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Legislative Toolkit on Conflict of Interest

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The views expressed herein can in no way be taken to reflect the official position of the European Union and/or the Council of Europe.

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Content

1. INTRODUCTION: WHY A LEGISLATIVE TOOLKIT?

Compared with bribery, conflict of interest has received less attention in international conventions. At the same time, abusing conflict of interest situations can generate the same or even more **illicit benefit** than bribery. For example, under previous procurement regulations in Ukraine, neither bidders nor members of the tender board had to declare any conflict of interest. This and other loopholes seem "to have benefited primarily a small circle of influential Ukrainian businessmen", with billions of damages estimated for the public budget.[1] A "parade of conflicts of interest that reached all the way to members of the U.S. Senate" is blamed for a savings and loans crisis in the United States which "ended up costing taxpayers in excess of $150 billion."[2] At the same time, conflict of interest violations can have serious non-financial consequences. For example, the industrial explosion in Tianjin, China, in August 2015 killed more than a hundred people. According to media reports, the company involved used "political connections to shield its operations from scrutiny".[3] The public officials who should have supervised the company's operations did not do so because they apparently put their interests in political connections above their public duties.

Conflict of interest is a corruption risk relevant for **all countries**, not only those in transition. The 2013 Eurobarometer survey on corruption in European Union member states reveals that 54% of companies perceive conflict of interest violations in procurement procedures to be widespread.[4] Conflict of interest affects **all sectors** of society, not only the public sector, but also the media,[5] science,[6] businesses,[7] or NGOs.[8] This legislative toolkit however focuses on conflicts of interest in the public sector.

There are manuals on **general principles** and policies for managing conflict of interest in public administrations, such as the standard reference "Managing Conflict of Interest in the Public Sector: A Toolkit" by the Organisation for Economic Co-operation and Development (OECD).[9] Conflict of interest legislation is also subject of the 4th Evaluation Round by the Group of States against Corruption (GRECO).[10] Other monitoring mechanisms, such as the OECD's Anti-Corruption Network (ACN), or the United Nations Convention against Corruption (UNCAC) Review mechanism[11] also address conflict of interest. However, despite this increasing focus on conflict of interest during the last 10 years, there is no **concrete regulatory** guidance on conflict of interest. This situation leaves legal drafters without one source to turn to for possible answers to the following questions:

- What are good **examples** for regulating conflict of interest?
- What are possible **pitfalls** and common mistakes in conflict of interest regulations?
- What is needed for a conflict of interest regulation to be **comprehensive**?

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[1] Stewart S. (2013), *Public Procurement Reform in Ukraine: The Implications of Neopatrimonialism for External Actors*, Demokratizatsiya 22 March 2013, pages 205 and 206, available at www.gwu.edu, accessed 10 October 2015.

[2] Demski J. S. (2003), *Corporate Conflicts of Interest*, Journal of Economic Perspectives, Volume 17, Number 2, Spring 2003, page 52, available at www-personal.umich.edu, accessed 10 October 2015.

[3] New York Times (30 August 2015), *Behind Deadly Tianjin Blast, Shortcuts and Lax Rules*, available at www.nytimes.com, accessed 10 October 2015.

[4] *Eurobarometer* (2013), available at http://ec.europa.eu, accessed 10 October 2015.

[5] Ethical Journalism Network (2015), *Untold Stories, How Corruption and Conflicts of Interest Stalk the Newsroom*, available at http://ethicaljournalismnetwork.org, accessed 10 October 2015.

[6] Columbia University, webpage on *Responsible Conduct of Research, Conflict of Interest*, available at http://ccnmtl.columbia.edu, accessed 10 October 2015.

[7] Demski J. S., ibid.

[8] United States, National Council of Nonprofits, *webpage on conflict of interest*, available at www.councilofnonprofits.org, accessed 10 October 2015.

[9] OECD (2005), *Managing Conflict of Interest in the Public Sector: A Toolkit*, available at www.oecd.org, accessed 10 October 2015.

[10] GRECO *webpage*, available at www.coe.int, accessed 10 October 2015.

[11] UNCAC *webpage*, available at www.unodc.org, accessed 10 October 2015.

This legislative toolkit aims at providing guidance on the above three and other questions in particular for practitioners from countries in transition. Obviously, one size does not fit all and legislative drafting is accordingly not a mere reliance on possible model provisions. Having said that, this toolkit provides sound basis for countries as they look toward developing their own legislative basis.

Another specificity of this toolkit is that, unlike other manuals that focus on administrative officials, leaving out **judges** and **parliamentarians**[12], this manual covers also these categories. International guidance on how judges and parliamentarians should manage conflicts of interest is scarce: the Council of Europe Recommendation CM/Rec(2010)12 on the independence of judges[13] mentions only incompatibilities, but leaves *ad hoc* conflicts out. Similarly, none of the international organisations, notably the Inter-Parliamentary Union (IPU),[14] has issued any guidance for parliamentarians. This has repeatedly led legal drafters to apply the same conflict of interest rules for public officials to judges and parliamentarians, something that may not be the best fit for the categories involved.[15] Lastly, the toolkit attempts to resolve an often present dilemma among practitioners on whether there should be any differences in approach to regulating this issue for lower level and **higher level** civil servants; political appointees; or judges.

This toolkit takes the following approach:

- **Regulatory guidelines** provide a starting point to users of the toolkit for their own draft law. The Model Law offers several options whenever appropriate. Obviously, this is not a prescriptive proposition. Rather, it is an attempt to illustrate concretely how one can formulate a conflict of interest law.
- For each provision, **commentaries** clarify the rationale; illustrate the necessity of regulation with case examples; and point out what to pay attention to. The commentaries also suggest what to avoid.
- For each provision, an annex shows the applicable **international** standards and examples from **national regulations**.

It is obvious that this legislative toolkit, including its regulatory guidelines, cannot replace a process of careful legal drafting: each national draft law will need tailoring to the needs, terminology, and legal framework of the given country. However, the hope is to make the process somewhat easier by providing a structured and synthesised review of options.

[12] OECD (2005), ibid.

[13] *Recommendation CM/Rec(2010)12* of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, no. 21, available at https://wcd.coe.int, accessed 10 October 2015.

[14] IPU *webpage*, available at www.ipu.org, accessed 10 October 2015.

[15] Reed Q. (2010), *Regulating conflict of interest in challenging environments*, U4 Issue 2010:2, page 4, available at www.u4.no, accessed 10 October 2015.

2. Regulatory guidelines on conflict of interest

Chapter I: Conflicts

Article 1 – Basic rule and definitions

(1) *[Avoidance]* **A public official shall make every effort to avoid situations of conflict of interest. This general rule applies in addition to all prohibitions in Chapter I. If the conflict cannot be avoided, Chapter II applies.**

(2) *[Conflict of interest]* **Conflict of interest is a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.**

(3) *[Private interest]* **The public official's private interest includes, but is not limited to, any advantage to himself or herself, to his or her family, persons or organisations with whom he or she has or has had close personal, business or political relations. It includes also any liability, whether financial or civil, relating thereto.**

(a) "Public official" means any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority. It also includes any other person who performs a public function, including for a public agency or public enterprise, or provides a public service.

(b) "Family" means at the minimum spouses, children, adopted children, parents, adoptive parents, brothers, sisters, or any other persons living with the public official in the same household or in a civil partnership.

(c) "Close personal relations" include, but are not limited to, past and ongoing friendship or enmity.

(d) "Business relations" means a past or ongoing entrepreneurial trade relationship or common business under civil law.

(e) "Political relations" means the membership of a public official in a political party, or his/her relation to another member of that political party, if both have a formal function in party management or party campaigns.

Article 2 – Restrictions on business activities

(1) *[Self-dealings]* **The public official, his/her family, and legal persons fully or partially under their control or from whom the official or family members receive substantial financial benefit, are prohibited from entering into contracts with the public organisation where the public official holds office, which are not related to the office/employment or to standard consumer transactions.**

(2) *[Contracts with third parties]* **A public official and any natural or legal person that had or has a business relation with the public organisation where the public official holds office shall not enter into a contract, unless concerning standard consumer transactions.**

(3) *[Existing contracts]* **Where the contract under paragraphs 1 or 2 was concluded and did not terminate [a specified period of time] before the public official took up office, rules on conflict of interest management from Chapter II shall apply.**

Article 3 – Restrictions related to state-owned companies

(1) *[Shareholder]* **While being a representative of publicly-owned shares in a company, as well as [for a specified period of time] after the fulfilment of his/her duties, a public official is prohibited from:**

(a) receiving any kind of financial or non-financial benefit from the company or its subsidiary companies;

(b) acquiring capital shares, stocks or property of the relevant company;

(c) holding other offices or functions in the company.

(2) *[Management and employees]* **The provisions of this legislative toolkit apply respectively to employees of a state-owned company if they occupy a management post or are considered public officials according to the national law. A state-owned company shall adopt an internal policy on conflict of interest for all other employees.**

(3) *[Contracts]* **A public official and his/her family members shall not conclude a contract with a company in which the State has a share, unless it is a standard consumer transaction.**

Article 4 – Restrictions on political activities

(1) *[Communication]* **Public officials are prohibited to use official communication to further the needs of election campaigns or of political parties.**

(2) *[Use of resources]* **It is prohibited to use public resources for purposes of campaigns or political parties unless foreseen under political finance or campaign laws.**

Article 5 – Restrictions on gifts and benefits

(1) *[General rule]* **The public official and his/her family members are prohibited from demanding or accepting gifts, favours, hospitality or any other benefit for themselves, their family, or persons or organisations with whom they have or have had close personal, business or political relations which may influence or appear to influence the impartiality with which the public official carries out his or her duties or which may be or appear to be a reward relating to his or her duties. This does not include conventional hospitality or minor gifts.**

(2) *[Advice]* **Where the public official is in doubt as to whether he or she can accept a gift or hospitality, he or she has to seek the advice of the conflict of interest manager.**

(3) *[Refusing]* **If the public official is offered an undue advantage, he or she should refuse the undue advantage and report the attempt as soon as possible to his or her supervisor, or directly to the appropriate law enforcement authority.**

(4) *[Protocol gifts]* **A public official, upon fulfilling the duties of office, is permitted to accept diplomatic and similar gifts which are presented:**

(a) within the framework of State, official and working visits in-country or abroad;

(b) by officials of foreign states or international organisations to the public officials working in diplomatic and consular missions;

(c) to a public official as a representative of the State or local government authority on public holidays and on days of commemoration and celebration.

