to information requires not only a law but also a comprehensive public policy, this issue of *Corruption* °C includes, for the first time, the contribution of a foreign author – Slovenia's Deputy Information Commissioner Sonja Bien Karlovšek – on transparency policy in this Central European country.

Linda Austere, on the other hand, analyzes negative trends in the efforts of the European Council and the European Union to adopt international regulations on access to information which anticipate standards that are significantly lower than those already guaranteed in Latvia and in a whole row of other European countries. Possibilities for arbitrary interpretation of the amount of information that must be made accessible to the public and the time limit for giving answers to requested information, vagueness in certain other points, and the exclusion of courts and lawmakers from the scope of access-to-information requirements are but some of the flaws in the drafts of European Council and EU regulatory documents. Although Latvia would not be required to lower its national standards, weak international standards would not promote further progress at the national level.

Accessibility of information is also one of the corruption impacting factors that Inga Vilka examines in her analysis of corruption risks in local government. Often, when there is talk about the distribution of municipal funds or when public hearings are held on development projects, lack of information makes it difficult for local residents to effectively monitor the use of public funds or to protest against unacceptable projects. One of the most sensational news items in early 2008 was the arrest of a number of city officials on suspicion of bribery in the Riga City Council. The circumstances of this specific case will, of course, have to be investigated. But the question of the extent to which local government structures and rules of procedure actually promote the risk of corruption, does arise. Insufficient political supervision by the opposition, the merging of decision-making and executive institutions, opportunities for local officials to avoid taking responsibility for their decisions are additional factors that increase the risk of corruption in local government and that are analyzed in this issue of *Corruption* °C.

Valts Kalniņš,
Corruption °C editor

1. Combating Corruption. Facts: the First Six Months of 2008

This chapter takes a chronological look at major developments connected with the prevention of corruption. Like all issues of *Corruption °C*, this one, too, lists the criminal investigation cases in which CPCB has handed over materials to the prosecution for initiation of criminal proceedings. The chapter concludes with news on policy documents and bills that have been reviewed at the Meeting of State Secretaries, by the Cabinet of Ministers and by the *Saeima*.

The incident that received the greatest amount of public attention during the period under review was the misappropriation of money from the Corruption Prevention and Combating Bureau that was discovered in mid-April, and the controversial procedure that was subsequently carried out to assess Aleksejs Loskutovs' performance as director of CPCB, which resulted in his dismissal at the end of June. On the one hand, the former CPCB director was accused of insufficient supervision of Bureau activities, particularly its internal affairs. On the other hand, arguments in Loskutovs' favor were the positive results achieved under his direction in the fight against corruption, as well as suspicion that the accusations against Loskutovs were a mere pretext used by ruling political parties to render the Bureau ineffective and susceptible to political pressure.

One of the most prominent CPCB moves in the first half of 2008 was the arrest of a senior official in Riga's Urban Development Department, Raimonds Janita, and the former director of the Urban Development Department, Vilnis Štrams, on suspicion of accepting bribes in connection with a development project approved by the Riga City Council. Eventually, two more persons – the current director of the city's Urban Development Department, Pēteris Strancis, and the former Riga and Jūrmala mayor, Andrejs Inkulis – were arrested in connection with the same case.

Another portentous move was CPCB's decision to ask five political parties to pay the state a total of Ls 1,055,582.83, which had been spent in the run-up to the 9th *Saeima* elections in excess of the amount permitted by the law. The largest part of this sum (Ls 1,027,366.67) was to be paid by the *Tautas Partija* (People's Party). CPCB had established a direct connection between this party's election campaign and the campaigns run by a number of legal persons to promote the

People's Party. CPCB added the donations received and the sums spent on campaigns by these legal persons to the campaign expenditures and donations of the respective political parties. *Zaļo un Zemnieku Savienība* (Union of Greens and Farmers) was asked to pay Ls 11,626.89; *Dzimtene* (Native Land), Ls 9,810.42; *Saskaņas Centrs* (Harmony Centre), Ls 4,691.69; *Jaunais Laiks* (New Era), Ls 2,087.16. In the case of the election alliance between *Latvijas Pirmā partija* (Latvia's First Party) and *Latvijas Ceļš* (Latvia's Way), the problem was that the parties that had set up the alliance had since been reorganized and stricken from the Registry of Political Organizations. This left open the question of who to ask for reimbursement of campaign expenditures exceeding permitted sums.

Materials Submitted by CPCB for Initiation of Criminal Prosecution¹

Listed here are only the investigations of criminal offenses committed in public service that have been carried out by CPCB. It should be kept in mind, however, that other law enforcement authorities also carry out such investigations. In the period under review, CPCB has handed over eight cases involving 25 persons to the prosecution for initiation of criminal proceedings. The public officials suspected of criminal offenses committed in office are:

- 8 former and current deputies of the Vangaži City Council,
- 7 State Police officials,
- 1 SRS Financial Police official.

February 14 – criminal proceedings initiated against two State Police officers for accepting a bribe and assaulting a law enforcement official. The officers had stopped a person driving without a valid driver's license. To avoid punishment, the driver had offered a bribe of 200 EUR. After pocketing the bribe, the two officers had tried to resist arrest, had physically attacked a CPCB official and threatened him with a gun.

February 18 – criminal proceedings initiated against a Latvian University of Agriculture professor and a private individual. The professor was held in suspicion of repeatedly soliciting and accepting undue advantages in order that he give a student passing marks without the student having taken any examinations. The private individual was suspected of supporting solicitation and acceptance of the money, of fraud and embezzlement. The professor had repeatedly and with the aid of an intermediary demanded and received a total of Ls 270.

¹ This information was taken from the report "Activities of the Corruption Prevention and Combating Bureau in the Period from January 1 – June 30, 2008". Information from this report has also been used elsewhere in this text. For quotation purposes, the full text of the report is available on the Internet: http://www.knab.gov.lv/uploads/free/zinojumi/knabzino_010808.pdf Last accessed on August 14, 2008.

February 27 – criminal prosecution initiated of two police officials for solicitation and acceptance of a bribe. The criminal investigation launched in April 2007 revealed that a Saldus district criminal inspector had solicited and received a bribe in the amount of 1,000 EUR with intermediation of a second person – an SRS Financial Police official – in connection with the search for a Latvian citizen residing in Ireland. The bribe had been paid for termination of the search.

February 29 – investigation material submitted to the prosecution in the case of the deputy head of the Riga Traffic Police suspected of passive bribery, and a private individual suspected of active bribery. In December 2006, the police official had, in his office, accepted a bribe for ending an investigation into a traffic violation. After receiving the bribe, the official had handed the bribe-giver a paper to sign and submit to the Traffic Police. The deputy head of the Riga Traffic Police had then dismissed the case on the basis of the document that he himself had prepared.

April 17 – investigation materials submitted to the prosecution for initiation of criminal proceedings against eight former and current deputies of the Vangaži City Council for abuse of office with avaricious intent. In April 2004, eight deputies had gone on a tourist trip to Sri Lanka, but in city council documents the trip had appeared as an official visit to France and Spain. Ls 5,187 from the municipal budget had been spent on the “official” trip, which had been approved at a meeting of the city council by the deputies themselves. At the same time, the deputies had declined allocation of funds for reconstruction of a roof in Vangaži, quoting lack of funds as the reason for their decision.

April 28 – criminal proceedings initiated against a Riga district criminal inspector for passive bribery, and two private individuals for active bribery. One of the individuals suspected of bribery had repeatedly urged a person to give the inspector a bribe of Ls 5,000 via an intermediary to ensure termination of a criminal investigation. The bribe was given in two parts: Ls 2,000 and Ls 3,000. The first intermediary appropriated the first part of the bribe (Ls 2,000), but was apprehended upon receipt of the remaining sum (Ls 3,000). After receiving the total sum of Ls 5,000, the second intermediary – the instigator of the bribery – gave Ls 1,000 to the police official and appropriated the remaining Ls 4,000.

May 6 – criminal proceedings initiated against two Riga Traffic Police officers for abuse of office and forgery of official documents, and one private individual for instigation to these crimes. A driver had asked the two police officers for advice on what to do in connection with an accident that had occurred at an earlier date, at another location. Although the accident had occurred some time ago and at another location, the officers had written a report on the accident, making it possible for the driver to claim insurance. Three months later, on the basis of this report, the driver’s insurance company paid almost Ls 3,000 for repair of the automobile.

May 22 – investigation materials submitted to the prosecution for initiation of criminal proceedings against three persons suspected of various crimes:

organization of bribery, attempted intermediation in bribery, acceptance of a bribe. One of the suspects had urged a person to pay a bribe of Ls 50,000 – supposedly to be given to an SRS official for reducing the amount of surtax payable after a financial audit. After receiving one part of the bribe in the amount of Ls 23,000 from the first suspect, the second suspect had handed over only Ls 10,000 to the third suspect. The third suspect had misled the other two into believing that the money was intended for an SRS official. The real intention had been to appropriate Ls 10,000.

Information Released by the Prosecutor’s Office on the Progress of Corruption Cases (Criminal Investigations, Indictments)²

The information provided here is only that which can be found on the Internet website of the Prosecutor’s Office. This information does not give a complete picture of the situation as regards all indictments and cases taken to court for criminal offenses committed in the public service during the period under review.

January 25 – the Prosecutor decided to launch an investigation into possible criminal offenses committed under Chapter 24 of the Criminal Law: disregard of the Law on Prevention of the Misappropriation of State and Municipal Financial Assets and Property, the Law on Corporate Insolvencies, the Commercial Law, and accountancy requirements; furthermore, misuse of authority and abuse of powers in management of the Latvian State Radio and Television Centre and management and liquidation of its subsidiary, the Digital Latvian Radio and Television Centre.

February 11 – the Prosecutor initiated criminal proceedings against the former director of the State Special Care Home “Reģi” for neglect of official duties and violation of fire-safety regulations. According to the initial charges, the director had ordered reconstruction of the attic floor of the building to accommodate six additional rooms for residents of the home. Although the electrical wiring that was installed in these rooms failed to meet safety requirements and work on the attic floor had not yet been completed, residents of the home had already been moved into these rooms. The wiring capacity was insufficient for the powerful electric heaters used in the new rooms, and this regularly caused the fuses to blow out. To prevent this, the director had allowed the fuses to be replaced with more powerful fuses. This, however, had caused the wiring to overheat, which, as is pointed out in the examiner’s report, caused a short circuit that led to a fire in which 26 persons lost their lives.

² Data taken from the website of the Republic of Latvia Prosecutor’s Office. <http://www.prokuratūra.gov.lv> Last accessed on August 14, 2008.

May 19 – the Prosecutor brought charges against the head of a CPCB department and one of her subordinates. The head of the department was charged with failing to perform her duties and misappropriation of Ls 14,270, EUR 13,995 and USD 19,487. Her subordinate was charged with misappropriation of Ls 75,598, EUR 24,350 and USD 7,800. The money in question was money that had been seized and impounded in the course of criminal investigations.

In addition to the information released by the Prosecutor's Office, it must be mentioned that, on February 4, the Senate of the Supreme Court affirmed a judgement acquitting the chairman of the Ventspils City Council, Aivars Lembergs, in the so-called Grinbergs case. Criminal charges had been brought against Lembergs for ignoring the order of the Cabinet of Ministers to appoint Ojārs Grinbergs to the board of the Ventspils Port Authority. The Senate's Criminal Department agreed with the conclusion of the two lower courts that the order had been incomplete, making it impossible to identify Ojārs Grinbergs (personal ID number was not given).

Legislation and policy documents

January 31 – in its second reading, the *Saeima* passed a Bill on Declaration of the Financial Assets of Natural Persons. A general declaration of assets has for quite some time been considered an important instrument for monitoring the movement of capital acquired through corrupt or criminal practices, but the law has still not been passed.

March 6 – submitted by CPCB and announced at the Meeting of State Secretaries: draft amendments to the Law on the Corruption Prevention and Control Bureau. One of the most significant changes is the change of CPCB status from public agency under supervision of the Cabinet to autonomous public agency. The amendments also define the cases in which a CPCB director can be removed from office. The current law says that the director can be dismissed, among other reasons, if deemed unfit for the job. The anticipated amendments say that the director may be removed from office if he or she has, in the discharge of his or her functions, been party to a deliberate violation of the law or dereliction of duty, which has resulted in serious and damaging consequences. It is pointed out in the annotation to the amendments that the Minister President, as the highest authority, is currently able to influence the work of the Bureau, posing a risk to its independence. Since independence of special anticorruption agencies is one of the cornerstones of effective corruption prevention, the authors of the amendments feel that the Bureau must be autonomous in order to maintain independence in the performance of its functions.

April 3 – in its second reading, the *Saeima* passed draft amendments to the Law on Financing of Political Organizations (Parties). The amendments anticipate higher limits on pre-election campaign expenditures. In addition, the amendments shorten the length of time in which expenditures are counted as campaign

expenditures from 270 days, as stipulated by the current law, to 120 days prior to elections. Declarations on campaign revenues and expenditures will have to separately list expenditures for advertising placement, for direct mail advertising (including e-mail), for preparation of advertising materials, for planning, preparation and organization of election campaigns, including the salaries of campaign workers, rental of equipment, printing of newspapers, magazines, newsletters, books, etc., for funding of campaign-related charity events, including contributions and donations, and any other expenditures connected with election campaigns.

April 17 – announced at the Meeting of State Secretaries: draft of the CPCB Performance Strategy 2008–2010.

April 17 – announced at the Meeting of State Secretaries: draft of Cabinet of Ministers Regulations on Registering, Evaluating, Using and Redeeming Gifts Received in the Discharge of Official Functions, which are the Property of State or Municipal Institutions. The regulations lay down the rules for registering, evaluating, using, and redeeming gifts that a public official is allowed to accept in accordance with the Law on Prevention of Conflicts of Interest in the Acts of Public Officials, and define the competence of a commission for judging the legitimacy of the acceptance of gifts.