(5) *[Public property]* **Except for paragraph (4) (d), gifts under paragraph (4) are the property of the relevant public organisation.**

(6) *[Register and disposal]* **The procedures by which the gifts referred to in paragraph (4) shall be registered, evaluated, used and redeemed, are subject to a decree.**

Article 6 – Conditions for sponsoring and donations

(1) *[Donation]* **"Donation" means the provision of cash and non-cash contributions and services by parties from the private sector (donors) to one or more bodies of the State (beneficiaries).**

(2) *[Sponsoring]* **"Sponsoring" means donations through which the sponsor promotes an activity pursued by the State with the aim of attaining an advantage in the form of a promotional or publicity-enhancing effect.**

(3) *[Restrictions]* **Sponsoring and donations are only possible as a supplementary budgetary measure subject to the following conditions:**

(a) Sponsoring and donations are prohibited in the area of law enforcement, supervision and control, and regulatory oversight.

(b) Outside of the areas mentioned in Item (a), sponsoring and donations are permissible, provided that there is no possibility of undue influence being brought to bear on the administration in discharging its duties, and that no impression of any such influence arises.

(4) *[Separation of tasks]* **Sponsoring and donations are negotiated and managed only by public officials of internal units whose main function is not directly associated with providing services of interest to the sponsor, donor, or anybody of his/her private interest.**

(5) *[Written consent]* **The acceptance of offered or solicited sponsoring and donations shall require the written consent of the supervisory authority, or, in case of lack or absence of such, of the head of the public organisation.**

(6) *[Transparency]* **All sponsorship and donation agreements and payments are to be placed on record and are to be disclosed to the public. Further details are subject to a decree.**

Article 7 – Incompatibilities

(1) The following domestic or foreign activities are incompatible with the active position of being a public official:

(a) *[Multiple public functions]* **Exercising another paid or unpaid public function in another branch of power, unless expressly permitted by law.**

(b) *[Paid work]* **Any kind of paid work or commercial activity, unless with written approval and within the limits determined in time and finances by decree. Approval is granted for scientific, didactical or artistic work, unless it constitutes a conflict of interest in the case at hands.**

(c) *[Companies]* **A public official may not exercise management, supervisory or representation functions in a for-profit company, except in the cases of Article 3 (state-owned companies). Exceptions to this restriction can apply to lower level public officials [as further defined] as well in cases where the size and the sector of the company does not affect the public official's field of work.**

(d) *[Supervising former employers]* **Public officials, who, over the course of a specified period of time, received income from business entities, do not have the right to possess direct supervisory or control functions in respect to such business entities, for the duration of a specified period of time.**

(e) *[Lobbying]* **A public official cannot lobby in the field of his/her work or lobby a public entity he/she works for.**

(f) *[Former lobbying]* **Anybody having worked as a lobbyist is prohibited to work as a public official in the field of his/her previous lobbying or at the public entity he/she lobbied until a [specified period of time] has elapsed.**

(2) *[Legal consequence]* **Public officials have to resign from incompatible functions referred to in paragraph 1 before they take on the conflicting public office or function or, if it is not possible, without delay. If they hold the public office when the incompatibility occurs, they have to be transferred or suspended from office or function until the termination of the outside conflicting activity becomes effective.**

Article 8 – Post-employment restrictions

(1) *[Post-employment conflict]* **Public officials cannot conduct professional activities, including lobbying, or be employed by a private sector entity for [a specified period of time] after leaving office where such activities or employment relate directly to the functions held or supervised by the public officials during their tenure, or otherwise constitute a conflict of interest.**

(2) *[Notification]* **Public officials have to notify the oversight entity when they are offered an activity as defined in paragraph 1 which they did not immediately decline. The notification does not release them from the restriction under paragraph 1.**

(3) *[Use of information]* **Public officials shall not use privileged information obtained in their official position or take similar improper advantage when conducting professional activities, seeking or exercising employment or appointment after leaving public office.**

(4) *[Self-dealings]* **Once the public official leaves office, the restriction of Article 2 (Self-dealings) applies respectively, until a [specified] period of time has elapsed.**

Chapter II: Management of ad-hoc conflict of interest

Article 9 – Disclosure

In case a conflict of interest cannot be avoided by the public official according to Article 1 Paragraph 3, he/she must inform the conflict of interest manager.

Article 10 – Exclusion

(1) *[Exclusion]* **A public official shall not participate in the preparation, consideration or passing of decisions, otherwise influence decisions or fulfil duties related to his/her conflict of interest.**

(2) *[Decision]* **The conflict of interest manager decides on the appropriate way of excluding the public official, in particular by restricting access to information, by transfer of tasks to another public official or transfer of the public official to another position, or by order to abstain from voting in collegiate bodies. Until the decision by the conflict of interest manager, the public official has to abstain from any further action on the conflicting matter.**

(3) *[De minimis]* **In case of minimal private interest, the oversight entity can decide to let the public official continue working on the matter despite the conflict.**

(4) *[Documentation]* **Decisions referred to in this article are made in writing.**

Article 11 – Conflict of interest managers

(1) *[Definition]* **Conflict of interest managers are designated staff members or organisational units responsible for managing conflicts of interest in coordination with the public official concerned.**

(2) *[Hierarchies]* **For public officials in hierarchical organisations, supervisors in the line of hierarchy are responsible for managing conflicts of interest. Heads of public organisations who are the ultimately responsible for the entire organisation can delegate this function to an integrity focal point inside the organisation.**

(3) *[Other officials]* **Chapter IV designates conflict of interest managers for public officials in special sectors.**

(4) *[Responsibilities]* **The responsibility of conflict of interest managers includes:**

- **(a) Taking decisions under Article 10;**
- **(b) Regularly reviewing the annual interest declarations of immediate subordinates;**
- **(c) Providing advice and guidance;**
- **(d) Identifying and minimising areas of heightened risks for conflicts;**
- **(e) Ensuring training and awareness of subordinates on managing conflicts;**
- **(f) Receiving and processing complaints about conflicts;**
- **(g) Taking measures necessary to protect individuals who have provided information regarding conflicts of interest;**
- **(h) Regularly reviewing compliance with and efficiency of implementation of rules;**
- **(i) Ensuring that third parties are aware of rules.**

(5) A central oversight body can be designated to take on functions listed in paragraph 4 (in particular lit. a, c, e, and f), with regard to a part of or all public officials.

Chapter III: Oversight

Article 12 – Commencement of job

[Hiring] **Human resource units are jointly responsible with conflict of interest managers for verifying the absence of incompatibilities of candidates.**

Article 13 – Regular declaration of private interests by public officials

(1) *[Frequency]* **Public officials – except for [further defined] lower pay grades – shall present their declaration of interests, income, assets and liabilities on the following occasions:**

- **(a) Upon commencement: within [a set number of] days upon appointment (for positions of especially high corruption risk during the selection process, before appointment).**
- **(b) Updating: annually, on the date determined by the competent authority.**
- **(c) Upon conclusion: within [a set number of] days of concluding the performance of public functions.**
- **(d) For positions with high corruption risk, one or [more-specify] years after having carried out public function.**

(2) *[Contents]* **The declaration contains the following information:**

(a) Full details of the person concerned, indicating that person's identity document, taxation and/or labour documentation and civil status, occupation and function performed, and the state body or state-owned corporation in which that function is performed.

(b) The date and place when/where the declaration of interests, income, assets and liabilities was filled.

(c) Detailed information on the persons who make up the family group, indicating their identity document, taxation and/or labour documentation, if any, and civil status. In each case, it must specify their occupation or activity.

(d) Details of real property of any kind, located within the country or abroad, held in ownership, co-ownership, community of property, fiduciary property, any other form of ownership or lease, and significant improvements that have been made to such property. The form must indicate the address, location, registration identification, percentage, liens, date of acquisition, value paid at that date, and source of funds used for each acquisition made subsequent to appointment.

(e) Detail of registered personal property of any kind, located within the country or abroad, held in ownership, co-ownership, community of property, and any other form of ownership. The form must record their type, trademark, model, year of manufacture, and identification numbers; registration data, date of acquisition, value paid at that date, and the origin of the funds used for each purchase made subsequent to the appointment.

(f) Details of other personal property, where the market purchase value exceeds [...]. The record must show the date of purchase, the value and currency paid at that date, and the origin of the funds used for each purchase made subsequent to the appointment.

(g) Details on capital invested in securities, shares and other instruments, whether or not tradable in the country or abroad. The form must indicate the security or instrument representing the value, its registration number, the date of issuance, the issuer, and the quantity, determined or capable of determination, which it represents in legal currency on the date of the declaration; the date of acquisition, the value paid on that date, and the source of the funds used at each acquisition that takes place subsequent to the appointment.

(h) Details of rights in communal, personal or corporate undertakings, constituted in the country or abroad, either in administration or in capital. The form must identify the name, corporate purpose, tax identification number of the company, percentage and nature of the rights of the obligated person, and identification of any related natural or legal person through which the interest is held. It must also indicate the date of acquisition of each right, the value paid at that date, and the origin of the funds used for each acquisition made subsequent to the appointment of the obligated person.

(i) Details of participation in boards of directors, administrative and supervisory boards, advisory boards, or any collegial board, whether remunerated or honorary.

(j) Indication of the balance of accounts and other financial products in banks or other financial institutions, national or foreign, and cash holdings in national or foreign currency. It must indicate the name of the bank or financial institution in question.

(k) Listing of mortgages, pledges or common loans and debts, indicating their component obligations and the type of obligation, the debtor or creditor and the amount owed.

(l) Annual income derived from the position for which the declaration is made as well as from other activities, work in a relationship of dependency or the exercise of independent or professional activities.

(m) Annual income and outlays related to pensions and social security systems.

(n) Details of other property, either real or personal, including securities, that is held by a third party in part or in full for the benefit of the obligated person, the name of the third party, the date the property was acquired and how it was acquired, the value of the property on the date it was acquired, the current value and any income or payments made to the obligated person based on that property.

(o) Identification of any public posts or positions held by the person concerned, paid or honorary, as director, employee, consultant or representative of any commercial or non-profit undertaking, specifying the organisation contracting the official. In case of a declaration upon commencement of office, the information must cover two years immediately preceding the beginning of office mandate. In the case of updates, the information shall cover the year prior to the declaration.

(p) Identification and brief description of gifts and similar advantages, received as a result of the position, the approximate value of which exceeds the equivalent of a set value.

(q) Express declaration that the data and background provided are truthful and accurate.

(r) Express declaration that no relevant properties or data have been omitted.

(s) Identification of the private organisations (political party affiliations, associations) that a public official has participated in, from a set number of years preceding the time the declaration is submitted.

(3) *[Verification]* **A central verification body verifies declarations as follows:**

(a) Declarations are verified for compliance with declaration obligations and the accuracy of the submitted information.

(b) Verifications take place at least on a substantial sample of all declarations, based on a written sampling methodology. The sample of public officials is based on a random choice, as well as on risk criteria. Verifications also take place following open and anonymous complaints, media reports, notifications by other authorities, and any other substantial irregularity.

(c) For the purpose of checking the accuracy of submitted information, the oversight body has access to relevant state databases under conditions defined by the respective law regulating the powers of the oversight body.

(4) *[Submission and other aspects]* **Further aspects of the declarations, in particular their function of preventing illicit gain and the procedure of submission is subject to the respective law.**

Article 14 – Compliance declarations by contractors

(1) *[Compliance declarations]* **Contractors with public organisations have to submit a declaration on complying with the provisions in Chapter I. The body competent for public procurement provides guidance on how to ensure compliance with this Paragraph.**

(2) *[Verification]* **Public organisations contracting goods and services should set up a mechanism for actively detecting possible conflicts of interest of their public officials with the intended contractor. The mechanism should include review of the database of annual declarations, registers for citizens, companies, and business, as well as non-state open source information. Article 13 applies respectively. This function can be assigned to an external integrity focal point.**

Article 15 – Freedom of information

(1) *[Managing]* **Disclosures and decisions on managing conflicts of interest (Chapter II) and compliance declarations under Article 14 are public information under freedom of information laws.**

(2) *[Declarations]* **Declarations are published online and are freely accessible, with data in searchable, machine-readable format.**

(3) *[Statistics]* **Each public organisation is responsible for annually publishing online, with data in searchable, machine-readable format, statistical information on how it managed conflicts of interest. This includes information on applied sanctions (Chapter IV).**

(4) *[Business contracts]* **Public organisations have to publish online the details of contractors of goods and services.**

Article 16 – Complaints

(1) *[Anonymous]* **Any public official or citizen can be submitted in open or anonymous form, to the public organisation concerned, external audit and oversight bodies, and to authorities responsible for administering sanctions.**

(2) *[Whistleblowing]* **Protection of whistleblowers under the applicable laws applies to persons who report on incidents of conflict of interest.**

(3) *[Duty to report]* **A public official shall provide information regarding conflicts of interest known to him or her involving other public officials to the head of the public organisation or other competent body.**

Article 17 – Audits and external oversight

Compliance with conflict of interest regulations and efficiency in their implementation are subject to regular external audits and external oversight by [supervising authorities, integrity bodies, court of auditors, ombudspersons, or parliamentary inquiry committees].

Chapter IV: Special provisions

Article 18 – Members of government; the President

Provisions of this law apply to Members of Government, their deputies, and the President subject to the following:

(1) *[Private interests]* **Private interest does not constitute a conflict of interest if the regulatory matter in question:**

- **(a) is of general application;**
- **(b) affects the Member or the President as one of a broad class of the public;**
- **(c) consists of being a party to a legal action relating to actions of the Member as a Member of Government or the President; or**
- **(d) concerns the remuneration or benefits of all Members or the President as provided under law.**

(2) *[Political relations]* **The following restrictions do not apply to Members of Government, their deputies, and the President:**

- **(a) Article 1 paragraph 2 (e) on private interests concerning political relations insofar as political appointments and decisions are concerned;**

(b) Article 4 paragraph 1 on political communication.

(3) *[Paid work]* **Members of Government and the President are prohibited from any kind of paid work or commercial activity [unless certain defined exceptions apply].**

(4) *[Business restriction]* **The restriction in Article 2 applies to all public organisations.**

(5) *[Post-employment]* **Post-employment restrictions (Article 8) apply to Members of Government in as far as they have carried out preparatory, decision-making or supervisory functions related to individual private sector entities. Lobbying the Parliament is prohibited for a specified period of time after leaving office.**

(6) *[Managing]* **The Member has to disclose any circumstances which might give grounds for complaint of conflict of interest, to the Cabinet [or the central oversight body]. Further details, including recusal, are regulated in the Government's rules of procedure. The President provides disclosure through a public statement [or to the central oversight body].**

Article 19 – Members of parliament

Provisions of this law apply to Members of Parliament subject to the following:

(1) *[Private interests]* **Private interests do not constitute a conflict of interest if the matter in question:**

(a) is of general application;

(b) affects the Member or the other person as one of a broad class of the public;

(c) consists of being a party to a legal action relating to actions of the Member as a Member of Parliament;

(d) or concerns the remuneration or benefits of all Members as provided under law.

(2) *[Political relations]* **The following restrictions do not apply:**

(a) Article 1 paragraph 2 (e) on private interests concerning political relations;

(b) Article 4 paragraph 1 on political communication.

(3) *[Paid work]* **Members of Parliament are prohibited from any kind of paid work or commercial a*ctivity, e*xcept in the cases defined in the laws on their status. Article 7 paragraph 1 (c)** *[prohibition on companies]* **does not apply.**

(4) *[Post-employment]* **Post-employment restrictions (Article 8) apply to Members of Parliament in as far as they have carried out preparatory, decision-making or supervisory functions related to individual private sector entities. Lobbying the Parliament is prohibited for a specified period of time after leaving office.**

(5) *[Managing]* **A Member has to disclose any circumstances which are not contained in the regular declarations (Article 13) and which might give grounds for complaint on conflict of interest, to the parliamentary body in which he or she is about to debate or vote. Further details are regulated in the Parliament's rules of procedure.**

(6) *[Conflict of interest managers]* **For Members of Parliament, the parliamentary commission for ethics and discipline [or a similar body or the central oversight body] provides advice and guidance.**

Article 20 – Judges

Provisions of this law apply to judges subject to the following:

(1) *[Conflict]* **In addition to Article 1, a judge is in conflict of interest where:**

(a) He/she has a private interest with regard to a party or its representative;

(b) He/she or any person defined in Article 1 paragraph 2 is a witness to crucial facts in a dispute;

(c) He/she would hear or determine an appeal from the decision of a case or issue tried by him or her.

(2) *[Private interest]* **Private interests do not constitute a conflict of interest, if all other judges in the country would have a similar conflict of interest.**

(3) *[Incompatibilities]* **In addition to Article 7, the following incompatibilities apply to judges: the profession of lawyer, bailiff, notary, or insolvency practitioner.**

(4) *[Post employment]* **Judges cannot provide legal services for [a specified period of time] after leaving office, to any private party whose case they handled as a judge or represent parties at the court/s in which they served during [a specified past period of time].**

(5) *[Managing]* **The following procedures apply (with further details being subject to procedural law):**

(a) The judge has to disclose to the parties any circumstances which might give grounds for complaint of conflict of interest.

(b) The recusal may be initiated by a judge on his or her own initiative or by a party. Due diligence is required with identifying possible conflicts of interest and an initiative for recusal has to be taken at the earliest stage possible. A motion for recusal is not admissible once the interest is disclosed and the parties continue the trial.

(c) The judge shall recuse him/herself in case of conflict of interest and shall make arrangements for the reallocation of the case.

(6) *[Conflict of interest manager]* **For judges, the judicial self-administration body or a similar unit [or the central oversight body] exercise the function of conflict of interest manager.**

(7) *[Appeal]* **Failure of recusal is grounds for appeal.**

(8) *[Paralegals]* **The provisions of this article apply *mutatis mutandis* to paralegals and similar court employees [as further defined].**

Article 21 – Prosecutors

Article 20 applies *mutatis mutandis* except for paragraph 5. The term "party" in Article 20 paragraph 1 (a) includes the judge.