April 17 – announced at the Meeting of State Secretaries: draft of a Framework Document on Financing of Political Parties. The document provides for the option of partial financing of political parties from the national budget and, at the same time, effective monitoring of the legitimate use of these funds. Partial government financing is considered to be a measure that can help to curb the influence on political parties of a small group of affluent persons and induce political organizations to perform in the public interest.

June 9 – the Cabinet of Ministers Committee approved the draft of a Framework Document on the Need for a Legal Lobbying Basis in Latvia and referred it to the Cabinet for further review. In the preparation of this document, experience in other countries was examined, and the need in Latvia for legislation on lobbying that would ensure the transparency of government decisions that serve the interests of individuals or groups.

June 12 – in its first reading, the *Saeima* passed amendments to the Administrative Offenses Code drafted by CPCB and approved by the Cabinet of Ministers. The amendments supplement Section 166³⁴ and prescribe the liability of persons making donations to political parties for failure to comply with restrictions on party financing. This would make it possible to take legal action against persons who make illicit donations to political parties, something that currently has no legal consequences.

June 19 – the Meeting of State Secretaries reviewed draft amendments to the Law on the Prevention of Conflicts of Interest in the Acts of Public Officials which include the clearly defined obligation of public officials to report possible

conflicts of interest and other cases of corruption, and anticipate protection for those public officials who report such cases. Due to objections from a number of institutions, CPCB has withdrawn the bill. CPCB has now been asked to prepare a new bill that would identify the problems connected with conflicts of interest and help to reach a consensus on the need for such a bill and on the questions that must thereby be regulated.

June 19 – in its second reading, the *Saeima* passed a bill on service pensions for Corruption Prevention and Combating Bureau officials. The bill grants service pensions to CPCB officials who have served no less than 20 years and have reached the age of 50, or have, regardless of age, been retired for health reasons or due to staff reduction. The reasoning behind this bill is that CPCB officials, unlike those employed by other law enforcement agencies, are not entitled to service pensions, which places them at a comparative disadvantage. It must be added that adequate social guarantees are considered to be an important corruption prevention factor.

2. After the “Global Explosion”¹

Cautious Notes on the Future of Freedom of Information Policy in Europe

*Linda Austere*²

One could argue that the tide of legislation for the freedom of information we have witnessed over the past 20 years during which the main parameters of the right were established has abated, making way for new discussion on the implementation rather than the quality of the existing legal norms and policies. The focus of the debate among freedom of information (FOI) practitioners would thus shift to describing and understanding the nuances of still open legal concepts such as “public interest”, “national security”, “infringement of a persons’ private life”, “internal deliberations” or “commercial secret”. In fact, however, the debate on international FOI legislation is just about to begin and the debate on the parameters of the right is far from closed.

The ongoing struggle to define the right is exemplified by the recent, vocal policy debate over the endeavour of the Council of Europe (CoE), one of the most visible FOI standard-setters in the past decade, to create the world’s first binding international FOI treaty: the Council of Europe Convention on Access to Official Documents. In parallel with the Council of Europe initiative, the European Union is reviewing its FOI policy and law.³

This article provides a reflection on discussions in the workshop “Limitations in FOI Laws: A Snapshot of Practice” organized by the Centre for Public Policy *Providus* in May 2008.⁴ The discussions reflected by the author pertain to one of the central themes of debate – the draft of the first binding international access to information document, the Council of Europe Convention on Access to Official Documents (henceforth Convention). This article also considers the implications of the review of the EU Regulation, which although limited to one institution has international relevance. Therefore, based on discussions in the workshop as well as opinions expressed by several prominent thinkers and researchers, the author will attempt to draw some parallels between issues that have arisen in drafting the Council of Europe Convention and the intermediary results of the review of the EU Regulation on access to official documents.

“A snapshot of practice” in Riga

In May 2008, FOI experts and practitioners from 15 countries gathered in Riga to discuss recent developments in freedom of information policy, law and implementation practice. The goal of the event was to pull together a variety of backgrounds and experiences in order to uncover the *de facto* content of such widely used, but ill-defined, grounds (or legitimate aims) for withholding information as “national security”, “NATO secret”, “information received in confidence” and “rights of a third person”, where the latter includes such notions as commercial secret and individuals’ private life, as well as internal deliberations and the secret of investigations. The participants sought to identify the gist of each notion.

Discussions did not focus solely on the peculiarities of legal interpretation in different countries and legal systems. Several sessions of the workshop were devoted to the one of the most important standards of the day: the draft Council of Europe Convention on Access to Official Documents, adopted by the Steering Committee of Human Rights (CDDH) on 26 March 2008. At the time of preparation of this publication, the draft Convention is under consideration by the Parliamentary Assembly of the Council of Europe.

Variety of perspectives

Providus invited five experts to give their initial insights and to open discussion on the draft Convention. Inga Reine – the representative of the Cabinet of Ministers of the Republic of Latvia in the International Human Rights Organizations, who, while not directly involved in the drafting procedure of the Convention, has repeatedly expressed a critical position on behalf of Latvia, as a country with one of the most progressive FOI laws as far as it concerns the scope of the application of the law and definitions. Eva Moraga is a lawyer affiliated with a civil society organization *Access Info Europe*, which, while being a relatively new organization, has been an active member of the expert debate on the draft Convention. The director of the *Access Info Europe*, Helen Darbishire along with several other civil society organizations (London-based *Article 19* and New York-based *Justice Initiative*) were granted the status of consultative members in the CDDH, drafting the actual Convention, and were invited to testify before the group of experts. *Justice Initiative* was represented by Darian Pavli, a lawyer focusing on issues of freedom of information and expression. The discussion was chaired by Prof. David Goldberg – a former (2007) co-convenor of the Campaign of Freedom of Information in Scotland, and an international media law and FOI expert.

The Council of Europe Convention on Access to Official Documents

At the time of the workshop in Riga, the Council of Europe Convention on Access to Official Documents had already left the stage of drafting. The final draft of

the document was approved by the group of experts (CDDH) delegated by the member states of the Council of Europe on 26 March 2008. The draft document still requires an opinion from the Parliamentary Assembly of the Council of Europe before being adopted by the Council of Europe's Committee of Ministers.

The discussion in the workshop revolved primarily around the topics of the content of the proposed draft Convention, as well as the possible strategies of advocacy, in order to promote change that may amend or at least partially mitigate possible drawbacks in the draft document.

Opinions on the draft CoE convention

Discussions in Riga centred on the quality of the draft of the Convention as the appropriate legal mechanism for giving higher status to the right to access information held by public authorities. It was noted that, since 2002, the minimum standards for access to official documents in Council of Europe member states was set by the Recommendation Rec (2002)2 on access to official documents.⁵ The debate of the invited panel focused on whether the Convention is, indeed, a step forward.

From a strictly theoretical perspective the Convention, as a binding document, is a means to guarantee the status of the right in national legislation. It establishes a more uniform interpretation of the norms that should be enshrined in national legislation, and thereby ensures the existence of the right of access to information even in countries where national law does not yet grant sufficient protection to citizens.

On a more practical note, it is customarily agreed that a legally binding document – convention – follows the soft law when the latter is no longer sufficient to reach its regulatory goals, and needs to be improved and strengthened. One may frame it differently and argue that the new, legally binding document, ought to strengthen the standards established by soft law and help to “cement” the achievements of the Council of Europe Recommendation 2002(2) on access to official documents. However, is it the case with the Convention on Access to Official Documents?

Concurring with the position taken by information commissioners, representatives of the non-governmental organizations and a handful of governments during the drafting process, the invited panel unanimously agreed that the text of the convention adopted by the CDDH sets an overly low standard and is of dubious added value for the 39 Council of Europe countries that already have access to information laws. The specialists pointed out several significant flaws in the text of the convention that, as they argued, render the new document largely void. Should the document be adopted in its current form, it is unlikely to improve the standard of implementation of the right to access information and documents from public sector institutions.

The institutional realm of regulation

The guest speakers addressed the institutional scope of the right/obligation of access, pointing to the fact that the final draft of the Convention fails to include information held by **legislative** and by **judicial bodies**. The speakers pondered the legitimacy of excluding these branches of government from the scope of the Convention.

In their more general comments on the present draft, several speakers expressed their concern about such shortcomings in the draft Convention. They noted, in particular, that the scope of the right envisaged by the convention is significantly narrower than that provided for in a number of national legislations of the CoE member states, who have ensured the right to access information or documents from both judicial and legislative bodies in their national law.⁶

Another way in which the scope of the right to documents is limited under the Convention is the failure to extend the right of access to official documents to private bodies that exercise **public functions** or operate with public funds. This means that the Convention may fail to create a legal regime/standard ready to meet the challenges of privatization and outsourcing of public functions of governments. It is fair to note that an overwhelming majority of the national FOI regimes have adopted the functional definition of a public authority.

Lack of sufficient legal remedies

While the two problems mentioned above may pose a significant challenge to the quality of the national FOI regimes, it is the following two that drew the utmost attention of the discussants, particularly in the light of the status of the Convention as a binding international law.

The draft text of the Convention adopted by the CDDH, does not require states to provide access to a sufficiently strong legal remedy. Namely, the future Convention contains no guarantee that when requests for documents are denied (or in case of tacit refusals), the requestor will have **access to an appeals body** which has the power to order public authorities to disclose official documents. Nor does the Convention guarantee that requestors will have access to the courts.

No time limits for the reply from an institution

Another much-criticised aspect of the draft document is the absence of a requirement that sets statutory **maximum time-limits** within which requests for access to official documents must be processed. Inga Reine pointed out that where a person requesting access to documents cannot rely on the maximum time limit for the receipt of the reply from an institution, one's right to information is

rendered void regardless of the quality of the legislation on which is based, e.g. the institutional scope of the law or the nature of the exceptions.

Reservations on possible reservations

In addition to the above, both pundits of international law and freedom of information pointed out that even the standards enshrined in the Convention may be jeopardized by states entering reservations on certain provisions. The issuing of reservations is possible because the draft document fails to define which provisions of the Convention may or may not be subject to **reservations**.

The panel's debate vacillated between two extremes. On the one hand, the need to accept the inevitability of a Convention and to find the most appropriate *fora* to discuss the problems identified with those directly involved in the decision making process. And on the other hand, questions were raised about the need for an international document, particularly one that might threaten a significant part of the achievements of the previous decade and could, indeed, mark the beginning of the ebb of the freedom of information. In conclusion, however, the panellists asserted, that organizations and individual experts, shall attempt to use all legitimate channels to communicate their reservations and proposals to the decision makers both on national and international levels, in order to achieve an optimal content of the draft of the Convention.

Proposed Amendments to the EU Regulation on Access to Official Documents

At the same time as the Council of Europe Convention on Access to Official Documents is being discussed, the European Union has launched a public consultation on the review of its access to information regime, Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. The proposed review of this regulation (henceforth Proposal) is an integral part of the EU internal process. The review of the EU access to documents regulation has been presented as having the goal of "improving" the quality and scope of access of EU citizens to the information held by EU institutions. Some argue, however, that the content of the proposals constitutes a retreat from the present, however modest,⁷ achievements in EU transparency.⁸

The panellists pointed out the fast pace of EU legislative reform, as well as the current debate on the need for a uniform FOI regime in the EU Member States. The discussions in the workshop focused almost exclusively on the formal elements of the EU legislative process, including the speed of the legislative process, the nature and scope of the involvement of civil society and the EU Member States. While bearing in mind that *de jure* the Regulation applies exclusively to institutions of the EU, some discussants expressed the concern that the

substantial aspects of the EU law could impact directly on, and potentially imperil, the development and the quality of FOI laws and policies on the national level.

By way of an illustration, it would be short-sighted to overlook the proximity of certain elements of *Acquis Communautaire* and the national legislation. The former already has a strong bearing on the quality of FOI in the Member States. This includes protection of personal data of private persons, or protection of information that may reveal the details of internal communication and deliberation, as well protection of commercial secrets or international deliberations. Eminent experts of FOI in the European Union argue that the implementation of the proposed new EU regulation is likely to result in a drop of standards of access to information in the EU institutions. It could in turn adversely influence the quality of FOI implementation in the Member States.⁹

As with the discussion on the CoE Convention, much attention has been devoted to certain structural issues of the Regulation: the definition of “document”, the notion of “registers”, and the concurrent application of access and data protection regimes in the EU. Substantially, some of the most vocal criticism applies to several proposed new elements of the regulation, which would exempt from access information about investigation procedures carried out by the commission. In essence, the Commission’s proposals for reform will eliminate the existing procedure whereby limitations to access information about investigation procedures are lifted once the final decision pertaining to an individual person has been sent to the addressee.

Ruling out access to information received from private entities

The new Article 2(6), proposed by the Commission, in particular its second part, completely excludes from the scope of the Regulation documents “containing information gathered or obtained from natural or legal persons by an institution within the framework of [...] investigations”.¹⁰ The limitation is absolute and permanent: it applies to all such information, not restricted by any conditions, and it applies even after the close of the investigation in a particular case.

Steve Peers from the University of Essex points out that the second part of the new paragraph “would in particular protect the documents submitted by companies – which would indirectly have the effect of more completely protecting the “commercial interests” of companies, even though the Commission has not explicitly proposed an amendment to this ground for exception”¹¹ as the Commission has stated in the explanatory memorandum to its proposals for the amendments of the Regulation.¹² Thus, as Peers notes, “the Regulation would offer greater protection for corporate interests, even though the corporate sector and public authorities “feel... that the current rules strike the right balance”¹³. In effect the proposed amendments not only extend the exception as it relates to commercial interests but also make it impossible to know what has been found out about possible wrongdoing.

Documents, “non documents” and the wide scope of official discretion

In its commentaries to the proposed amendments the Commission argues that the new definition of “document” provides for a greater scope of access, especially access to information contained in electronic data bases of the European Commission. Commentators, on the other hand, have expressed the concern that the new proposals will limit the scope of the right of access by narrowing the definition of documents to which it applies (Article 3(a) of the Regulation).