Article 22 – Independent public officials

All provisions of this law apply to independent public officials who are not judges or members of parliament subject to the following departures from Chapter II:

(1) *[Collegial decisions]* **If independent public officials decide in a collegial body, they have to disclose any conflict of interest to this body. The collegial body [or the central oversight body] decides how the public official has to manage the conflict.**

(2) *[Individual decisions]* **If independent public officials make decisions individually, they have to disclose any conflict of interest to the public [and to the central oversight body and/or the body they usually report to] and decide on the management of the conflict at their own discretion [unless they fall under the competence of the central oversight body]. The decision regarding the conflict of interest shall be recorded in written and is equally disclosed to the public.**

Article 23 – Local governments

Provisions of this law apply to members of local councils and of local executive organs subject to the following:

(1) *[Councils]* **For members of local councils, Article 19** *[Members of Parliament]* **applies respectively. In addition to disclosure (Article 18 paragraph 5), members have to abstain from voting. Members can apply for exemptions to the General [or the Ministry for Local Governments, or the central oversight body], in case the restriction would not be in the public interest, in particular when it would affect a substantial number of councillors. Members are prohibited from any kind of paid work or commercial activity unless within the limits determined by law.**

(2) *[Executive organs]* **For members of local executive organs, Article 18** *[Members of government]* **paragraphs 1** *[Private interests]* **and 2** *[Political relations]* **apply respectively; disclosure under paragraph 4 is done to the local council [and the ministry competent for local governments, or the central oversight body].**

(3) *[Business activities]* **Members of local councils and of local executive organs can apply for exemptions to Article 2** *[Restrictions on business activities]* **to the General Auditor [or the ministry competent for local governments, or the central oversight body], in case the restriction would cause a disadvantage to the public financial interest.**

(4) *[Incompatibilities]* **Members of local councils and of local executive organs who exercise their function on a part-time basis are exempt from the incompatibilities in this Article and Article 7 paragraph (b)** *[paid work]* **and (c)** *[companies]*.

Article 24 – Other special sectors

Laws regulating other specialised public professions can contain further restrictions and procedures.

Chapter V: Consequences

Article 25 – Criminal or administrative offences; legal persons

(1) *[Offences]* **The following violations are sanctioned [criminally and/or administratively]:**

- **(a) A failure of a public official or former public official or a family member to comply with restrictions and incompatibilities as prescribed in Chapter I and IV;**
- **(b) A failure of a public official to comply with the provisions on managing a conflict of interest as prescribed in Chapter II and IV;**
- **(c) A failure of a public official or a family member to comply with the provisions on regular declaration of private interests (Article 13);**
- **(d) The intentional or reckless failure to act by a conflict of interest manager when a public official does not comply with his/her obligations.**
- **(e) A failure of a contractor to comply with the provision on declaration of interest (Article 14) and the restriction on business activities (Article 2);**
- **(f) A failure of a state-owned company and its management to comply with the provision in Article 3;**
- **(g) A failure of a sponsor or donor to comply with Article 6;**

(2) *[Confiscation]* **Any financial advantage from a violation under paragraph 1 is subject to confiscation under criminal or administrative law.**

(3) *[Legal persons]* **Legal entities may also be found liable for offences in paragraph 1, pursuant to applicable legislation.**

Article 26 – Disciplinary liability

Violations under Article 25 constitute disciplinary offences. Sanctions include dismissal from office in cases of grave offence as defined in laws on disciplinary liability. A disciplinary sanction does not preclude application of criminal, administrative, or civil sanctions.

Article 27 – Civil liability; ban on procurement

(1) *[Damages]* **In accordance with the principles of the national legal system, a person who has engaged in conduct constituting an offence under Article 25 shall be liable for any resulting damages to the State or a private natural or legal person. The imposition of compensation under this paragraph 1 does not preclude any other criminal or civil or administrative remedy, which is available by law.**

(2) *[Injunction]* **Any former public official who engages in conduct restricted under Article 8, or provisions referring to it, may be prohibited by a court order from engaging in such conduct. The filing of a petition under this paragraph does not preclude any other remedy which is available by law.**

(3) *[Procurement]* **For violations under Article 25 paragraph 1 (e) to (g) a ban on public procurement applies under the national procurement legislation, in proportion to the seriousness of the violation.**

Article 28 – Voidance of civil and public legal acts

(1) *[Contracts]* **Contracts involving a prohibited conflict of interest shall be voidable in line with the principles of applicable civil or administrative law. Voidance is not mandatory if the contract was in the public interest and would have been concluded had the conflict not existed. The public organisation, the central oversight body, any party to a proceeding related to the contract, or civil society organisations with fighting corruption being among its statutory purposes can apply for a court decision on the validity of the contract.**

(2) *[Administrative acts]* **The rule from paragraph 1 applies *mutadis mutadis* to administrative legal acts.**

Article 29 – Ban on office and promotions

(1) *[Promotions]* **Public officials found to have violated Article 25 by a final legal decision cannot be subject to incentives or promotions for [a specified period of time]. Any incentives or promotions granted in the period between the discovery of the violation and the final decision on it shall be suspended.**

(2) *[Ban]* **A ban on office for [a specified period of time] shall be applied to all cases involving criminal liability for conflict of interest violations. A ban also applies where an official refuses to resolve an actual conflict of interest of which he or she is aware of.**

3. COMMENTARY

Preliminary note: one law for all?

The purpose of these regulatory guidelines is to strengthen trust in public officials; to help officials adjust their public duties and private interests in a proper manner; and to reduce the risk of corruption. The rules herein apply to all persons exercising public functions in any branch of power or any level of the State. The guidelines contain common rules which apply universally (such as the definition of Conflict of Interest in Chapter I Article 2 paragraph 1; or the restriction on sponsoring and donations in Article 7). They also contain special rules for any office that requires different restrictions, exemptions, and procedures. This concerns in particular members of government, judges, prosecutors, and members of parliament, but also other categories (Chapter III).

The legislator of many, if not most, countries defines conflict of interest separately in the statutes of each profession: civil servants; ministers; independent agencies; local governments; parliament; and the judiciary each have their own rules on conflict of interest (such as Germany). There are also countries which have an all-encompassing conflict of interest law for all three branches of power (such as Slovenia).

This legislative toolkit follows the approach of such an all-encompassing conflict of interest legislation for the following main reason: conflict of interest provisions in different sectors overlap to a large extent; for example, the circle of family members defining a private interest is usually the same for any sector. The European Commission for Democracy through Law ("Venice Commission") of the Council of Europe stated ten years ago that similar principles of conduct apply to all sectors of the public service:

> "Although this Recommendation [Council of Europe Model code] is not applicable to publicly elected representatives, members of government and holders of judicial office, the Commission has previously found that 'in the light of the explanatory memorandum (of the Code of Conduct), and of common sense too, the circumstance that the application of the code of conduct is limited to public officials does not exclude that these standards may be applicable, mutatis mutandis, to publicly elected representatives and members of government'. (CDL-AD(2005)017, para. 231)."[16]

However, as the Venice Commission pointed out, one has to keep certain differences in mind. If one does not, attempts to draft **all-encompassing** conflict of interest legislation "face high risks of failure":[17] For example, a judge faces distinct conflicts when having to decide on the credibility of a witness who is his/her family member, even though the outcome of the trial will not affect the witness. A parliamentarian, in turn, is elected to bring his/her personal convictions on issues such as abortion into office. Special regulations are thus necessary. This legislative toolkit shows the particularities for certain sectors in Chapter III. As Article 24 of this legislative toolkit indicates, other professions will need review in light of whether additional guidance is needed on what a relevant private interest is and how to manage it.

One can observe that conflict of interest policies for different public sectors tend to be drafted separately, instead of sharing overarching principles and solutions. The all-encompassing approach of this legislative toolkit allows the reader to grasp the commonly shared points as well as the particularities of each profession more easily. At the same time, it would seem easier to split up this toolkit and feed it into different sector laws, if need be, rather than the other way round. In

[16] Venice Commission, *Opinion CDL-AD (2008)014*, para. 52 note 9, available at www.venice.coe.int, accessed 10 October 2015.

[17] See in this context Reed Q. (2012), *Regulating conflict of interest in challenging environments*, U4 Issue 2010:2, page 6, available at www.u4.no, accessed 10 October 2015.

any event, an all-encompassing law will have the advantage of setting out a basic standard that applies to all public officials.

Chapter I: Conflicts

Preliminary note

Chapter I follows the model of having a **general** catch-all clause followed by a list of the most important conflict of interest situations in need of concrete guidance. Article 1 is the general clause for conflict of interest. Articles 2 to 8 draw concrete lines for certain situations; however, these Articles are **non-exhaustive**, leaving room for application of Article 1 to situations not covered. In theory, there is no limit to defining special situations of conflict of interest in addition to the general clause. Depending on the local context, it might be necessary to address specific situations, such as for example public officials abusing their access to information as members of civil associations (Article 20 Macedonian Law on Prevention of Conflict of Interest).

The laws of some countries do not contain a general clause, but regulate different conflict of interest situations in a vast variety of different laws, leading to a highly **fragmented** system of varying definitions. Such models can still be highly effective with strong oversight and sanctions in place, as is the case of the United States.

In countries with a long-standing and highly developed legal tradition of coherent application of different laws, this fragmented approach works. By contrast, such an approach is not necessarily the most suitable one for **countries in transition**, for which this legislative toolkit is namely intended.

Article 1 – Basic rule and definitions

(1) *[Avoidance]* **A public official shall make every effort to avoid situations of conflict of interest. This general rule applies in addition to all prohibitions in Chapter I. If the conflict cannot be avoided, Chapter II applies.**

(2) *[Conflict of interest]* **Conflict of interest is a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.**

(3) *[Private interest]* **The public official's private interest includes, but is not limited to, any advantage to himself or herself, to his or her family, persons or organisations with whom he or she has or has had close personal, business or political relations. It includes also any liability, whether financial or civil, relating thereto.**

(a) "Public official" means any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority. It also includes any other person who performs a public function, including for a public agency or public enterprise, or provides a public service.