The revised definition of a “document” in Article 3(a) introduces a new concept – a “document for the purposes of the Regulation”. Namely, the Commission has introduced a more formal and restrictive definition that limits the generally accepted understanding of “documents” or “information” that stems both from the national as well as international FOI norms. According to the Proposal, a document is an object of the law not only when it is “drawn up” by the institution (current definition), but when it also meets the criteria of being either “formally transmitted” to another person or entity, or “otherwise registered” within the institution.

Arguably, the proposed Regulation will vest the public officials of the EU with a significant discretion that may have a very strong bearing on the amount of documents available to the citizens. While the present definition of a document as information “drawn up” by the Commission, rests on an objective criteria, the new proposals of the Commission render the scope of the Regulation directly dependent on the discretion of the officials. Steve Peers remarks pointedly that the new approach “would likely lead to a delay before which a document (in the ordinary sense of the term) would become a “document” for the purposes of the Regulation, and therefore subject to the Regulation.”¹⁴

Considering the content of the new rules, one may observe that the application of the Regulation could be delayed or altogether avoided simply by not registering or by delaying registration of a document. At the same time, the notion “formally transmitted” denotes the situation where the document has been sent to recipients, which appears to limit the realm of the Regulation solely to the final/publicized documents, such as the documents resulting from the EU decision-making procedures.

When read in conjunction with the newly proposed Article 2(6) (discussed above), the proposed Regulation clearly provides for an unusually restrictive (comparing to even the most conservative access regimes on a national level) approach to FOI regulation.¹⁵

Separating the realms of data protection and access to information law

In order to eliminate the current practice of blanking out all names and other personal data from the documents released under the Regulation, in the realm

of data protection, the Commission proposes a new formulation of the Article 4(5). The first part of the proposed Article provides for the requirement to release personal data of certain categories of data subjects (e.g. persons fulfilling their official duties). The new standard of exemption from this rule provides that information can be withheld if releasing it “would adversely affect the persons concerned.”¹⁶ While the legitimacy of such an exemption is a valid question in itself and whilst it is important to take into consideration the adverse effect on the persons concerned by the release of their personal data, ambiguity remains about the objective criteria of adverse effect and about telling an adverse effect from a merely uncomfortable situation.

The proposal prescribes a complete separation of the realms of the two regulations: “Other personal data [than that mentioned above] shall be disclosed in accordance with the conditions regarding lawful processing of such [personal] data laid down in EC legislation on the protection of individuals with regard to the processing of personal data.”¹⁷ Echoing the debate on the national level, both the participants of the workshop as well as the panel, who have provided commentaries on the draft of the Commission’s proposals to the Regulation 1049/2001, maintain that the present proposal sets a standard that is lower than one established by the courts of the Member States of the European Union, as well as the Courts of the European Union.¹⁸

Both on a national as well as supranational plane, the courts have admitted the importance of the “public interest” test, while deciding on the release of personal data under the FOI regime. Citing the Court of First Instance in Case T-194/04 (*Bavarian Lager*)¹⁹, the experts maintain that the new proposal effectively abolishes the standard established by the Court that a document cannot be refused simply on the grounds that it contains personal data but must also give weight to the public interest in this disclosure. The institution must be able to demonstrate that disclosure of the particular personal data would in addition affect the “privacy and the integrity of the individual”.²⁰

The question on the impact of such a policy on the practice of application of the FOI *vis à vis* the data protection legislation on a Member State level still remains open.

Shall Member States’ exemptions apply to access to documents on the EU level?

European Parliament in its resolution²¹ sought to limit and to better define the ability of Member States to oppose disclosure of their documents held by the Commission. Following the guidelines of the Parliament, the Commission proposes a new Article providing that a Member State must be consulted unless it is clear that the documents shall or shall not be disclosed.

When consulted, the Member State shall give reasons for not disclosing the requested documents, based on Regulation 1049/2001 **or** on relevant similar

and specific rules in its national legislation. When the above are clearly identified, the EU institution, holding the document, will deny access to these documents.

There are several criticisms towards the proposal of the Commission. First, while the Commission argues that the new provision takes into account the judgment of the European Court of Justice in the appeal case C-64/05 P, the organization *Statewatch* argues that their interpretation of the judgment is partial, and there is, indeed, nothing in the *IFAW* judgment (as well as the opinion of the appellate court), that commands such interpretation.²² While the European Court of Justice annulled the earlier judgment, arguing that “there is nothing to exclude the possibility that compliance with certain rules of national law protecting a public or private interest, opposing disclosure of a document and relied on by the Member State for that purpose, could be regarded as an interest deserving of protection on the basis of the exceptions laid down by (the) regulation”²³, it also held that Article 4 (5) “requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in Article 4(1) to (3) of the regulation.”²⁴

Applying national restrictions to documents held by EU institutions (documents for the purposes of the Regulation), would create a curious mixture of standards of access to documents held by the Community institutions.

Narrowing the institutional realm of the Regulation

There are two vantage points one can use to consider the institutional realm of a regulation: scope of a document in terms of obliged bodies and scope in terms of exceptions or other limitations that are introduced by the new definitions. The Regulation 1049/2001 currently does not apply to all EU institutions (for example, Courts). While there is no notable change in the former, in fact, the scope of the Regulation is extended giving wider access to documents characterizing the legislative process in EU (see Art. 12), concerns remain about the risks concealed by some of the definitions.

One of the proposals of the Commission suggests (along with an indefinite exemption of access to corporate documents obtained by the EU institutions in the decision making process (see details above)) that the entire category of documents – “document submitted to courts by parties other than the institutions”²⁵ – is not to be considered a document for the purposes of this regulation, and therefore exempt from the its scope of application. While grounded in the Judgment of the Court, justification of such decision on the side of the Commission remains terse and scant.²⁶

Conclusion

The forthcoming norms in international law raise questions (and the eyebrows of many). From the position of an observer, there are considerable similarities between the attempts of the two regional powers. Both institutions began their work with the most benign intentions. The Council of Europe aspired to raise the profile and strengthen standards of access to documents. The European Union, on the other hand, to amend some of existing shortcomings in its access to documents regime and to provide for wider access of citizens to the workings of the Community. Yet, countervailing pressures that have resulted from the discomfort caused by certain information released under access to documents regimes, such as information on the motivation of decisions, personal data of people/officials involved in the decision-making process, information about the influence of commercial interests in the decision-making process, or information about spending of public funds and the quality of public functions, has resulted in proposed drafts for the new regulations that could result in less rather than more access to information.

The debate on the content of the restrictions/exemptions in the FOI law which has been at the heart of the debate over the right of access to information during the past decade and more, has been now replaced by another debate over the reach of the right of access to information. The concerns summarized in this article relate not to limitations on the right based on legitimate interests of a state, but on the scope of the right itself. Recent developments indicate that the debate has shifted from policy discussions in expert circles about the nature of the right of access to more political considerations and even to a power struggle between what information should be released and what information political leaders are ready to make public. In this sense, the new struggle over the right of access to information is about the right of the public to know as balanced against the desire of those in power to retain control over the information that they possess.

The discussions over the drafting of both the Council of Europe Convention and the revision of the EU Regulation have revealed the lack of international political consensus on the nature and scope of the right to access to documents.

¹ The notion of *global explosion* was pointedly used to describe the developments in FOI policy throughout the world by Ackerman, J. M. and Sandoval-Ballestros, I. E. in their article *The Global Explosion of Freedom of Information Laws*. *Administrative Law Review*, Vol. 85, 2006, pp. 85–130.

² Linda Austere – *dipl. iur.* University of Latvia, MA in Public Policy from the Central European University. Since 2002, has worked with questions related to public sector information transparency and anticorruption policy. Since 2005, has been working at the Centre for Public Policy PROVIDUS.

³ Regulation 1049/2001 Of The European Parliament And Of The Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁴ The workshop also marked a historical moment for the FOI policy of Latvia. The draft of a new (revised) Freedom of Information Law was about to leave the final stage of the inter-institutional coordination process, and advance to the political level in the Cabinet of Ministers.

⁵ Recommendation Rec(2002)2 of the Committee of Ministers to member states on access to official documents. <https://wcd.coe.int/ViewDoc.jsp?id=262135&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> Last accessed on September 26, 2008.

⁶ Much in line with the above-mentioned was the debate on the nature of the right enshrined in the Convention, i.e. on the question whether the new international law can, indeed, be a step forward and grant the citizens of the CoE countries a more general right to access to information *vis-à-vis* the right to access official documents. However, in the opinion of experts, the issue is of a very high political salience for the majority of the Member States of the Council of Europe, and therefore an agreement on a more liberal definition of the scope of the international law than is enshrined in the majority of the national FOI legislations is under doubt.

⁷ The statistics on the implementation are compiled by the European Ombudsman who has also issued a critical opinion on the content and the possible consequences of implementation of the proposals of the Commission. <http://ombudsman.europa.eu/home/ly/default.htm> Last accessed on August 15, 2008.

The experience of Proivodus complements the arguments of pundits. After submitting a series of FOI requests to different EU institutions in order to obtain information necessary to strengthen the arguments in its research, as well as to gain a more direct insight in the FOI proceedings of the Communities, the results of the application process revealed that the time limits of the reply from the EU institution (in particular the notification of the receipt if the application) tend to be open-ended. An additional consultation with the national governments may prolong the process of the receipt of the documents from EU institutions still in the realm of the Regulation. Information prepared by the Member States tends to be withheld, arguing that such data can only be released by the author (original classifier) of the document.

⁸ The dynamics of standards of access to EU`s documents are best seen in the commentary of Steve Peers, professor of law at the University of Essex (UK): Peers, S. (2008). *Proposal for Access to Documents. Article-by-Article Commentary*. <http://www.statewatch.org/foi/sw-analysis-docs-june-2008.pdf> Last accessed on August 15, 2008.

⁹ Some of the strongest criticism comes from a coalition of non governmental organizations: The European Federation of Journalists, Corporate Observatory Europe, the European Citizens Action Service lead by *Statewatch*.

¹⁰ Proposal for a regulation of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents. Brussels, 30.4.2008, COM(2008) 229 final. http://ec.europa.eu/transparency/index_en.htm Last accessed on September 26, 2008.

¹¹ Peers, S. (2008). *Proposal for Access to Documents. Article-by-Article Commentary*.

¹² Proposal for a regulation of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents. Explanatory memorandum.

¹³ Peers, S. (2008). *Proposal for Access to Documents. Article-by-Article Commentary*. <http://www.statewatch.org/foi/sw-analysis-docs-june-2008.pdf> Last accessed on August 15, 2008.

¹⁴ *Ibid.*

¹⁵ Bunyan, T. (2008). Comments on the definition of a "document" in the Commission's proposal – back to the age of the "dinosaurs"? <http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm> Last accessed on July 2, 2008.

¹⁶ The proposal of the Commission, see p. 19.

¹⁷ *Ibid.*

¹⁸ The commentary refers to Regulations (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

¹⁹ The court upheld the opinion of the applicant, ordering the release of the names of lobbyists, arguing that such information cannot constitute violation of the principle of protection of the private life of a person, since it has originated during implementation of a public function of an institution and the person herself.

²⁰ See a more detailed analysis in: Peers, S. (2008). *Proposal for Access to Documents. Article-by-Article Commentary*. <http://www.statewatch.org/foi/sw-analysis-docs-june-2008.pdf> Last accessed on August 15, 2008.

Nikiforos Diamandouros, P. (2008). *Contribution of the European Ombudsman, P. Nikiforos Diamandouros, to the public hearing on the Revision of Regulation 1049/2001 on public access to Documents*. <http://www.statewatch.org/news/2008/jun/eu-ep-ombudsman-on-com-proposals-speech.pdf> Last accessed on August 15, 2008.

²¹ European Parliament Resolution with recommendations to the Commission on access to the Institutions' texts. 4 April 2006. www.europarl.europa.eu/oeil/DownloadSP.do?id=4560&num_rep=5671&language=en Last accessed on August 15, 2008.

²² C-64/05 P, *Sweden (IFAW) v Commission* annuls the Judgment of the Court of The First Instance T-168/02, *International Fund for Animal Welfare v Commission*.

²³ C-64/05 P. Judgment of the Court. December 18, 2007. Paragraph 84.

²⁴ *Ibid.*, Paragraph 83.

²⁵ The proposal of the Commission, see p. 16.

²⁶ In the Case T-2/03, *Verein für Konsumenteninformation v Commission*, when deciding on the access to a cartel file, the Court of First Instance held that, in principle, an institution receiving an application for access to documents must carry out a concrete review of all documents contained in the files and refer, in its decisions, to particular documents rather than to the files as a whole. Judgment of the Court of First Instance, April 13, 2005.

3. The Extraordinary Case of Transparency in Slovenia

*Sonja Bien Karlovšek*¹

Slovenia has nowadays, in particular in international circles, a good reputation for free access to public information. But – since there is always a “but” – this reputation should not be regarded as permanent and is in fact based on various circumstances which could be altered, putting the level of transparency back to the beginning of 2003 when Slovenia adopted its first Access to Public Information Law (hereinafter APIL). Therefore the purpose of this article is to analyze all factors which are relevant in the policy of transparency in Slovenia and which are crucial for maintaining a considerably high level of openness and transparency. In my view, these conditions are general in nature and can be transferred to other systems or states striving for free access to public information.

The letter of the law

General character

Every good system of freely accessible public information is based on a coherent and intelligible law, following modern international standards in this field. These standards have been remarkably well summarized by the organization Article 19 in Freedom of Expression Course for Nepal Participants' Manual², by defining five key aspects of a good right to information law: (1) a broad presumption in favour of disclosure; (2) strong proactive disclosure requirements; (3) good procedural mechanisms for requesting information; (4) a limited regime of exceptions; (5) the right to appeal refusals to an independent body.

Slovene law at present fulfils all of the five above-mentioned conditions. Access to information of public character is regulated by Access to Public Information Law³, which has introduced since 2003 the principle of openness and transparency to all the three branches of authorities: executive, legislative and judiciary. Slovenia therefore has a uniform regulation of access to public information which is exposing to public scrutiny the judiciary in whole not just its administration or so-called court management. The exceptions to freely accessible

public information are therefore regulated accordingly and exhaustively listed in APIL.⁴ This area is undoubtedly one of the most important in the public sector, particularly because the spirit of the law changes the thinking of the public sector employees and is clearly oriented towards transparency and openness of functioning of all bodies in the broadest segment of the public sector. The amending law of APIL presents quite a few new concepts establishing Slovenia even higher on the international scale of country transparency. The promulgation of the original APIL itself placed Slovenia among the 50 countries, which passed such a law at all. Even though Slovenia was one of the last European countries to pass it, the situation in everyday life proved, in contrast with quite a few other, especially Balkan, countries, that Slovenian public sector did not accept this novelty with too much opposition or rejection.

The scope of the law

According to APIL, each piece of information originating from work sphere of a public body is considered as information resulting from performance of public law tasks or in relation to activity of the body. Information of public character must have been formed in the course of the activities of the body or procedures that fall within the competence of the body. If the first condition is fulfilled, the information of public character can relate to any content of any area of activity of the liable body and can be related to its policy, activity and decisions that fall under the sphere of activities or responsibility of the respective body.

In 2003, when APIL was adopted, it was clearly stipulated in law that every information originating from the field of work of the public bodies and occurring in the form of a document, a case, a dossier, a register, a record or other documentary material drawn up by the body, by the body in cooperation with other body, or acquired from other persons, is deemed to be public information. Moreover, this presumption of openness shifted the burden of proof to the public authority if they wish to claim application of a certain exception.

Disclosure obligation

Since 2003, the law has demanding proactive disclosure requirements, which must be overseen by the one or more officials that each public authority has to appoint. Each public authority has an obligation to draw up a catalogue of public information. Each body is obliged to transmit to the Internet some of the most important public information, such as consolidated texts of regulations relating to the field of work of the body, linked to the state register of regulations on the Internet; programmes, strategies, views, opinions and instructions of general nature important for the interaction of the body with natural and legal persons and for deciding on their rights or obligations respectively, studies, and other similar documents relating to the field of work of the body; proposals for regulations, programmes, strategies, and other similar documents relating to the field of work of the body; all publications and tendering documentation in accordance with regulations governing public procurements; information on their activities

and administrative, judicial and other services and, of course, other public information the public authority deems necessary.

Procedure for obtaining public information

The procedure for obtaining public information has also been set out in the law. The applicant has the right to apply for the information in an informal manner, e.g. by telephone, so it is relatively simple to place requests for information but such a request does not enjoy legal protection.⁵ On the other hand, the applicant can apply in a formal manner and thus enjoy whole legal protection by filing a complaint to the Information Commissioner and later by administrative court dispute. A formal request can be made in written manner, orally to the protocol of the public authority and electronically and is most often filed in a previously prepared form.⁶ Due to the free access principle⁷, set down in the law, it is not necessary to provide reasons for the request; moreover, specially trained public officials have to offer assistance to requesters which have difficulties formulating the request. The request must contain the indication of the body with which it is being filed, the personal name, company or the name of the legal entity, the indication of the potential representative or the plenipotentiary, as well as the address of the applicant, or the address of his representative or plenipotentiary. In the request for access to public information, the applicant must also specify the information he wishes to get acquainted with and the way he wishes to get acquainted with the contents of the requested information (consultation on the spot, a transcript, a copy, an electronic record). From this it is clear that the requester him/herself has the right to specify the form in which they would like to receive the information and the public authority has to meet his requirement.

There are no strict rules as where to file a request; therefore the applicant can file a request for access to public information with the body which is considered by him/her to hold the requested information. The burden of transmitting the request again lies on the public authority, which has received the request. If it does not hold the requested information, it must immediately, and at the latest within the time limit of 3 working days beginning from the day of receiving the request, assign the request to the body which is, in relation to the contents of the request, competent for resolving the request, and notify the applicant about that.

The review of request for information

The law stipulates that the authority shall decide about the applicant's request immediately, but at the latest within the time limit of 20 working days beginning from the day of receiving the complete request. In practice, the time limit for the decision of a public authority is normally 20 working days and can in exceptional circumstances even be extended. These exceptional circumstances are also determined in the law and limited only to those cases, when the body requires more time for the transmission of requested information due to the implementation of partial access to public information (to separate generally

accessible information) or due to comprehensive documentation. In such cases the time limit may be extended for not more than 30 working days.⁸ However, there are no shorter timelines in place for urgent requests.

The intention of the lawmaker was evidently to draw up a simple and quick procedure for obtaining public information. This intention reflects in the handling with the requests: if the body grants a request for access, it does not have to issue a special decision but is obliged to make an official note. On the other hand, if the public authority refuses the request for access, in whole or in part, it shall issue a written decision. The decision to refuse access to the information must among other components contain specific explanation of grounds for the refusal of the request, as well as advice on possible legal remedies. The explanation of the grounds should furthermore be concrete; the public authority does not satisfy the law with simply referring to a certain exception. On the contrary, the interpretation of a certain exception in each case has to be specific and concrete.

The cost of information

The law also contains clear provisions concerning the costs for transmitting information of public nature. Consultation on the spot of the requested information is free of charge and public authority can charge the applicant only the material costs for the transmission of a transcript, copy or electronic record of the requested information.

In the Decree on the provision of public information, which was adopted by the Government, fairly reasonable fees have been set for standard forms of public information (e.g., 0.06 EUR for a photocopy of an A4 paper, information recorded on a standard DVD 2.92 EUR), which all public authorities have to consider. However, the aforementioned decree also allows the public authorities charge for searching for and assessing the information by adopting a tariff which has to be approved by the Ministry of Public Affairs.

This possibility causes some heavy problems in practice. The assessing and searching for public information is charged differently in different institutions and depends on the time the public official has spent on this. Above that, the charges differ according to the education of the public officials; therefore the charges for the information of the same kind can vary dramatically. There is no external control over charging these kinds of fees. The charging is supervised only by the administrative inspection office of the Ministry of Public Affairs. This inspection in practice merely formally confirms the calculations of public authorities.⁹ Moreover, since the public authority in these cases formally grants access to the demanded information, the applicant has no right to file a complaint about the charge to the Information Commissioner. This deficiency lies in the fact that APIL does not provide for a complaint possibility against every infringement of the right to access public information. Additionally, there are no special charges or fee waivers for impecunious requesters or for requests in the public interest.

Exceptions of the right to access to information

The procedure being the basis for the effective exercise of the right to obtain public information, the regime of exceptions has proven to be the core of any information law. In APIL, 11 exceptions are determined and 6 of them further refer to other laws (e.g., Law on Companies, Personal Data Protection Law). The access can be refused if the information relates to:

- 1) information which, pursuant to the law governing classified data, is defined as classified;
- 2) information which is defined as a business secret in accordance with the law governing companies;
- 3) personal data the disclosure of which would constitute an infringement of the protection of personal data in accordance with the law governing the protection of personal data;
- 4) information the disclosure of which would constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the law governing government statistics activities;
- 5) information the disclosure of which would constitute an infringement of the tax procedure confidentiality or of tax secret in accordance with the law governing tax procedure;
- 6) information acquired or drawn up for the purposes of criminal prosecution or in relation to criminal prosecution, or misdemeanours procedure, and the disclosure of which would prejudice the implementation of such procedure;
- 7) information acquired or drawn up for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure;
- 8) information acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and the disclosure of which would prejudice the implementation of such procedures;
- 9) information from the document that is in the process of being drawn up and is still subject of consultation by the body, and the disclosure of which would lead to misunderstanding of its contents;
- 10) information on natural or cultural value which, in accordance with the law governing the conservation of nature or cultural heritage, is not accessible to public for the purpose of protection of (that) natural or cultural value;
- 11) information from the document drawn up in connection with internal operations or activities of bodies, and the disclosure of which would cause disturbances in operations or activities of the body.

Harm and public interest tests

As it is evident from above formulations, the law clearly sets out the legitimate interests, which might override the right of access. Since the harm test is included in the formulation of a certain exception or in the law in which the exception is further defined, access can be denied only where disclosure would pose a risk

of harm to a legitimate interest. The law also provides a public interest test and stipulates that access shall be granted in cases where the overall public interest would be served better by disclosure even though it might harm a legitimate interest.¹⁰

It is worth mentioning that the public interest test is a type of weighing test (a so-called balance test) but no predetermined circumstances for public disclosure are set down in APIL. According to Information Commissioner's decisions, the public interest in disclosure is likely to be strong where:

- the disclosure will assist public understanding of an issue of current national debate;
- the issue has generated public or parliamentary debate;
- proper debate cannot take place without wide availability of all relevant information;
- where the issue affects public safety or public health, where the release of information would promote accountability and transparency in decision making;
- where the issue concerns the making or spending of public money.

The public interest takes the upper hand also in following specific cases:

- If the considered information is related to the use of public funds or information related to the execution of public functions or employment relationship of the civil servant.¹¹ This provision is actually an application of the public interest test by the legislator and is in practice often used to grant access to information, even where these are claimed to be personal data or business secrets: salaries of public officials, other payments of public funds, subsidies, the content of a public procurement contract, the level of education of public officials.
- If the considered information is related to environmental emissions, waste, dangerous substances in factory or information contained in safety report and also other information if the Environment Protection Law stipulates so.

Obligation to grant partial access

The Slovene APIL also has a severability clause determining the obligation of the public authority to grant partial access if only one part of a document is covered by an exception. Partial access should be applied in all cases when the excepted information can be excluded from the document without jeopardizing its confidentiality.

The weakest point of the law is that it does not specify overall time limits beyond which exceptions will not apply or will apply only with special justification although some time limits can be gathered from the wording of a certain exception.¹²

Limitations of a law: poor Balkan experience

At this point it is important to stress that information law is of immense importance for the policy of transparency. However, the information law is only a necessary and not yet sufficient condition for the working of a system of transparency. There are many examples which prove the authenticity of this finding. In Bosnia and Herzegovina, for instance, the information law is of highest quality and has been written by a mixed Bosnian-international commission of leading transparency experts, lawyers and representatives of nongovernmental organizations. In spite of this, the level of transparency in Bosnia and Herzegovina is far from being satisfactory.¹³

The same is true also for Macedonia, which encounters many problems despite good provisions in the law and the existence of a commission working as an appeal body.¹⁴ The law as such cannot be alive without other conditions like a strong independent control mechanism, leading the policy of transparency.

The Role of the Information Commissioner

Experience has shown that an independent appeal body is essential to providing requesters with an accessible, rapid, low-cost and effective appeal. The courts on the contrary are too expensive and complicated, and take too long for most requesters. The role of this body is particularly important in terms of interpreting exceptions to the right of access, given the complexity and sensitivity of this aspect of the system.

Legal basis of the Information Commissioner's competencies

The experience in Slovenia shows that the role of a central appeal body can even go further. Five years ago when APIL was adopted, the Commissioner for Access to Public Information was established and began its work on September 9, 2003. It is also very important that already from the outset the Commissioner for Access to Public Information in accordance with the express provision of the law has served as an independent and autonomous state body.

On January 1, 2005 the new Personal Data Protection Law came into force. This law also transposed into the Slovenian legal order the Directive 95/46/EC of the European Parliament and the Council dated October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.¹⁵ After the adoption of the Information Commissioner Law (hereinafter ICL) coming into force on December 31, 2005 the Inspectorate for Protection of Personal Data and the Commissioner for Access to Public Information merged into a new body of the Information Commissioner (hereinafter IC).

Independence viewed theoretically

From a theoretical standpoint, the requirement to be fully independent demands that:

- the head official of the supervisory service is not appointed exclusively by the executive branch;
- the head official of the supervisory service cannot be dismissed or can only be dismissed in expressly defined cases;
- the supervisory service is not subjected to instructions;
- the conflicts of interests with other tasks possibly transferred to the supervisory service are excluded;
- the supervisory service has the right to obtain the required human and material resources for its tasks.

Thus the aspects of autonomy and independency are as follows:

- Institutional: the body does not receive instructions from another body;
- Functional: the competencies of the body are restrained only by the constitution and the law;
- Personal: the procedure of appointment and election, mandate and duration as well as the reasons for early dismissal;
- Financial: ensuring financial means for the body's effective operation.

As evident from the ICL, these demands for independence have fully been complied with. The IC is both an autonomous and independent state body, executing several important competencies both in the area of access to public information as well as in personal data protection. The IC decides on appeals against decisions with which first level bodies have dismissed or refused requests, or otherwise violated the right to access or the re-use of public information. Within the frame of appellate proceedings on access or re-use of public information, the IC is also competent for supervision over the implementation of the law and the operating regulations adopted on its basis.

Appointment of the Information Commissioner

The IC is a public official appointed by the National Assembly of the Republic of Slovenia based on the proposal of the President of the Republic. The appointment procedure is identical to the procedure of appointing the previous Commissioner for Access to Public Information as well as for the appointment of the Head National Supervisor for the protection of personal data in accordance with the Personal Data Protection Law. For the appointment as IC, a person must fulfil the following conditions:

- be a citizen of the Republic of Slovenia;
- hold a university degree;

- have at least five years of working experience;
- have not been convicted by a final decision for a criminal offence punishable by an unconditional punishment of deprivation of liberty.

The person appointed as IC is given a five-year mandate and can be re-elected once.

The autonomy and independence of the IC can also be seen in the procedure for his/her early dismissal defined in ICL. The IC can be dismissed only by the National Assembly of the Republic of Slovenia in cases when:

- he/she him/herself so demands;
- he/she no longer fulfils the conditions for execution of his/her function;
- he/she becomes permanently incapable of performing his/her function;
- he/she neglects to execute his/her powers in accordance with the law and the Constitution.