(b) "Family" means at the minimum spouses, children, adopted children, parents, adoptive parents, brothers, sisters, or any other persons living with the public official in the same household or in a civil partnership.

(c) "Close personal relations" include, but are not limited to, past and ongoing friendship or enmity.

(d) "Business relations" means a past or ongoing entrepreneurial trade relationship or common business under civil law.

(e) "Political relations" means the membership of a public official in a political party, or his/her relation to another member of that political party, if both have a formal function in party management or party campaigns.

Commentary

Paragraph 1

The definition of conflict of interest in this paragraph is taken from the Council of Europe **Model code of conduct** for public officials.[18] One must distinguish three kinds of conflict of interest:

- Actual or **real** conflict of interest: An ongoing or past situation, where the private interest of the public official conflicted with his or her official duties.[19]

  For example: a judge handles a case to which her husband is a defendant.

- Apparent or **perceived** conflict of interest: it appears that a public official's private interests could improperly influence the performance of their duties, but this is not in fact the case.[20]

  For example: A public official receives somebody who had been his best friend in school. An outsider knowing both might perceive a private interest, whereas in reality, the official is largely estranged from the friend. Another example: A public official used to own a company which he fully sold years ago. Outsiders might still associate the public official's name with the company and perceive a private interest, even though the public official might genuinely not care about it anymore at all.

- **Potential** conflict of interest: where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.[21]

  For example: a public official responsible for procurement owns a private business. The private interest in the business could become a conflict were the business to bid in a tender managed by the official.

Perceived and potential conflicts of interest are not mutually **exclusive**. For example, a gift accepted by a public official is usually perceived as a conflict of interest and could, at the same time, be a potential conflict of interest: a perceived conflict exists, as an outsider would think that the public official will have to return something in exchange, for example a favourable treatment of the gift-giver. A potential conflict exists because the gift-giver could come back to the public official – the public official's duties would then conflict with the private bond to the gift-giver.

It is international standard to include perceived conflicts into the definition. Not only the Council of Europe Model code of conduct, but also the Organisation for Economic Co-operation and Development (OECD) recommends it:

> "In general, the **appearance** of a conflict of interest is also to be avoided, to minimise the risk to the organisation's reputation (and officials' personal reputation) for integrity. As **perceived** conflict of interest could be similarly harmful to the trust in public decision making, managers should also consider perception when they decide on specific cases."[22]

[18] The wording is now slightly simpler, as the following track changes show: "Conflict of interest ~~arises from~~ is a situation [...]".

[19] OECD Toolkit, ibid, page 97.

[20] OECD Toolkit, ibid.

[21] OECD Toolkit, ibid.

[22] OECD Toolkit, page 8 (emphasis by author).

Potential conflict of interest is subject to restrictions and **incompatibilities** (Articles 2 following). Where legislators consider the risk of potential conflicts of interest high enough, they declare them incompatible.

The definition concerns only conflicts between private and public interests; it does not address cases of two **conflicting public interests**. Such a conflict occurs where, for example, an acting civil servant would be at the same time member of parliament. The role of parliament overseeing the executive would conflict with the role of the civil servant as a member of the executive. However, some incompatibilities address this issue of conflicting public interests (see at Article 7).

For **post-employment** restrictions, the general definition of conflict of interest does not directly apply: after leaving office, the person is not engaged anymore in the "objective performance of official duties". Again, such restrictions primarily aim to prevent **potential** conflicts while the official is still active: the prospect of a private post-employment might motivate the official while being in office to please the interests of his/her future private employers to the detriment of public interests.

A private interest can influence the performance of a public official's duties not only when he/she is personally related to the party of an administrative procedure, e.g. being a friend, but also its legal or other **representative**, such as a lawyer. In this sense, there should be no difference to a court proceeding (see below Article 20).

Despite the further definitions in paragraph 2, no conflict of interest definition can ever be exhaustive. It is therefore necessary that additional **guidance** and training is available to all stakeholders subject to conflict of interest legislation. A frequently cited example of such guidance is the "6 Ps" by the Western Australia Integrity Coordinating Group:[23]

Public duty versus private interests	Do I have personal or private interests that may conflict, or be perceived to conflict with my public duty?
Potentialities	Could there be benefits for me now, or in the future, that could cast doubt on my objectivity?
Perception	Remember, perception is important. How will my involvement in the decision/action be viewed by others?
Proportionality	Does my involvement in the decision appear fair and reasonable in all the circumstances?
Presence of mind	What are the consequences if I ignore a conflict of interest? What if my involvement was questioned publicly?
Promises	Have I made any promises or commitments in relation to the matter? Do I stand to gain or lose from the proposed action/decision?

Paragraph 2

The definition in paragraph 2 draws by and large from the Council of Europe Model code of conduct. There are, however, three modifications. First, for clarification purposes, private interest "**is not limited to**" enumerated elements, as there can always be constellations that would not fit under any of the listed elements. For example, good neighbours sharing with the public official a two-apartment house are neither "friends" nor necessarily "close personal relations", but might at least qualify for a perceived conflict of interest. Second, paragraph 2 merges "**family**" and "close relatives" into one technical term ("family"). Third, paragraph 2 replaces the term "**friends**" of the Model code of conduct with the term "close personal relations" for the following reason: enemies

[23] Western Australia, Integrity Coordinating Group, *Conflicts of interest – Guidelines for the WA public sector*, available at https://icg.wa.gov.au, accessed 10 October 2015.

can also provoke (negative) conflict of interest, but do not fit under the term "friend". Public officials abuse their positions for personal vendettas or private business disputes, as anecdotal evidence proves. In such cases, enmities cause public officials to put their private (negative) interests above their public duties.

It is important to have the definition of **private interest** (paragraph 2) cover all possible sources of potential conflict. To this end, not only family members are included, but also friends, business associates, and political affiliates (as defined in Article 1). At the same time, it is necessary to underline that private interests include not only **financial** but also non-financial aspects. GRECO has criticised countries in the past which limited conflict of interest to financial interests.[24] Most national laws clarify this explicitly (see below "c. Foreign examples"). An example for a financial private interest is the granting of a public contract to a family member; an example for a non-financial private interest is the dropping of criminal charges against a good friend. The definition of private interests is also important to indicate a threshold below which private interests will not count as serious enough to qualify for a conflict. This means, notwithstanding qualifying further circumstances, that the interests of a neighbour, tenant or distant relative will usually not count as a private interest of the public official.

However, it is important to keep in mind that private interests are "**not limited**" to the enumeration in paragraph 2. A doctor who performed a life-saving operation on a family member of the public official would not qualify for any of the examples listed under paragraphs 2 (a) to (e). The public official will not have a business relation with a doctor of the public health system. They also might not know each other, so one could not speak about a "close personal" relation. Still, it would probably be hard to argue that the public official would not have a private interest related to this doctor. So conflict of interest rules would apply. A similar case could be the priest of a public official.

Sub-statutory guidance can provide more instructions in this regard. The above mentioned "6 P's" are one example of such guidance.[25]

Paragraph 2 (a) to (e)

The definition of "**public official**" is taken from Article 2 paragraph (a) UNCAC. It aims at including the widest circle of public officials possible. Obviously, the definition will have to be adapted to the national context. Examples for an "advantage to himself or herself" are usually related to the private sphere of the official, such as granting him/herself a building permit, or a tax relief. However, one should keep in mind that a public official can also grant him/herself an advantage related to his/her own professional life: it is a common feature of administrative procedures in most, if not all, countries that a public official cannot make a final decision on an **appeal** against his/her own earlier decision. So, if a citizen is unhappy about a tax notice, the tax officer can review his/her own decision and correct any possible mistake. However, if the tax officer does not grant full relief, the citizen must have the right to access a higher instance, including, if necessary, a court. For judges, Article 20 paragraph 1 (c) sets out this incompatibility on being one's own appeal judge.

The definition of **family members** is largely similar across many conflict of interest laws. This wording is taken from Article 4 of the Slovenian Integrity and Prevention of Corruption Act 2010 for the following reason: it also refers to persons living in the same household; this is an important aspect given that people increasingly choose to not formalise their partnership relations.

A simple purchase contract is not enough for establishing a "**business relation**". Only formalised business relations for the sake of **joint profit-making** should be considered as a close enough relation to cause a conflict of interest. The definition in this paragraph would need tailoring to the technical terms under national tax or business registry laws. It is a modification of Section 1

[24] See e.g. GRECO (2005), *Evaluation Report on Romania*, Greco Eval II Rep (2005) 1E, para. 50, available at www.coe.int, accessed 10 October 2015.

[25] Above at footnote 23.

paragraph 4 of the Latvian Law on Prevention of Conflict of Interest in Activities of Public Officials 2002: "counterparty – a natural or legal person or an association of natural or legal persons established on the basis of a contract, which in accordance with the provisions of this Law is in declarable business relations with a public official". It turned out that in practice, the limitation to "declarable business relations" was too narrow or unclear, as for example long-term business contracts were not declarable.

An example of a "business relation" constituting a conflict of interest is the following: a minister of energy has a joint company with a partner. The company does not produce anything related to energy. However, the business partner owns further companies in the energy sector. In this case, the minister is in a conflict of interest when deciding on matters of his business partner's energy companies: he is deciding over the private interests of someone he is in a business relation with.[26]

It should be kept in mind that transactions not fitting under the term "business relations" under paragraph 2 can still be a conflict of interest under the **general clause** of paragraph 1: for example, a public official should not decide on a matter of a person from whom he/she just bought a house. There is a high risk that the seller reduced the price with a strategic discount to create a private bond with the official. Thus, at least by perception, the public official is in conflict of interest.