The procedure to the dismissal of IC shall be started on the proposal of the president of the Republic of Slovenia only.¹⁶

The internal set-up and financing

It needs to be emphasised that IC freely and independently adopts his/her establishment plan, which in turn means that he/she is able to independently decide on the number of personnel required to perform the IC's functioning. In other words the IC can make an independent decision based on own experience on the required number of new employees. It is also important that the Commissioner is able to adopt a system of job positions independently. This means that the IC independently establishes working posts and with regard to professional experience fills them with employees. Also the provisions of the Civil Servants Law allow the state bodies, which are not a part of state administration or judicial authorities, a sizeable level of autonomy when adopting systems of job positions, internal organisation and establishment plan.

Independence and autonomy guarantee of IC is ensured also financially. Financial resources for the operation of the IC are provided from the state budget and are granted on proposal of the IC by the National Assembly. The same is valid also for other independent state bodies in the Slovenian legal order, *de jure* representing one of the indicators of the bodies' independence from the executive. It is also very important that the IC salary is defined comparative to salaries of other heads of independent state bodies and is ranked within the Ordinance governing salaries of public office holders.

The material means for the functioning of the IC are sufficient to cover all competencies and allow for at least one educational programme per year for each employee. The salaries of employees are (slightly) higher than those of public

officials of the government because the IC is an independent body and not bound to governmental system and salary regulation.

Powers

Specific powers represent another indicator of IC's independence and autonomy:

- Access to all, even to confidential data without prior security checkups. The IC is authorised to view all classified data without the need to obtain clearance for access.
- The right to view tax secrets related to the procedure of the IC. These competencies are relevant with regard to the principle of the material truth which dictates that within a proceeding the body must ascertain the true actual situation and uncover all facts necessary for the adoption of a lawful and correct decision.
- The option of filing to the Constitutional Court of the Republic of Slovenia a request for constitutional review of a statute or other regulation and general acts adopted to perform public powers in relation to the current proceeding. This competency is of vital importance to assure the IC has the power to overview both legal areas: access to public information as well as protection of personal data.

In relation to the legislative power branch, the IC has to prepare an annual report on its work, containing information on the adjudicated cases, recommendations and assessments for both legal areas of his/her competence. The IC issues yearly reports on its work to the National Assembly.¹⁷

Non-legal factors of autonomy

For the most part the independence is ensured through everyday work, the provisions governing independency being only a precondition for the true autonomy. I would like to stress that autonomy is ensured on a daily basis through everyday work and cannot be taken for granted. An independent public authority has to be fully aware of its special status and not join any activities run by the Government.

Besides the legal basis of autonomy and independence of the administrative appeal body, **the crucial question is who takes responsibility for national transparency policy**. In Slovenia, although the policy-maker by law is the Ministry of Public Affairs, in fact this task has been **taken over voluntarily by the IC**. In my view, this has been a deciding factor in the dramatic increase in the openness of Slovene public authorities in the last five years.

Staff

The Information Commissioner herself selected people for the staff of the IC. This was possible because the IC itself was newly established. Back in 2003,

there were only 2 experts, working on appeal cases. In 2008, there are 9 experts who actively work on this field.¹⁸ The IC's team is young, diligent and enthusiastic for the ideas of openness and transparency. It is also worth mentioning that, unlike in some other states, all the staff have a bachelor's degree in law and continue their studies on various specialization or postgraduate studies.

The practical work on appeals concentrates on the interpretation of the APIL, in particular on procedural questions and exceptions which are most important for the effectiveness of the right to know. All these questions are interpreted in the favour of disclosure of information¹⁹ and in an applicant-friendly manner. The exceptions are interpreted as narrowly as possible and are deemed to be listed exhaustively in the APIL, and above all, no decision is taken without thorough inspection of the requested information *in vivo*.

The Information Commissioner Nataša Pirc-Musar is a very well known and respected person in Slovenia.²⁰ Because of her various experience in the field of public relations, she has been able to effectively promote the ideas of transparency in various ways: through granting media interviews, joining TV and radio shows and other public activities. Above all, she gained trust of the citizens when defending the right to know and thus promoted the idea of transparency throughout Slovenia.

Education

A great step has been made regarding the education of public officials who were appointed as responsible for access to public information and the head officials of various public authorities. This education is continuous because of staff fluctuation and extends from monthly six-hour courses in the Administrative Academy to continuous non-obligatory consultation on specific cases and procedural questions by phone or e-mail for interested public authorities.

In the last five years, the educational role of the IC has not diminished, but it has altered to systematic training of those public authorities which encounter numerous problems dealing with access to public information (e.g., services of general interest such as public schools, social work institutions and health care institutions). This kind of training is practically oriented and based on the rich legal practise of IC. In that way, the IC can spread the ideas of transparency in a more effective way. As a supportive part, there are also some leaflets and brochures which cover particular issues, such as the public interest test.

The training is mainly oriented towards the shift in the mentality of the "old generation" of bureaucracy, which was based on secrecy.²¹ Moreover, the education is intended to fight the most common excuses for non-transparency: ignorance and too much work. Ignorance can be successfully fought by learning but the fact that access to public information does create certain work for public officials and does take time naturally remains. Inalterability lies in the very nature of a fact and hence the public officials have to adapt to it.

Public communication

Employees of the IC keep a proactive approach towards public relations. Many of them publish articles in legal magazines and in newspapers, discussing the topical issues of transparency. Through the IC's website, all topical issues are made public by press releases and there is no hindrance of actively representing the standpoint of the IC before media.

The IC website does not only provide lots of information about access to information and personal data protection but also gives full insight into the work of IC by publishing all decisions taken in the appeal procedure. In this way, everyone can learn the idea of openness and follow the practice in this field.

The consolidation of competencies – freedom of information and personal data protection

The reputation of the IC improved since it overtook the competencies of personal data protection. The merged body ensures greater visibility as well as unification of the entire legal practice of the field. It also increases the awareness of all other government bodies while carrying out the stated legislative provisions to the benefit of all applicants. The right to personal data protection and the right to know can be regarded as two sides of the same coin. One can never prevail over the other. Therefore it is necessary to lead a consistent and unified policy with balance and proportionality tests towards the citizens and government bodies, a policy of legal review which prevents public confusion. Precisely this emphasis is the one observed most by fellow commissioners from other countries. Trust in a certain institution can only be obtained by professional work combining respect for human rights with professional attitude towards both the applicants, i.e. citizens on the one hand and public sector bodies on the other.

Specific Factors Contributing to Transparency in Slovenia

There are also some other specific factors, which contributed to the level of transparency in Slovenia. They are based on legal competencies and are necessary for the efficiency of the IC activities.

Appeal against administrative silence

The appeal on the grounds of inactivity of the body is related to stipulating the time limit for transmission of information. The possibility of appeal on the grounds of inactivity of the body in case of absence of reply (administrative silence) has proven essential in ensuring effective access to information. The number of such appeals on the grounds of inactivity of the body in Slovenia has

been considerably higher in previous years than the number of appeals against actual decisions rejecting the request for access to information. Therefore there is every reason to conclude that access to public information would not be actively implemented without the stipulated appeal on the grounds of inactivity of the body.

In 2007 the Information Commissioner received 121 complaints against the decisions of authorities that rejected requests for access to or re-use of public information. Meanwhile 221 complaints were lodged as a result of implied decisions, namely, in instances where an authority had failed to reply to the applicant's request. In such instances the Information Commissioner asked the authority to review the applicant's request as soon as possible, consequently in as many as 164 cases the liable body granted an applicant access to the requested information.²²

The right to demand documents

IC can demand all documents which have been requested by the applicant (including classified documents) if necessary to deal with a complaint. In practice, no decision is taken without reviewing the requested information, which prevents the IC from purely formal decisions. Within the frame of his/her competency, the IC can also view tax secret and classified documents.

If, when dealing with a complaint in a case of access to public information, the IC suspects that the first level body holds the requested information but does not entirely or partially reveal it to the IC, the IC can use powers in accordance with the law governing inspections. In practice, IC has therefore investigative powers if the information is not sent or is claimed to be non-existent. An energetic approach is of highest importance, since in about 40% of all denials the public authority argues the requested information is not in its possession.

The IC has also the power to perform the so-called *in camera* inspection of documents. In practice this inspection is carried out without the presence of the party requesting access to public information if it is deemed necessary to prevent access to the requested information prior to the Information Commissioner's final decision.

Penal provisions

Last but not least, the IC has procedural competencies connected with misdemeanour (penal) provisions. The ICL allows for issuing of fines in cases where, in spite of being so requested, an official fails to transfer to the IC the demanded document, case, dossier, register, record or documentary material although they are in the body's possession. The responsible person of the public authority is liable for such a violation.

The ICL also allows for issuing of fines upon an official responsible for a violation when, in spite of the IC's decision, the official fails to transfer the required document, case, dossier, register, record or documentary material to the applicant. In 2008, Information Commissioner for the first time issued a fine for not providing the requested information within the prescribed time limit without justification when the appointed public official did not release the information for four months and repeatedly demanded the applicant to supplement the request although it was clear from the start.

Factors Hindering Transparency in Slovenia

A couple of factors will be mentioned briefly in hope they can be avoided in other countries.

Firstly, appeals against every infringement of the right to know should be permitted under law. In Slovenia, the appeals are listed in the law; however, the lawmaker has failed to anticipate the need to appeal against the costs charged for disclosure of information. Consequently, the requestor has to turn to the court directly if the public authority imposes charges wrongly, which takes a lot of time.

Secondly, the relation between the APIL and other laws that determine some aspects of access to information should be clearly resolved. In Slovenia, the relation between APIL and laws regulating judicial procedures is especially controversial. From the IC's standpoint, the exercise of the authority of the judiciary which includes trials also represents a part of the public law tasks of the body and therefore falls under the sphere of activities of the body. Should it be ascertained in the appeal procedure that the requested document exists, that the body is in possession of the document and that the requested information derives from the work sphere of the body, the basic criteria for existence of information of public character are fulfilled. For that reason, individual documents from court records, such as transcripts of public hearing, orders, decisions and judgments, fulfil all the requirements for existence of information of public character.²³ In practice a distinction has developed between the right of access to court records under the procedural law and the right of access to information of public character under APIL.

Courts as liable bodies have frequently rejected requests for access on account of procedural law provisions, under which the parties to a case have the right to examine and transcript separate records. Other persons may be allowed to examine and obtain transcripts of separate records, but only if they can demonstrate legitimate benefit. In this manner the courts assess whether the applicant has the appropriate legal interest to obtain specific information and requests for access to information of public character are regularly rejected, despite the fact that APIL specifically enshrines the principle of free access to information of public character.

Such interpretation of APIL has been, according to the IC's practice, considered inappropriate and therefore IC ruled the whole or partial access of such documents under APIL. Provisions of procedural laws that regulate the right of access and transcription of records are not in relation *lex specialis derogat legi generali*, since they do not regulate the same right. Provisions of procedural laws relate to the right of parties and clients in a judicial procedure, i.e. the right of a person who has demonstrated legitimate benefit to the access and transcript of records in a specific court case, whereas APIL regulates the right of anyone to access different documents – information of public character that is at the disposal of the bodies. The right of parties to have access to the court records and the general right of access to public information are not rights which would be in collision or which would exclude each other. The question of access to public information should be decided separately in each concrete case and for each document. The positions taken in the judgments of the Administrative court of the Republic of Slovenia are to be understood in light of this, namely, APIL as general law and sector specific laws regulating access to public information are equal. These positions should, however, in no way be understood as requesting an additional condition regulated in procedural laws, neither is it possible to request additional proof of justifiable interest or benefit for granting of access to information from court records.

Conclusion

The development of transparency in Slovenia undoubtedly indicates that the legal basis is merely a preliminary condition for a policy aimed at increasing the level of transparency. My experience, gained also from the implementation of access to public information in Macedonia shows that the policy maker should defend a firm standpoint when it comes to issues of transparency and should dedicate all efforts to this mission.

However, in most cases, not the legal competencies as such, but rather their usage is problematic, especially when the relevant authorities are afraid of exercising their authority. The practical autonomy and independence of authorities governing access to public information is therefore essential. Transparency is a virtue to which public officials have to adapt and that takes some time; nevertheless the authorities responsible for transparency have to be energetic and persistent. This logically leads to the conclusion that success of increasing transparency mainly depends on non-legal, “soft” or even personal factors.

One should also consider that the battle for maintaining a high level of transparency is an on-going process and no system is good enough to rest on its laurels. In Slovenia, the level of transparency has increased immensely in the past five years yet at the same time there are some shortcomings which will need to be improved in the future (especially the charging of fees, the relation between APIL and other laws and some procedural questions concerning the necessity of the owner of personal data to be a party in the procedure of access to public information). Otherwise, the deficiencies, although they are deemed to be of

lesser importance, can overturn the positive work of the past. The burden therefore lies on the Government and the Parliament who need to detect the problems in practice and provide legal remedies to them.

¹ Sonja Bien Karlovšek is a Deputy Information Commissioner, Republic of Slovenia.

² Freedom of Expression Course For Nepal Participants' Manual. *Article 19*, Federation of Nepali Journalists, Freedom Forum. June 2008. <http://www.article19.org/pdfs/other/freedom-of-expression-course.pdf> Last accessed on August 21, 2008.

³ Official Gazette RS, No. 51/06 – official consolidated text and No. 105/06 – ZUS-1.

⁴ All the exceptions are included in the First Paragraph of Section 6 of APIL.

⁵ An appeal is not allowed when an informal request has been lodged.

⁶ The form for a formal request and for all kinds of appeals can be found on the website of the Information Commissioner: www.ip-rs.si

⁷ The applicant is not required to give the legal grounds for the request or expressly characterize it as a request for the access to public information. If it is evident from the nature of the request that it concerns access to public information under this law, the body shall consider the request pursuant to this law.

⁸ The body is obliged to decide about the extension of the time limit, including the explanation of the grounds for the extension, by an order, which it shall serve on the applicant. The body is obliged to reach the decision at the latest within the time limit of 15 working days after the receipt of request but a special appeal against such an order is not admissible.