The Council of Europe Model code includes "**political relations**" into the relevant private interests. This is sensible, as a public official is in a conflict of interest when he/she, for example, has to decide on an issue related to his/her political party. However, neither the Model code, nor its Explanatory Memorandum define what "political relations" mean. In the context of a more principle-oriented Code of Conduct, this is feasible. However, for a law with serious consequences for the public official, some further definition is necessary. To this end, it would probably be too wide a circle if one would deem a public official to be in conflict whenever he/she has to deal with another member of his/her political party, as most of these people he/she would not know. However, one should assume a conflict, once the two political party members work together in a political party similar to undertaking a joint business. This is the case once both party members exercise a formal function in party management or party campaigns. The terms "party management and campaigns" are borrowed from the United States Code (5 U.S.C. § 7323) on political participation of public employees.[27] The definition would need tailoring to the technical terms in national laws on political parties and electoral campaigns. Obviously, exemptions exist for members of government and parliament (see below Chapter III).

Paragraph 3

The first phrase of Paragraph 3 is the general basic rule of dealing with conflict of interest situations: **avoiding** them. The rule is not only a statement of values, but has practical consequences. For example, a good friend might approach a public official in a licensing agency with several service desks. The public official should indicate to the friend that he/she better go to a different service desk, in order to not even let a conflict of interest situation arise. Only if the conflict of interest cannot be avoided, management of the conflict is necessary; this would, for example, be the case, if there were no option to avoid the conflict *ex ante*, for example when there is only one public official providing services.

Paragraph 3 phrase 3 is necessary for clarifying the **relation** between the general conflict of interest definition in Article 1, and the prohibitions under Article 2 to 8. It is important to avoid a misinterpretation that Articles 2 to 8 preclude any further application of the general clause in Article 1. For example: a friend of a public official managing a state-owned company applies for a job at the company. This does not fall under the absolute restriction of Article 3 paragraph 3.

[26] See for a possibly similar case: RFE/RL (15 April 2015), *Conflict Of Interest? A Tale Of Two Ukrainian Oligarchs And One Deputy Minister*, available at www.rferl.org, accessed 10 October 2015.

[27] United States Office of Government Ethics, *Compilation of Federal Ethics Laws*, page 96, available at www.oge.gov, accessed 10 October 2015.

However, the public official would still be in a conflict of interest under Article 1 and would need to manage the conflict according to the rules in Chapter II.

Article 2 – Restrictions on business activities

(1) *[Self-dealings]* **The public official, his/her family, and legal persons fully or partially under their control or from whom the official or family members receive substantial financial benefit are prohibited from entering into contracts with the public organisation where the public official holds office, which are not related to the office/employment or to standard consumer transactions.**

(2) *[Contracts with third parties]* **A public official and any natural or legal person that had or has a business relation with the public organisation where the public official holds office shall not conclude a contract, except for standard consumer transactions.**

(3) *[Existing contracts]* **Where the contract under paragraphs 1 and 2 was concluded [within a specified period of time] before the public official entered office, conflict of interest management under Chapter II applies.**

Commentary

Paragraph 1 has two functions: One, it prevents real conflict of interest for public officials who could influence these contracts in their favour. Second, it avoids **perceived** conflict of interest for those public officials who have no such power, but the public might still believe they do. In other words: if even one public official in a public organisation has control over a company, this company is prohibited from doing business with the public organisation.

It is important to not word the restriction in a way that only "public officials are prohibited", or "third parties are prohibited", but to put the obligation on **both sides**. In this way, both sides are responsible for compliance.

The element "at least partly under their **control**" refers to any qualified share in a legal person which grants the shareholders rights, such as blocking votes or nomination of board members. The quorums depend on national law. The alternative "substantial financial benefit" is important where the public official does not have a share in a legal person, but for example only profit participation.

It is important to formulate the restriction in a way that it puts an obligation on **both sides**, not only the public official, but also the contractor. Compliance declarations (see Article 16) complement this restriction.

For **high level** public officials, it will be necessary to restrict business transactions not only with the public organisation they belong to, but with public organisations in general. The reason is simple: the influence of a minister reaches well beyond his/her organisation.

Paragraph 1 is no replacement for a comprehensive, transparent **procurement system**, applicable to all substantial contracts in the public sector. A functioning system will prevent, from a different angle, that the State can buy goods and services from a contractor in which a public official has a private interest, rather than from the contractor with the best offer. Similar applies for the reverse, the selling of State property (**privatisation**).[28]

The rationale behind **Paragraph 2** seems obvious: any financial transaction that goes beyond usual **consumer contracts** would at least appear to influence the independent decision on behalf of the public organisation. For example, if the public official bought a house from the contractor, the

[28] Wiehen, M. H. (2004), *Avoiding Corruption in Privatization – A Practical Guide*, gtz-paper, available at www.u4.no, accessed 10 October 2015.

public would perceive the deal having been favourable to the public official. The exemption for standard consumer transaction is necessary as otherwise, all companies with which the public official signs contracts for consumer purposes would be excluded from public procurement. The Montenegrin law focuses only on service contracts; however, purchase contracts, too, carry the risk of influencing public officials, for example a strategic discount given to a public official when buying a house. Obviously, paragraph 2 also includes **employment** contracts.

An alternative or complementing element to Article 2 could be the **divestment** of business interests. For example, a public official could be obliged to transfer any share above a certain quorum to another person (outside the private interest). These arrangements are often called "**blind trusts**", where the trustee has full discretion over the assets, and the public official has no knowledge of or right to intervene in their handling. However, this only works for the public official: one can hardly oblige family members to divest their business interests. Furthermore, blind trusts can work only in environments with thorough oversight and enforcement ensuring that the trust is "blind" in reality and not only on paper. The business restriction in Article 2 seems the clearer option, and the option which is easier to monitor.

For **government members**, stricter rules apply as they and their families should not only make no business transactions with the public organisation they supervise, but with the public sector in general (see below Chapter III).

Paragraph 3 reflects the fact that a public official is not *per se* in a conflict of interest when entering office with an **existing contract**: he/she might not be anywhere close to managing this contract for the public organisation. At the same time, there is no indication that a public organisation would negotiate favourable terms because a contractor would later become a public official – there is simply no incentive for this. The Slovenian law also explicitly excludes the restriction for existing contracts (see below). The New Zealand law is somewhat stricter on the level of local governments. There, existing contracts above $25,000 with the local government prohibit a candidate from being elected as local councillor.[29]

Article 3 – Restrictions related to state-owned companies

(1) *[Shareholder]* **While being a representative of a publicly-owned share in a company, as well as [for a specified period of time] after the fulfilment of his/her duties, a public official is prohibited from:**

(a) receiving any kind of financial or non-financial benefit from the company or its subsidiary companies;

(b) acquiring capital shares, stocks or property of the relevant company;

(c) holding other offices or functions in the company.

(2) *[Management and employees]* **The provisions of this legislative toolkit apply respectively to employees of a state-owned company if they occupy a management post or are considered public officials according to the national law. A state-owned company shall adopt an internal policy on conflict of interest for all other employees.**

(3) *[Contracts]* **A public official and his/her family members shall not conclude a contract with a company in which the State has a share, unless it is a standard consumer transaction.**

[29] New Zealand, *Local Authorities (Members' Interests) Act 1968*, Section 3 (1): "[N]o person shall be capable of being elected as or appointed to be or of being a member of a local authority or of any committee of a local authority, if the total of all payments made or to be made by or on behalf of the local authority in respect of all contracts made by it in which that person is concerned or interested exceeds $25,000 in any financial year."; available at http://www.legislation.govt.nz, accessed 10 October 2015.

Commentary

State-owned companies are a frequently-used opportunity by public officials for enriching themselves. On the one hand, state-owned companies often manage large asset portfolios or even generate high annual turnovers. On the other hand, companies are designed to allow a variety of stakeholders to profit from it. Both factors make state-owned companies an attractive object for corruption. Notorious cases from transition countries are testimony of this high risk. In addition, state-owned companies often act as if having access to unlimited public funding. There are numerous examples how state-owned companies took advantage of their privileged status in terms of financial security:

> "Creditors and the board often assume that there is an implicit state guarantee on SOEs' [state-owned enterprises] debts. This situation has in many instances led to excessive indebtedness, wasted resources and market distortion, to the detriment of both creditors and the taxpayers. Moreover, in some countries, state-owned banks and other financial institutions tend to be the most significant if not the main creditor of SOEs. This environment leaves great scope for conflicts of interest. It may lead to bad loans by state-owned banks as the enterprise might feel itself under no obligation to repay the loan. This may shelter SOEs from a crucial source of market monitoring and pressure, thereby distort their incentive structure."[30]

One has to distinguish three basic forms of how public officials can take an advantage from a state- owned company:

- As shareholder representatives;
- As managers;
- As contract partners.

Article 3 takes all three forms into account. This legislative toolkit does not set fixed **periods of times** or thresholds in respect to stated prohibitions. However, it should be noted that post-employment restrictions apply usually for periods between one to five years (see below at Article 8).

Paragraph 1 aims primarily at **undue influence** of the public official. The public official is a representative of the public interest in the share. Depending on the form of the company and the legal framework, the State's "prime responsibilities" in the company include:

> 1. Being represented at the general shareholders meetings and voting the state shares.
>
> 2. Establishing well structured and transparent board nomination processes in fully or majority owned SOEs, and actively participating in the nomination of all SOEs' boards.
>
> 3. Setting up reporting systems allowing regular monitoring and assessment of SOE performance.
>
> 4. When permitted by the legal system and the state's level of ownership, maintaining continuous dialogue with external auditors and specific state control organs.
>
> 5. Ensuring that remuneration schemes for SOE board members foster the long term interest of the company and can attract and motivate qualified professionals."[31]

It is important that the public official exercises the above oversight function impartially without any private interest in a financial benefit, such as gifts, stocks, or contracts.

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[30] OECD Guideline, ibid, page 22.

[31] OECD *Guidelines on Corporate Governance of State-Owned Enterprises*, 2005, Principle 2 F, available at www.oecd.org, accessed 10 October 2015.

As managers (paragraph 2), public officials can easily direct financial flows from the company to their private pockets. In general, the criminal offence of **embezzlement** prevents any personal enrichment. However, clear restrictions in conflict of interest legislation facilitate the application of this otherwise rather undefined offence. Managers of private companies might receive part of their salary in stocks, or stock options. With regard to state-owned enterprises, one should be careful: the risk seems too high that public officials will abuse such payment schemes for self-enrichment (e.g. by transferring stock options the value of which considerably exceeds usual salary bands to their private pockets).

Paragraph 3 aims primarily at the following constellation: the public official concludes a **service contract** with the public company, for example for consultancy services. It is rather easy to use such contracts for sham arrangements, where the actual performance and value of the "services" remains murky, providing the public official *de facto* with a financial benefit without much in return. Procurement rules can prevent such arrangements only to a certain extent. Similar is true for purchase contracts, where goods might be sold to a public official below market value.

It is important, to exclude **standard consumer** transactions. Otherwise, the public official and his/her family members could not enter into any contract with a state-owned phone company, a state-owned airline, or a state-owned housing service.

Article 4 – Restrictions on political activities

(1) *[Communication]* **Public officials are prohibited to use official communication to further the needs of election campaigns or of political parties.**

(2) *[Use of resources]* **It is prohibited to use public resources for purposes of campaigns or political parties unless foreseen under political finance or campaign laws.**

Commentary

Article 4 does not contain a **general restriction** on political activities of public officials. In other words, in general the position of public official is compatible with party membership. Some countries follow a stricter approach, such as Poland: "Civil Servants are not allowed to establish or participate in political parties" (Article 78 Paragraph 5 Civil Service Law).[32] The ECtHR decided in 1998 that certain restrictions on political activities served the legitimate purpose of securing the political impartiality of civil servants.[33] The case concerned a restriction on local government officials who had to give up their political activities – either in or outside the workplace – on behalf of political parties. Similarly, the Venice Commission in one case approved of "prohibitions on not having other employment and on conflict of interest, which include prohibition on joining political parties" and stated they "appear to be appropriate."[34]

However, a prohibition for civil servants – or only of one sector, such as public prosecutors – to join political parties would be unconstitutional in many European countries. For this reason, these guidelines do not take on this restriction. However, even if political activities are in general permitted, they may still lead to conflict of interest. For example, a public official working at a central election commission would be in conflict of interest when deciding on the validity of a vote concerning the party he/she is a member of. Under Article 1 paragraph 2 (e) of these guidelines, these would be a conflict from a "political relation".

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[32] *Poland Act of 21 November 2008 on Civil Service*, available at https://www.agidata.org, accessed 10 October 2015; for further country examples see OECD (2003), *Managing Conflict of Interest in the Public Service, OECD Guidelines and Country Experiences*, page 67, available at www.keepeek.com, accessed 10 October 2015.

[33] ECtHR, *Ahmed and others v. the United Kingdom*, application 22954/93, decision of 2 September 1998, available at http://hudoc.echr.coe.int, accessed 10 October 2015.

[34] Venice Commission, Opinion no. 473/2008, *CDL-AD(2008)019*, at no. 41, available at www.venice.coe.int, accessed 10 October 2015, available at www.venice.coe.int, accessed 10 October 2015.

However, there are clear cases where public officials abuse their office for political purposes. In these cases, the private interest in the political activity conflicts with the public duty of neutrality. Paragraph 1 concerns cases where, for example, the public official uses the office letterhead to express his/her support for the politics of a candidate or party; of receiving political financing during office; or where he or she uses his/her work time to organise a political party.

Obviously, the restriction of Article 4 Paragraph 1 does not apply to members of parliament or members of government who are political officials (see below at Chapter III).

Paragraph 2 concerns the abuse of State resources for the purpose of **political financing**. Usually, the use of public resources for political financing is strictly limited. It usually includes: direct financial support from the budget, free airtime on radio and TV, or free use of public facilities. Any other support is illegal, such as use of staff at ministries for campaign purposes or use of the ministry budget to survey public opinion on campaign topics.

Article 5 – Restrictions on gifts and benefits

(1) *[General rule]* **The public official and his/her family members are prohibited from demanding or accepting gifts, favours, hospitality or any other benefit for themselves, their family, or persons or organisations with whom they have or have had close personal, business or political relations which may influence or appear to influence the impartiality with which the public official carries out his or her duties or which may be or appear to be a reward relating to his or her duties. This does not include conventional hospitality or minor gifts.**

(2) *[Advice]* **Where the public official is in doubt as to whether he or she can accept a gift or hospitality, he or she has to seek the advice of the conflict of interest manager.**

(3) *[Refusing]* **If the public official is offered an undue advantage, he or she should refuse the undue advantage and report the attempt as soon as possible to his or her supervisor, or directly to the appropriate law enforcement authority.**

(4) *[Protocol gifts]* **A public official, upon fulfilling the duties of office, is permitted to accept diplomatic and similar gifts which are presented:**

- **(a) within the framework of State, official and working visits in-country or abroad;**
- **(b) by officials of foreign states or international organisations to the public officials working in diplomatic and consular missions;**
- **(c) to a public official as a representative of the State or local government authority on public holidays and on days of commemoration and celebration.**

(5) *[Public property]* **Except for paragraph (4) (d), gifts under paragraph (4) are the property of the relevant public organisation.**

(6) *[Register and disposal]* **The procedures by which the gifts referred to in paragraph (4) shall be registered, evaluated, used and redeemed, are subject to a decree.**

Commentary

Public service is provided either free (financed by taxes), or in exchange for a set scheme of fees. Any additional gift can create a suspicion of perceived or actual conflict of interest. If the public official receives the gift after the service, it could appear as if he/she performed the service in anticipation of the gift. If the gift is received before the service, it creates an undue **obligation** to "thank" the gift-giver when performing the services. In both cases, the public duty of performing the services objectively conflicts with the private interest a gift always creates.

Paragraphs 1 to 3 are more or less taken literally from the Council of Europe **Model code** of conduct for public officials (Paragraph 1 is slightly edited in order to align it with the definition of "close personal" relations in Article 1). Some laws follow the same approach, such as the Croatian Act on the Prevention of Conflict of Interest in the Exercise of Public Office, Article 14 paragraph 2. The restriction can only take effect once the public official has taken office. Often, public officials bring obligations with them from gifts they accepted before taking public office. The restrictions under paragraphs 1 to 3 have no effect on such gifts. However, the (perceived) obligation arising from such gifts would fall under the general clause of Article 1, and might be included in the declaration upon assuming office if the gift is above the value thresholds for declaration.

It is important to define up to what threshold a gift is "**minor**". This requires not only a per gift value, e.g. 5 €, but also an annual cap for gifts from the same giver, e.g. 10 €, and a total cap of gifts receivable by different givers, e.g. 50 €. Otherwise, it is too easy to circumvent rules by giving a high number of small gifts. In addition to a mere value threshold, it is helpful to also define the exceptions descriptively. In this context, the Latvian law provides an example in Article 12 paragraph 3 (see below at Foreign examples). Often, countries explicitly forbid to accept travel (for free) on aircraft, in order to avoid any discussion about whether or not this constitutes a gift (see below the Canadian regulation).

Some countries have separate **gift registries** (see below the examples of Montenegro and Serbia). The question is how much sense such a separate gift registry makes, where gifts are also an item in the annual asset declarations. Therefore, often such gift registers lead to double paperwork. However, gifts which the official is not allowed to keep would not appear in asset declarations, but only in gift registries.

Some regulations also explicitly forbid **family** members or other close persons to accept any gifts related to the public official's function, except for protocol gifts (see below the examples of Montenegro and Serbia). The prohibition certainly makes sense. Therefore, paragraph 1 also prohibits family members from accepting gifts. However, without at least administrative sanction on the gift-giver or the family member, these provisions will probably lack implementation. The public official itself cannot be sanctioned for such gifts, as he/she can always claim that the gift transaction and even its reversal is beyond his/her control. Thus, appropriate sanctions for family members need to be foreseen as well (see below at Article 25 paragraph 1 (a).

The Model code does not contain provisions on how to proceed with **protocol** gifts. This goes beyond the scope of a code of conduct as it has a legal effect on the status of the property. Therefore, paragraphs 4 to 6 are modelled largely after provisions on protocol gifts as contained in many conflict of interest laws, such as the Latvian Law on Prevention of Conflict of Interest in Activities of Public Officials 2002 (Article 12). Protocol gifts can come from foreign or domestic public or private sources. By "divesting" the gift to the property of the public organisation, the public official will usually not have a personal obligation to the gift-giver and which might conflict with his/her duty to perform services objectively. Protocol gifts are somewhat similar to sponsoring and donations (Article 6), as in both cases, the public organisation receives something of value; the difference lies in the fact that protocol gifts do not have the purpose of financing/promoting activities of the public organisation.

Article 6 – Conditions for sponsoring and donations

(1) *[Donation]* **"Donation" means the provision of cash and non-cash contributions and services by parties from the private sector (donors) to one or more bodies of the State (beneficiaries).**

(2) *[Sponsoring]* **"Sponsoring" means donations, via which the sponsor promotes an activity pursued by the State with the aim of attaining an advantage in the form of a promotional or publicity-enhancing effect.**

(3) *[Restrictions]* **Sponsoring and donations are only possible as a supplementary budgetary measure subject to the following conditions:**

(a) Sponsoring and donations are prohibited in the area of law enforcement, supervision and control, and regulatory oversight.