⁹ In practice, the most problematic public authorities are smaller communities and small public agencies, which *successfully* turn away applicants by charging high fees.

¹⁰ The public interest test is not applicable in all cases. Among others exempted are classified data denoted with one of the two highest levels of secrecy and information which contains or is prepared on the basis of classified information of other country or international organization, with which the Republic of Slovenia has concluded an international agreement on the exchange or transmitting of classified information. Importantly, this test is applicable without any exceptions in the most frequently used exceptions, which are personal data, business secrets, and the most evasive exception, connected with internal operations and activities of the public authority.

¹¹ Except in cases when the law governing public finance and the law governing public procurement stipulate otherwise.

¹² According to the law an exception is, for example, the information which has been acquired or assembled for the purposes of criminal prosecution or in relation to it, or for the purpose of violation procedure and the disclosure of which could impair their execution. Equally the regulated exceptions are the information which has been acquired or assembled for the purposes of administrative procedure and the disclosure of which could impair its execution, and the information which were acquired or assembled for the purposes of civil procedure, non-contentious proceeding or other judicial proceeding and the disclosure of which could impair their execution. It is evident that these exceptions can be applied only in cases where the procedure is still ongoing.

¹³ Experts who were drafters of the law claim the reason for that lies mainly in the absence of a central appeal body. In addition to the oversight being given to an overstretched Ombudsman office, there are other key factors for the poor implementation, including the top-down approach for adopting the law with the concurrent absence of civil society demand, the lack of political will to implement the law, the hypocritical position of the international community which exempted itself from the scope of the law, the complexity created by having to adopt three laws (Bosnia, Federation, and Republika Srpska), the poor state of information management in Bosnia, and the fact that Bosnia is close to being a

failed state which, when the other aforementioned factors are taken into consideration, presents a particular challenge for introducing a transparency regime.

¹⁴ The author was one of the consultants in the project of strengthening transparency in Macedonia in 2007 and observed the following major problems: despite the sufficient number of employees of the Commission, the staff is not educated, qualified and motivated for the work in such a commission (the majority of them being translators from Macedonian to Albanian and vice versa), which causes evident backlogs, the work of the Commission is not organized in an efficient manner since only a few members of the Commission actually work on concrete cases, the members of the Commission are under more or less hidden political pressure, being aware of the fact that their long term job reliability and future career in the public sector depends on politics, the Commission takes decisions without inspection of the information, leaving its decisions formalistic, the majority of public authorities ignores the law and there is practically no financial or other support for the ideas of openness from the Government.

¹⁵ According to the provisions of the Personal Data Protection Law (PDPL) the national supervisory body is an independent and autonomous state body. Previous to the entry into force of the PDPL, however, the protection of personal data was entrusted with the Inspectorate for Protection of Personal Data as a body subordinate to the Ministry of Justice. Hence the Inspectorate was a first level body in relation to the Ministry of Justice.

¹⁶ The stated is obviously relevant in all of aforementioned cases except when IC him/herself demands his/her dismissal; in such case the president's proposal is of course not required.

¹⁷ The report must be submitted at the latest until May 31 for the previous year and published on the Commissioner's website. The annual report includes information on work accomplished in the previous year, recommendations and assessments in fields of personal data protection and access to public information.

¹⁸ Slovenia has approximately 2 million citizens and nearly 4000 public authorities, which have to follow APIL.

¹⁹ The interpretation of the law in favour of the applicant does not mean that the Information Commissioner has never issued a decision in favour of the public authority (statistics show that nearly 35% of complaints are refused and the decision of the public authority is confirmed), but merely the tendency towards such explanation of the law which takes into account the applicant being a layman (e.g., when determining the information which are requested) and of course the broadness of the right to know and the public interest by interpreting the exceptions to this right.

²⁰ After graduating in law Nataša Pirc-Musar was employed for six years at the Slovenian national television as a journalist and news presenter of the main news TV Dnevnik. Subsequently, she worked for five years as news presenter on central information programme of the largest commercial television broadcaster in Slovenia, POP TV. She gained additional experience in journalism at CNN and did her professional practice at BBC, Granada TV, Sky News, Reuters TV and Border TV. She has also contributed newspaper articles and worked for radio. In April 2003 she became Director of Training and Communications Centre at the Supreme Court of the Republic of Slovenia where she was also appointed as a public official responsible for public information. For further information about N.Pirc-Musar see also: <http://www.ip-rs.si/index.php?id=310> Last accessed on September 23, 2008.

²¹ An indicator of this mentality was, for instance, secret Official Gazettes in former Yugoslavia where various regulations concerning international economic relations were made obligatory.

²² For more information see: http://www.ip-rs.si/fileadmin/user_upload/Pdf/porocila/Letno-porocilo-07-ang.pdf Last accessed on August 21, 2008.

²³ It is worth mentioning that they can partly contain some exceptions of freely accessible information such as personal data.

4. Structural and Institutional Factors that Promote Corruption in Local Government

*Inga Vilka*¹

In the first semiannum of 2008 in Latvia, local government issues drew attention with a number of Constitutional Court rulings that highlighted the unconstitutional nature of some municipal planning documents, corruption investigations in the Riga City Council, and dismissal of the Ķekava Township Council. And with municipal elections coming up in June 2009, local issues are likely to remain in the focus of public and media scrutiny.

I will start with a short theoretical elaboration on local government and the principles upon which it functions. One of the main factors that increase the risk of corruption is the fact that legislation governing local government is in many areas inadequate, contradictory, open to interpretation, and not always understandable. This leads to ambiguous and complicated ways of carrying out functions. In this paper, however, I would like to draw attention to structural and institutional factors that increase the risk of corruption in Latvia's municipalities. At the same time, I would like to point out that *risk* of corruption cannot be equated with corruption. For this reason, the structural and institutional factors described here cannot be considered sufficient preconditions for corruption as such, and it would be wrong to conclude that corruption exists in all municipalities. I will illustrate my considerations with examples from the municipality in which I live – Ādaži county – and from media reports on the city of Riga.

Local government as such and local government in Latvia

Local government is by definition a power created by the residents (citizens) of a specific territory or territorial community, which functions in this territory and makes decisions on such questions which, according to the law, are under its jurisdiction, or on other questions important to the community, unless the law says that these are within the competence of other public administration institutions.

The different functions of municipalities throughout the world are based on key local government theories:

- the free community theory,
- the socioeconomic theory,
- the local state theory.²

The free community theory is based on the concept of a community's natural right to manage its own affairs. This theory makes the point that, initially, there was a community, not a state; that the community came before the state and that the state must therefore respect the right of a community to self-government. The socioeconomic theory highlights the non-governmental, primarily economic nature of municipal activities. According to this theory, local authorities are the managers of the local economy. According to the local state theory presented by German jurisprudence scholars, local government is a form of public administration at a lower level. The supporters of this theory do not acknowledge significant differences between the national and the local level of public administration. In their opinion, local government has been devised to improve public administration.

For its own local government system, each country has chosen the theory that it finds most appropriate, often borrowing individual elements from other theories.

To protect and strengthen local government, in the 1950s a number of European countries started working on a joint document, basing their work on the principles of democracy, decentralization and subsidiarity, in acknowledgement of the free community and socioeconomic theories. As a result, more than 30 years later, in 1985, the Council of Europe in Strasbourg signed the European Charter of Local Self-Government (European Charter), which took effect in 1988. According to the European Charter, "local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population".³

The main objective of European Charter of Local Self-Government is to protect and strengthen local government in European countries in accordance with the principles of democratization, decentralization of power, and subsidiarity. However, if too much attention is focused on the protection of local government from state supervision and centralization efforts, not enough attention is paid to the actual purpose of local government – to represent the local population and to deal with issues of local importance. The prevailing opinion is that the population can express its views in municipal elections and must then rely fully on the elected representatives. This problem exists not only in Latvia but in all of Europe. And this is why, 20 years after signing of the European Charter, the European Council has prepared and will probably in the near future adopt a Protocol to the Charter to give added weight to local government. The Protocol addresses and respects the many different forms of public involvement that can

be anticipated in national, regional and local legislation. The Draft Protocol includes topics such as:

- the right of the people to participate in local public affairs,
- the right of the people to receive information from the local administration,
- the duty of the local administration to guarantee these rights.⁴

In Latvia's Law on Local Government (1994), local government is defined as a local administration which, through a representation – a council – elected by the people, and institutions and agencies established by the representation, shall carry out the functions prescribed by the law, the tasks assigned by the Cabinet of Ministers, and voluntary local initiatives, in observance of national interests and the interests of the population of the respective administrative territory.⁵ From this follows that local government is an aggregation of the local decision-making body and executive institutions.

The work of local authorities is connected with the daily life of each member of the local population. In Latvia, local authorities have a relatively broad realm of competence. They are in charge of public utilities, maintenance of public areas, education, culture and cultural heritage, social care and social welfare, housing, economic and territorial development, building permits, etc. Local authorities can also engage in voluntary initiatives. For example, there are cases where they own and operate camping grounds, guest houses, cafes, markets, pharmacies and fire-stations.

In order to exercise their powers, local authorities create different structural units and institutions (boards, departments, offices, agencies, corporate enterprises), become stakeholders in societies and foundations, and outsource functions to other public or private institutions. The right of local authorities to create their own structures without violating the law is one of the principles of the European Charter of Local Self-Government.

At the beginning of 2008, there were 551 municipalities in Latvia (26 regions, 7 cities, 52 towns, 36 counties and 430 townships), but the number is being cut by the administrative-territorial reform. It is anticipated that after completion of the reform in 2009, there will be just a little over 100 municipalities in Latvia (cities and counties).

In Latvia, municipal property is separated from national property. In recent years, municipal budgets have generally represented about 25% of the total national budget. Total municipal revenues in 2007 were 1.43 billion lats, whereas expenditures were 1.46 billion lats.⁶ It should be noted that the revenues and expenditures of municipal corporate enterprises are not included in municipal budget reports, which means that the previously quoted ca. 1.5 billion lats are not the only financial resources at the disposal of municipalities. Principal municipal budget expenditures in 2007 included 316.4 million lats in capital expenditures, 193.2 million lats in payments for services, 79.6 million lats in payments for goods.⁷

The fact that local power is generally seen as important and worth fighting for is proved by the number of candidates and candidate lists in municipal elections. In 2005, 1695 lists were submitted in 530 municipalities; 15,682 candidates competed for 4,179 seats on local councils (on the average, four candidates for each seat).⁸ As a general rule, however, there is less interest in smaller, more remote and financially weaker municipalities. In 2005, for example, even after extension of the deadline for submitting candidate lists, voters in 69 municipalities had only one list to choose from. On the other hand, in Riga, Greater Riga, Jūrmala and other major cities, the struggle for power is always quite fierce. In 2005, there were 17 lists competing for seats on the Riga City Council, and Jūrmala had 21 lists running for power.⁹

Local government and the risk of corruption

The extensive powers of local authorities, the real estate and the financial resources under their management, and the huge impact of their decisions on real estate values explains why local government (decision-making and executive institutions) must be considered as one of the areas susceptible to corruption.

Corruption, as defined by the Law on the Corruption Prevention and Combating Bureau (CPCB), is bribery or any other action carried out by a public (local) official in abuse of function or position, with a view to obtaining an undue advantage for himself or herself or other persons. "Corruption most frequently occurs where the public and private sectors meet, especially where public officials are directly responsible for providing public services or issuing specific regulations."¹⁰

Local authorities provide (organize, order, purchase) a substantial share of public services, and build or reconstruct the infrastructure and buildings necessary for these services. They are also responsible for adopting zoning and building regulations, and issuing building permits. All these can be seen as high risk areas. Nevertheless, the existence of corruption in local government is above all connected with each and every one of its members' – deputies', officials', employees' – views, desires and behavior (although, behavior can be either voluntary and self-initiated, or involuntary – even forced), and public attitudes to corruption. Therefore, if a municipal official or employee carries out, supports, or fails to prevent corrupt activities, and the public turns a blind eye, then corruption exists and steadily increases. Structural and institutional factors can only facilitate and promote corruption; they are not preconditions that inevitably lead to corruption, but rather elements of an environment favourable to corruption.

Among the major structural and institutional factors that increase the risk of corruption in local government are:

- absence of political supervision in decision-making institutions,
- merging of decision-making and executive institutions, curtailment of the role of decision-makers,

- decision-making processes with insufficient deputy participation,
- conflicts of interest,
- non-transparent reporting to the local public,
- inadequate conditions for public consultations and hearings,
- excessive regulation and legal nihilism.

Absence of political supervision

The nucleus of local government is the decision-making body – the council – which is made up of deputies elected by the population. Latvia's municipalities tend to have a small number of deputies (7–15 seats on local councils, depending on the size of the population; 60 deputies on the Riga City Council). Local government expert, University of Latvia associate professor Māris Pūķis sees the small number of deputies as one of the reasons for the near absence of political supervision within the decision-making bodies themselves, which poses one of the greatest corruption risks.¹¹ In places where there is only one list of candidates in local elections, there is basically no political supervision. But even in other municipalities, with the small number of local deputies and the political fragmentation typical for Latvia, it is difficult to form factions that would keep an eye on each other in the decision-making bodies.

If none of the lists has succeeded in winning a clear majority, one or two deputies from one list must join up with the deputies of another list (who are likely to have different political platforms) to form a ruling coalition. In such cases, the most realistic way of achieving a coalition is to make sure that the other deputies have a personal interest in cooperation. As a result, local government coalitions may demonstrate the most unlikely combinations of lists (parties), as compared with the *Saeima's* political groupings. In a number of municipalities, especially the larger ones, it is clear that appointments – including appointments to executive positions – have been used to get a majority of seats on the council (salaried committee chairmen and deputy chairmen, board members of municipal companies, board members of the port authority, etc.).

The chances of the opposition to keep an eye on the activities of the ruling coalition are not great. The opportunities provided by the Law on Local Government are questions and debates at council and committee meetings (which according to the law are open to the public), and applications to supervisory institutions in cases where the correct procedure has not been observed – but this usually does no more than delay a process. The activities of the opposition are also limited by the fact that it usually does not have a single full-time municipal employee (official), who could follow current issues in a professional manner. It cannot be denied, however, that the existence of an opposition in local government is a significant corruption prevention factor.

Merging of decision-making and executive institutions

A number of corruption risks are connected with the merging of municipal decision-making and executive institutions, as decision-making bodies scale down their supervisory functions *vis-à-vis* the executive and are used as a vehicle for securing jobs in executive institutions.

In Latvia, the chairman of the local council, who is chosen by his fellow deputies, is the top decision-maker and, at the same time, the head of the executive. According to the law, the chairman presides over the work of the council and, in the cases set out in the law, represents the municipality without special authorization (here, *council* is understood to be the decision-making institution. In Latvia, there is a tendency to wrongly call the whole local administration the council.)¹² Nevertheless, in practice, the chairman of the council is also the head of the executive. Chairman of the council is a salaried job and may be combined with other jobs only in the cases set out in the Law on Prevention of Conflicts of Interest in the Acts of Public Officials. In practice, the chairman of the council often has a second job on the board of corporate enterprise founded or controlled by the state or the municipality (primarily in the larger municipalities, because smaller municipalities rarely have such enterprises for the execution of specific functions). More and more often we see situations in Latvia's municipalities where deputy chairman of the council is also a salaried job, and in numerous municipalities there are even several salaried deputy chairmen (in all of Latvia's major cities the chairman has at least two salaried deputies). This means that the chairman's deputy also has decision-making and executive powers and functions.

The Law on Prevention of Conflicts of Interest in the Acts of Public Officials does not prevent other local council members from working in executive institutions. Although no such studies have been carried out, I venture to say that there is not a single municipality in Latvia in which a local deputy (aside from the chairman) is not director or employee of a municipal institution. Furthermore, there is a number of municipalities in which more than half of the deputies are also employed in executive jobs.

Example. Of the 11 deputies on the Ādaži County Council, six also hold executive jobs: the chairman, the salaried deputy chairman, the head doctor at the Ādaži hospital, the deputy director of the Ādaži secondary school, the director of the Ādaži County social welfare office, a board member of *SIA Ādažu Ūdens* (the local water provider).¹³

In regard to local government performance, there is room for debate about the positive and negative aspects of a situation in which salaried deputy chairmen and deputies also represent municipal institutions. Positive in regard to deputy chairmen is the fact that power is dispersed and is not concentrated in the hands of one person. The work of deputies in municipal institutions is, on the one

hand, positive, giving decision-makers a better understanding of municipal affairs; but on the other hand, when budgets must be negotiated, these people defend their specific areas of interest and do not take a strategic view of local development issues. A corruption risk occurs if a deputy/decision-maker who is at the same time a deputy/municipal employee turns a blind eye or supports a decision in return for less interference in his or her activities or some other favour. In a situation in which members of the council also represent the interests of executive institutions, the decision-making body is weakened as a supervisory mechanism, or even rendered powerless.

Example. One of the most active members of the opposition (*Jaunais laiks*) on the Ādaži County Council, who, at council meetings, would frequently ask deputies of the ruling party awkward questions, has become a lot more conciliatory after being appointed to the board of *SIA Ādažu Ūdens*, the local water company.

Many more examples can be found of the fact that deputies are very much interested in securing positions for themselves in municipal institutions, and this is something that has a depletive effect on the work of decision-making institutions. In the Riga City Council it is already tradition for deputies to not only vote as required, but even to switch parties in order to get a seat on the board of a state-controlled or municipal enterprise, or some other lucrative job.

The corruption risk is increased by the fact that deputies tend to publicly deny their decision-making role and responsibility, and point to others – for example, executive institutions or committees to which they themselves do not belong. This increases the general impression that people cannot influence local government processes in any way whatsoever through their local representatives – the deputies – and that they must simply put up with whatever is going on.

Example. Having been criticized by the local population, the chairman of the County Development Committee claims he cannot reprimand the chairman of the Building Council for undisputable malpractice (e.g., for issuing building permits without detail plans, where such are required by law), this not being local tradition.

Example. Riga City Council deputy Edmunds Krastiņš, the former chairman of the Development Committee, when still in office, said in an interview with *Neatkarīgā Rīta Avīze*:

“If *Rīgas Satiksme*, in cooperation with the Transportation Department, has decided to invest approximately 100 million EUR in reconstruction of the 6th tram line instead of investing these 100 million in a new north-south tram line in Pārdaugava, then, of course, nothing can be done over there (in Pārdaugava).”¹⁴

Here, it should be kept in mind that it is not the Transportation Department that decides questions connected with the city's budget or with municipal enterprises – decisions are made by the City Council collectively. The Law on Local Government says that a local council may deal with any question that is within the competence of the local authorities, and that only the council may approve the municipal budget or amendments thereto.¹⁵

The above example highlights another problem area – development planning, at both the local and the national level. The Law on Local Government says that municipalities must prepare a territorial development programme and a territorial plan, and provide for implementation of the development programme.¹⁶ The programme, which only the local council may approve, is the document that earmarks all major investments. This means that deputies cannot refer the blame for unacceptable decisions to executive institutions. In practice, however, there are municipalities that do not have such programmes, or have programmes that are too general for practical use.

Decision-making processes with insufficient deputy participation

In accordance with the Law on Local Government, the rules for decision-making procedures in local councils are set out in local government statutes. Council meetings must be held no less than once a month, and the law says that draft decisions, opinions, and information on forthcoming decisions, must be made available to all deputies no later than three days before a regular council meeting and no later than three hours before an extraordinary meeting.¹⁷

Each deputy has a seat on at least one committee. Questions are usually examined by one or more committees before they are reviewed at the council meeting. But in certain cases a question may go straight to the council meeting.

In view of the broad realm of competence of local authorities, deputies must make decisions on a wide variety of questions, the scope of which depends on the size of the municipality and on its level of socioeconomic development.

Example. The agenda for the Ādaži County Council meeting on May 27, 2008 included 74 questions divided into seven sections.¹⁸

Deputies are not always sufficiently well informed to be able to weigh the pros and cons of a question and reach a well-considered decision. Most deputies carry out their duties after work at their regular place of employment and usually do not have the time to examine all questions. Moreover, the remuneration that deputies receive, which in the majority of cases is calculated according to the time spent in meetings and consultations with the public, does not exactly motivate deputies to devote more time to studying upcoming questions.

In practice, draft decisions and the necessary information material are not always available prior to the deadline specified by the law. At times, questions are included in the agenda, which have been submitted on the same or on the previous day.¹⁹ Such situations testify to the growing dominance of the executive in a municipality and show that decision-making bodies in which part of the members represent the executive will accept such conditions.

Conflicts of interest

Restrictions imposed on local officials by the Law on Prevention of Conflicts of Interest in the Acts of Public Officials in regard to holding more than one job apply to the chairmen of local councils and their deputies, to municipal CEOs and their deputies, to deputies of the local council, to directors of local agencies and their deputies, to board members and representatives of the shareholders of municipal enterprises, and to members of public procurement committees. Public officials subject to the requirements of this law are also persons who, in the discharge of their official duties in state or municipal institutions, are entitled to issue administrative acts or carry out supervisory, control, investigative or penal functions in regard to persons who are not their direct or indirect subordinates; or those who are entitled to handle state or municipal property, including financial resources.

It is not the purpose of this paper to analyze conflict-of-interest legislation; it is clear, however, that the law applies to a relatively broad circle of local officials. Nevertheless, in practice, there are officials who hold jobs in various companies, including ones that are directly affected by the decisions and actions of the local authorities. This creates a considerable risk that decisions pertaining to these companies will be more favourable, processes quicker, rules more lenient, etc., than for others. And these companies have access to more inside information than other companies.

Examples. Information available on the Internet shows that the chairman of the Administrative Commission, who is also a board member of the local rescue service, *SIA Ādažu glābšanas dienests*,²⁰ is at the same time project director for the New Europe Real Estate Company.²¹ The company plans to build apartment buildings on the shores of Mazais Baltezers, which will project out over the water. The Ādaži County Council has approved a detail plan for this territory, which is legally disputable.

Information available on the Internet shows that a member of the Administrative Commission is also project director for *SIA Vestabalt*, a developer who is active in the area. *SIA Vestabalt* is the company that initially launched the above project and is also the owner of the territory on the shores of Mazais Baltezers where, despite criticism from government institutions, the territorial plan allowed residential and commercial buildings in a flood hazard area. It has also allowed construction of multi-storey

apartment buildings. Since the objections of local residents to the detail plan were ignored and the correct procedure for drafting detail plans was not followed, local residents appealed to the Constitutional Court, which ruled this part of the territorial plan invalid. Nevertheless, the municipal authorities have not annulled their decision on the detail plan.²²

In regard to the supervision of municipal employees, one idea that has been periodically raised since creation of the National Civil Service Administration in the early 1990s is their inclusion in the civil service. Currently, Latvia's municipal officials and employees are not civil servants.

If municipal employees were to be included in the civil service – at least those who already are public officials –, the legal basis for regulation of conflicts of interest would not significantly differ. However, the National Civil Service Administration would provide additional supervision of public officials and, pursuant to the law, take disciplinary action and impose disciplinary sanctions. The first instance for complaints about local officials would be the National Civil Service Administration, and not the Administrative Court, the Constitutional Court, the Corruption Prevention and Combating Bureau or the Public Prosecutor.

There are, of course, numerous arguments against the establishment of a civil service at the municipal level (the subordination of municipal employees to the government; a common remuneration, evaluation and career development system in extremely diverse municipalities; distribution of responsibility among a greater number of supervisory institutions).

Non-transparent reporting to the local public

The Law on Local Government says that a local council must prepare an annual report that must be communicated to the public.²³ The annual public report must contain information prescribed by the law on the previous and the current years' budgets, on municipal liabilities and securities, on the estimated value of the municipality's immovable property in the past two years, on the value of its capital assets and any expected changes thereto, etc.

The fact that such reports actually are prepared and made public by local authorities must surely be seen as positive. However, formal presentation of the bare facts required by the law, without additional analysis, does not allow the public to get a clear picture and to judge the performance of the local authorities.

Examples. The annual public report of the Riga City Council must, all in all, be judged positively.²⁴ It is comprehensive, well-structured and well-designed, published in print and on the Internet; however, in this report, the local authorities steer clear of the problem issues. In Riga's annual report for the year 2007, for example, the only information provided on

public debt – a question of considerable interest to the public – is the sum payable from the current budget. Nothing is said about total public debt or plans for repayment. Theoretically, this information is available – anyone who is interested can find it on the website of the State Treasury, in the official report of the Riga municipality. So, why does the Riga City Council avoid the topic in the report that is released to the public?

In the second half of July 2008, the website of the Ādaži County Council, which contains quite a lot of information on local affairs, did not have the county's annual public report for either 2007 or any previous year. Over the telephone, a county Information Centre official explained that it was possible to read the report at the offices of the local administration.

Nowadays, many municipalities maintain Internet websites; they publish flyers, newsletters or newspapers which, according to them, are usually much appreciated by the local population. Such activities must clearly be judged positively. Although no systematic analyses have been carried out on the subject, examination of a fairly large number of municipal websites and newspapers leads to the conclusion that websites are the more neutral and objective source of information, whereas local newspapers are more or less openly used not only for reporting news, but also for polishing the image of local officials and party candidates running for election.

Ineffective public consultations and hearings

Currently, public consultations or hearings must be held on all territorial planning questions. It must be pointed out that public hearings only have a consultative function. The most controversial and contestable issues for which the law prescribes public hearings are detail plans and development projects. It is clear that there will rarely be situations in which everyone is happy and no one has any objections. The examples of some Greater Riga municipalities leave the impression that, in many cases, the local authorities would be happier if they were not obliged to hold public hearings. If these municipalities were truly interested in the opinions of the public, information about public hearings would be comprehensive and readily available.

Two points that leave room for manipulation in this question are:

- when and in what form to announce a public hearing,
- how to specify the location of a territory that is the object of a public hearing.

In regard to detail plans, the law says that notification of public hearings must be published in two issues of a newspaper, and that the direct neighbours of the territory in question must be notified in writing. However, if a municipality is interested in a real hearing, it can not only publish the formal notification in a newspaper; it can make the information available in various other places and ways.

Example. A positive example can be seen on the website of the Riga City Council where there is a special section on public hearings. In the case of larger territories (objects), information about public hearings is additionally published in the media (for example, in August 2008, on development of the lot next to the Central Station). Whether or not the views of the public are then taken into account is, of course, a different matter.

The Ādaži County website is also a positive example. Here, information about public hearings can be found in the section “Hearings on Preliminary Sketches.”

The question of how to specify the location of a territory that is the object of a public hearing arises when the territory is located on the outskirts of a city or in a rural area. In the city, each lot has an address with a street and a number, and when this is indicated in a public hearing notice people can approximately imagine where the lot is located and decide whether or not they are interested. On the outskirts of a city and in rural areas, however, where some lots only have a name and a registration number, it is not always made clear where the lot in question is located.

Example. The publications of the Ādaži County Council are inconsistent. In notifications of public hearings, sometimes the populated area (village) where a territory is located is indicated, but sometimes not. It seems that in cases where the authorities do not want to make an issue of a public hearing, they fail to indicate the exact location of a territory. Here is an example of an invitation to a public hearing:

The first draft of the detail plan for the Riga Region Ādaži County lot [name of lot] (reg. No. xxxx xxx xxxx) is up for discussion. The first draft of the detail plan is on display at the Ādaži County Council on weekdays from 9 a.m. to 5 p.m. Consultation of the public will take place from October 16, 2007 to November 16, 2007. A public hearing will take place on November 7, 2007 at 3 p.m. on the premises of [name of company] Ltd., in Vilandes Street in Riga.

Although such Ādaži County notices frequently indicate the name of a village, in this case it was not done, because the fact that the territory is located on the shores of Mazais Baltezers, in the Baltezers village, could be expected to produce a heated discussion. A question also arises about the choice of location for the public hearing – in downtown Riga. It must be pointed out, however, that in this case the law did not prescribe a public hearing.

With all our modern-day technical possibilities, including a map of the territory under discussion should not be a problem; but this could, of course, arouse greater public interest.

In July 2008, the *Saeima* passed amendments to the Law on Local Government, empowering municipalities to hold municipal referendums.²⁵ The transitional provisions provide that, by December 1, 2009, the Cabinet of Ministers shall draft and submit to the *Saeima* a bill on municipal referendums. The transitional provisions also provide that the section on municipal referendums of the Law on Local Government shall take effect concurrently with the law on municipal referendums. If the Cabinet carries out the task that the law has assigned to it and prepares the bill in due time, the public will have greater opportunities for participation, not only in consultative but also in decision-making functions.

Divided responsibilities, excessive regulation, and legal nihilism

A municipality carries out municipal functions (“autonomous functions,” acting officially in its own name or in the name of another municipality that has delegated a specific function) and state functions (“functions delegated by the state,” acting officially in the name of the Republic of Latvia). According to Article 4 (4) of the European Charter of Local Self-Government, “Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority, except as provided for by the law.”²⁶

According to this international document, municipal functions shall normally be regulated by local authorities. The state shall only restrict the rights of a local authority if this becomes necessary in order to protect an important public right. In reality, this is not the case. The functions delegated to local authorities are increasingly affected by the enactments of central authorities, creating a situation in which there is divided responsibility for public functions, so that ultimately no one bears full responsibility. When imposing regulations on local authorities, no thought is given to enforcement of these regulations. Moreover, some requirements are impossible to meet due to lack of financing, of which legislators are fully aware from the start. Requirements that are impossible to fulfil tend to make it easier to ignore other requirements of the law as well. Consequently, regulatory enactments that cannot be enforced encourage a nihilistic attitude toward the law.

Example. The Law on Housing Assistance defines four groups of people for whom temporary living accommodations must be provided in emergency situations and 14 groups of people who are first in line for housing in municipal tenement buildings. But local authorities may establish additional criteria. And there are also municipal low-income housing projects. Usually, the municipality has less available housing than is needed, so that people never move up the waiting list. In such situations, the attempts of individual municipalities to follow the law letter for letter can reach the point of absurdity.²⁷

Conclusion

This paper outlines some of the structural and institutional factors that increase corruption risks in local government. But would the situation improve if these factors were eliminated? From a narrow aspect, the aspect of risk containment – possibly. But from a broader aspect, the aspect of local development, elimination of all of the aforementioned factors would not lead to a better and more effective local system of power.

I do not feel that deputies should not also be municipal employees. Nor do I feel that municipal officials should be incorporated into the civil service system, or that there should be tougher legislation governing local authorities, public hearings, etc. At present, my recommendation would be to improve public involvement in the affairs of the community, to demand greater accountability from local authorities, with less leniency towards obvious transgressions. An important precondition for this is widespread understanding of public administration, local government, and individual rights and obligations.

At the national level, it would be extremely important to review legislation on local government to establish which laws and regulations are actually applied and which have in practice proved to be dispensable. The latter should, at least in part, be repealed, to provide clearer rules of the game for all those involved.

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² Liborakina, M. *Проблемы и перспективы местного самоуправления: независимая экспертиза реформы* [Local Government Problems and Prospects: an Independent Report on Reform]. Moscow, 2003.

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³ European Charter of Local Self-Government. <http://conventions.coe.int/Treaty/en/Treaties/Html/122.htm> Last accessed on August 13, 2008.

⁴ Preparation of Draft Protocol to the European Charter of Local Self-Government. European Committee on Local and Regional Democracy (CDLR). Committee of Experts on Democratic Participation and Public Ethics at Local and Regional Level (LR-DP). Strasbourg, February 8, 2008.

⁵ Law on Local Government. Adopted on May 19, 1994.

⁶ Official monthly reports on the national budget, January – December 2007. http://www.kase.gov.lv/?object_id=125 Last accessed on August 13, 2008.

⁷ Ibid.

⁸ Central Election Committee. 2005 municipal elections. <http://web.cvk.lv/pub/public/27529.html> Last accessed on August 13, 2008.

⁹ Ibid.

¹⁰ *Kas ir korupcija* [What is corruption]? Ministry of the Interior website. <http://www.iem.gov.lv/iem/2nd/?cat=2301&ing=lv> Last accessed on August 18, 2008.

¹¹ Author's interview with Māris Pūķis, July 2008.

¹² Law on Local Government, adopted on May 19, 1994.

¹³ Information taken from the Ādaži County website <http://www.adazi.lv>

¹⁴ Grabe, A. *Edmunds Krastiņš negrib uzurpēt varu* [E. Krastiņš does not want usurp power].

Neatkarīgā Rīta Avīze, June 26, 2008.

¹⁵ Law on Local Government, Section 21.

¹⁶ Law on Local Government, Section 14.

¹⁷ Law on Local Government, Sections 27, 30.

¹⁸ Minutes of the May 27, 2008 meeting of the Ādaži County Council. <http://www.adazi.lv/?sadala=1900&id=3026> Last accessed on August 13, 2008.

¹⁹ Proof of this can be found in the minutes of council meetings.

²⁰ Ādaži County website <http://www.adazi.lv>

²¹ New Europe Real Estate website <http://www.neweurope.lv>

²² Letter from the Ādaži County Council to the Ministry for Regional Development and Local Government Affairs, which is attached to the Ministry's letter.

²³ Law on Local Government, Section 72.

²⁴ Riga City Council public report. http://www.riga.lv/LV/Channels/Riga_Municipality/Publiskais_parskats/default.htm

Last accessed on August 13, 2008.

²⁵ Amendments to the Law on Local Government. July 17, 2008.

²⁶ European Charter of Local Self-Government. <http://conventions.coe.int/Treaty/en/Treaties/Html/122.htm> Last accessed on August 13, 2008.

²⁷ Pūķis, M. *Pašvaldību funkciju īstenošanai nepieciešamā finansējuma noteikšanas iespējas*. [Options for establishing the amount of funding necessary for the performance of municipal functions]. Supplement to *Pašvaldību finanšu izlīdzināšana. Priekšlikumi Latvijas pašvaldību finanšu izlīdzināšanas sistēmas pilnveidošanai*. SIA PKC and Astrop, 2007.

5. Appendix. Combating Corruption: a Quantitative Overview

The appendix provides a systematic look at trends in Latvia's effort to combat corruption. The information compiled here comprises data on the number of persons convicted of criminal offenses committed in public service and forms of punishment (2004 to the first semiannum of 2008).

Table 5.1.
**Persons convicted of criminal offenses committed in public service
and forms of punishment (2004)**

CL or CC Section	Total number	Principal punishment – imprisonment				Other forms of principal punishment		Waiver of punishment	Mandatory medical treatment
		1 year or less	1-3 years (inclusive)	3-5 years (inclusive)	Conditional	Payment of fine	incl. conditional fine		
317. Abuse of functions (CC 162.1 applied in 4 cases)	9	0	0	0	4	2	0	3	0
318. Abuse of office (CC 162 applied in 1 case)	15	0	0	0	9	6	0	0	0
319. Inaction by a public official (CC 163 applied in 2 cases)	9	0	0	0	7	2	0	0	0
320. Acceptance of a bribe (CC 164 applied in 4 cases)	31	0	7	2	21	1	0	0	0
321. Misappropriation of a bribe	2	0	0	0	1	1	1	0	0
322. Intermediation in bribery	4	0	1	0	2	0	0	1	0
323. Active bribery	12	0	0	0	9	1	0	2	1

Source: Court Administration (March 22, 2005).

Table 5.2.
Persons convicted of criminal offenses committed in public service
and forms of punishment (2005)

CL or CC Section	Total number	Principal punishment - imprisonment				Other forms of principal punishment		Waiver of punishment	
		1 year or less	1-3 years (inclusive)	3-5 years (inclusive)	5-10 years (inclusive)	Conditional	Payment of fine incl. conditional fine		
317. Abuse of functions	10	1	2	0	0	4	3	0	0
318. Abuse of office (CC 162 applied in 1 case)	6	0	1	0	0	2	1	0	2
319. Inaction by a public official	5	0	0	0	0	1	3	1	1
320. Acceptance of a bribe (CC 164 applied in 1 case)	26	0	2	2	1	21	0	0	0
321. Misappropriation of a bribe	4	1	1	0	0	2	0	0	0
322. Intermediation of a bribe	5	0	0	0	0	5	0	0	0
323. Active bribery	14	1	1	1	0	9	2	0	0
327. Forgery of official documents	1	0	0	0	0	0	1	1	0

Source: Court Information System (statistical data published February 14, 2007).

Table 5.3.
Persons convicted of criminal offenses committed in public service
and forms of punishment (2006)

CL or CC Section	Total number	Principal punishment - imprisonment					Other forms of principal punishment			Waiver of punishment
		1 year or less	1-3 years (inclusive)	3-5 years (inclusive)	5-10 years (inclusive)	Conditional	Payment of fine	Incl. conditional fine	Community service	
317. Abuse of functions	6	0	0	0	0	5	1	1	0	0
318. Abuse of office (CC 162 applied in 5 cases)	11	0	0	0	0	8	2	0	0	1
319. Inaction by a public official (CC 163 applied in 5 cases)	19	0	0	0	0	5	12	0	2	0
320. Acceptance of a bribe	26	0	1	1	1	18	5	1	1	0
321. Misappropriation of a bribe	3	0	2	0	0	1	0	0	0	0
322. Intermediation in bribery	3	0	0	0	0	3	0	0	0	0
323. Active bribery	20	2	0	0	0	16	2	0	0	0
325. Violation of restrictions imposed on public officials	2	0	1	0	0	0	1	0	0	0
327. Forgery of official documents	2	0	0	0	0	2	0	0	0	0

Source: Court Information System (statistical data published July 4, 2007).

Table 5.4.
Persons convicted of criminal offenses committed in public service
and forms of punishment (2007)

CL or CC Section	Total number	Principal punishment - imprisonment					Other forms of principal punishment			
		1 year or less	1-3 years (inclusive)	3-5 years (inclusive)	5-10 years (inclusive)	10-20 years (inclusive)	Conditional	Payment of fine	Incl. conditional fine	Community service
317. Abuse of functions	7	0	1	0	0	0	3	3	0	0
318. Abuse of office (CC 162 applied in 1 case)	8	0	0	0	0	0	4	3	0	1
319. Inaction by a public official	7	0	0	0	0	0	4	3	2	0
320. Acceptance of a bribe	22	0	3	0	2	0	15	3	1	0
321. Misappropriation of a bribe	5	0	0	0	0	0	2	3	0	0
322. Intermediation in bribery	7	0	2	0	0	0	5	0	0	0
323. Active bribery	23	0	2	0	0	0	21	0	0	0
326. ² Solicitation and acceptance of undue advantage	1	0	0	0	0	0	0	0	0	1
327. Forgery of official documents	1	0	0	0	0	0	0	1	0	0

Source: Court Information System (statistical data published January 22, 2008).

Table 5.5.
Persons convicted of criminal offenses committed in public service and forms of punishment (first 6 months of 2008)

CL or CC Section	Total number	Principal punishment – imprisonment				Other forms of principal punishment			
		1–3 years (inclusive)	3–5 years (inclusive)	5–10 years (inclusive)	Conditional	Payment of fine	Incl. conditional fine	Community service	Incl. conditional community service
318. Abuse of office (CC 162 applied in 1 case)	2	0	0	0	0	1	0	1	0
319. Inaction by a public official	4	0	0	0	0	2	0	2	0
320. Acceptance of a bribe	16	2	0	3	9	6	4	0	0
321. Misappropriation of a bribe	2	0	1	0	1	1	1	0	0
322. Intermediation in bribery	3	0	1	0	2	1	1	0	0
323. Active bribery	11	0	0	0	11	1	1	1	1

Source: Court Information System (statistical data published July 31, 2008).

Table 5.6.
Percentage of persons convicted of criminal offenses committed in public service and sentenced to imprisonment in the years 2004, 2005, 2006, 2007 and the first six months of 2008

Year	Total number of persons convicted	Incl. persons sentenced to imprisonment	
		Total number	Percentage of total
2004	82	10	12.2%
2005	71	14	19.7%
2006	92	8	8.7%
2007	81	10	12.3%
2008 (first 6 months)	38	7	18.4%

Primary data sources: Court Administration, Court Information System.

Table 5.7.
Percentage of persons convicted of abuse of office
and sentenced to imprisonment in the years 2004, 2005, 2006,
2007 and the first six months of 2008

Year	Total number of persons convicted	Incl. persons sentenced to imprisonment	
		Total number	Percentage of total
2004	15	0	0%
2005	6	1	16.7%
2006	11	0	0%
2007	8	0	0%
2008 (first 6 months)	2	0	0%

Primary data sources: Court Administration, Court Information System.

Table 5.8.
Percentage of persons convicted of accepting bribes
and sentenced to imprisonment in the years 2004, 2005, 2006, 2007 and
the first six months of 2008

Year	Total number of persons convicted	Inc. persons sentenced to imprisonment	
		Total number	Percentage of total
2004	31	9	29%
2005	26	5	19.2%
2006	26	3	11.5%
2007	22	5	22.7%
2008 (first 6 months)	16	5	31.2%

Primary data sources: Court Administration, Court Information System.

Table 5.9.
Percentage of persons convicted of active bribery
and sentenced to imprisonment in the years 2004, 2005, 2006, 2007 and
the first six months of 2008

Year	Total number of persons convicted	Incl. persons sentenced to imprisonment	
		Total number	Percentage of total
2004	12	0	0%
2005	14	3	21%
2006	20	2	10%
2007	23	2	8.7%
2008 (first 6 months)	11	0	0%

Primary data sources: Court Administration, Court Information System.