(b) Outside of the areas mentioned in Item (a), sponsoring and donations are permissible, provided that there is no possibility of undue influence being brought to bear on the administration in discharging its duties, and that no impression of any such influence arises.

(4) *[Separation of tasks]* **Sponsoring and donations are negotiated and managed only by public officials of internal units whose main function is not directly associated with providing services of interest to the sponsor, donor, or anybody of his/her private interest.**

(5) *[Written consent]* **The acceptance of offered or solicited sponsoring and donations shall require the written consent of the supervisory authority, or, in case of lack or absence of such, of the head of the public organisation.**

(6) *[Transparency]* **All sponsorship and donation agreements and payments are to be placed on record and are to be disclosed to the public. Further details are subject to a decree.**

Commentary

Global **sponsoring** spending reached **55 billion US$** in 2014 for both, sponsoring of private and public sector activities.[35] Sponsoring is largely known in the context of sports, where the name of the sponsor is placed next to the name of the uniform of teams, or on the billboards of stadiums. There are different degrees of sponsorship, such as general sponsors (making the only or largest contribution), official sponsors (a distinct title in return for a large contribution), technical sponsors (partial or full payment for goods and services), participating sponsors (one of several sponsors), or informational sponsors (providing media coverage, or conducting PR-actions).[36]

Donations differ from sponsoring insofar as they do not aim at enhancing the publicity of the donor. For example, where a car-maker supports a sports event by buying the team outfits without the car-maker's logo, it is a donation. When the outfits have the car-maker's logo, it is sponsoring.

The sponsoring report of the **German** Government for 2013 shows sponsoring and donations to federal public organisations (leaving regional and local entities aside) of 76.9 million €.[37] 51.4 million € concern campaigns for health prevention, for which sponsors provided billboard space or free airtime on radio and TV. 6.6 million € concerned sponsoring of cultural events.

Sponsoring of a public organisation may put the entire public organisation in a **conflict of interest**. The public organisation has a "private interest" in the sponsorship or donation: it might want to receive additional money for its budget, or useful items such as computers or cars which will facilitate the work of many or all its employees. In this sense, sponsoring can also put the individual public officials into a conflict of interest: the public official deciding on the sponsoring, and also public officials, who profit individually from the sponsorship. For example, a hotel might donate its used computers to a local police station. The policemen will have a substantial personal interest in receiving these computers for their workplace, as it might facilitate their work to a great extent. The conflict of interest is obvious: the policemen will not be in the same position anymore to deny a favour to the hotel after they accepted the computers. For example, the hotel might ask the policemen to take care of their guests at the hotel who were victims of pick-pockets, whereas usually such victims would have to go – and possibly wait – at the police station to file a complaint.

[35] IEG (2015), *Sponsorship Spending Report*, page 2, available at www.sponsorship.com, accessed 10 October 2015.

[36] Wikipedia, "*Sponsor*", available at https://en.wikipedia.org, accessed 10 October 2015.

[37] German Ministry of Interior (2013), Sponsoring Report [*Fünfter Bericht des BMI über die Sponsoringleistungen an die Bundesverwaltung vom 6. Juni 2013*], available at www.bmi.bund.de, accessed 10 October 2015.

Paragraph 3 therefore defines restrictions on sponsoring. In areas where essential public power is exercised, such as **law enforcement**, sponsoring and donations are completely forbidden. It is interesting to note that many countries contain similar "fragmentised" prohibitions on donations and sponsoring in their laws defining the status of their law enforcement bodies. For example, the Moldovan Law on the National Anti-corruption Centre defines the state budget as the sole source of funding of the Centre.[38] For all other cases where sponsoring is permitted, paragraph 3 (b) to (e) set out conditions for avoiding **conflict of interest**, for proper **supervision** of the sponsoring, and for **transparency** towards the public.

In addition, any sponsoring of public organisations runs the risk of being later on judged as **bribery**. For example, professional photographers in Germany used to take annual pictures of local school classes. The taking of the pictures was for free, only purchasing the pictures cost money. In order to maintain good relations with the local schools, a photographer would regularly donate something, such as a computer for the IT lab of the school. The Federal Supreme Court evaluated these donations as bribery, since the photographers received an official benefit in exchange, i.e. access to classrooms. The ensuing legal uncertainty led to the adoption of sponsorship guidelines: "In this legal situation, sponsorship beneficial to both sides is often obstructed. The only solution can come from legislation, or strong guidelines set by other authorities, the observance of which will preclude any offence."[39]

Despite the risks that usually arise from sponsoring of public organisations, regulation of sponsoring is a rather **young discipline**. Some countries deal with sponsoring under general conflict of interest provisions and provide "only" advisory guidance on this issue.[40] Germany introduced an administrative regulation only in 2006, Montenegro adopted restrictions for the first time with its new Law on Prevention of Corruption in 2014. These guidelines largely follow the German model. GRECO dedicated a chapter to the "German model" in its publication "Lessons learnt from the three evaluation rounds (2000-2010)".[41] Furthermore, Germany submitted the administrative regulation to be included in UNODC's "Best Practices in the Fight against Corruption" under the UNCAC.[42]

Donations to public organisations are distinct from donations to individuals, in particular to members of **parliament** to finance their election campaigns. These donations fall under political finance regulations.

Article 7 – Incompatibilities

(1) The following domestic or foreign activities are incompatible with the active position of being a public official:

(a) *[Multiple public functions]* **Exercising another salaried or unpaid public function in another branch of power, unless expressly permitted by law.**

(b) *[Paid work]* **Any kind of paid work or commercial activity, unless with written approval and within the limits determined in time and finances by decree. Approval is granted for scientific, didactical or artistic work, unless it constitutes a conflict of interest in the case at hands.**

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[38] Article 1 subsection 2, Law no. 1104 of 06.06.2002 on the National Anti-Corruption Center [*LEGE Nr. 1104 cu privire la Centrul Naţional Anticorupţie*], available at http://lex.justice.md, accessed 10 October 2015.

[39] GRECO (2012), *Lessons learnt from the three evaluation rounds (2000-2010)*, page 66, available at www.coe.int, accessed 10 October 2015.

[40] Western Australia, The Integrity Coordinating Group, Conflicts of Interest Scenario 2, *Sponsorship from the private sector*, available at https://icg.wa.gov.au, accessed 10 October 2015.

[41] GRECO (2012), ibid, page 57.

[42] Germany (2003), *General Administrative Regulation on Sponsoring*, available at www.unodc.org, accessed 10 October 2015.

(c) *[Companies]* **A public official may not exercise management, supervisory or representation functions in a for-profit company, except in the cases of Article 3 (state-owned companies). Exceptions to this restriction can apply to lower level public officials [as further defined] as well in cases where the size and the sector of the company does not affect the public official's field of work.**

(d) *[Supervising former employers]* **Public officials, who, over the course of a specified period of time, received income from business entities, do not have the right to possess direct supervisory or control functions in respect to such business entities, for the duration of a specified period of time.**

(e) *[Lobbying]* **A public official cannot work as a lobbyist lobbying in the field of his work or lobbying the public entity he/she works for.**

(f) *[Former lobbying]* **Anybody having worked as a lobbyist is prohibited to work as a public official in the field of his/her previous lobbying or at the public entity he/she lobbied until a specified period of time has elapsed.**

(2) *[Legal consequence]* **Public officials have to resign from incompatible functions referred to in paragraph 1 before they take on the conflicting public office or function or, if it is not possible, without delay. If they hold the public office when the incompatibility occurs, they have to be transferred or have to be suspended from the incompatible office or function until the resignation from the incompatible outside activity becomes effective.**

Commentary

The restrictions under Articles 2 to 6 focus on occasional activities and financial transactions which entail a conflict of interest for public officials. By contrast, the incompatibilities under Article 7 **paragraph 1** focus on **permanent functions** and positions. These functions bring about a high risk of conflicting with the public official's duties, at least in the perception of the public eye. The potential conflict of interest connected to these functions is so high that legislators usually consider them *per se* incompatible with the public office. For this reason, incompatibilities are sometimes called "absolute conflict of interest" as compared to "relative conflict of interest",[43] depending on the situation and as formulated in Article 1.

Paragraph (a) concerns – strictly speaking – a conflict of public duties. For example, the duties of being a government minister conflicts with the duties of being a constitutional judge, if the government is a party to a case before the constitutional court: "Thus, the principle of the separation of powers is the source of the 'traditional' incompatibilities in most countries between the parliamentary mandate and ministerial or judicial offices and certain public functions."[44] The constitution and other laws define where several public duties are compatible. For example, "in most parliamentary regimes the combination of ministerial and parliamentary duties is not only authorised, but actively encouraged in order to strengthen the ties between legislature (assembly) and the Executive."[45] Where no such explicit compatibilities exist, there is a high risk of conflict between the public official's duty to the public (including the duty to devote enough time and effort) in one public organisation with the duty in another public organisation. The incompatibility of paragraph (a) avoids such "divided loyalties."

It should be noted that compatibility of public functions is largely a question of constitutional law. In other words, where constitutional law does not support compatibility explicitly, a simple statute cannot introduce it if so doing would compromise constitutional principles such as the

[43] EUROSAI (2013), *Survey on the Independence of Supreme Audit Institutions*, page 4, available at www.eurosai.org, accessed 10 October 2015.

[44] Venice Commission (2012), *CDL-AD(2012)027-e*, page 77, available at www.venice.coe.int, accessed 10 October 2015.

[45] Venice Commission (2012), ibid, page 80, available at www.venice.coe.int

independence of the judiciary, checks and balances between public bodies, and guarantees for fundamental rights.

Paragraph (b) serves the objective of focusing the public official's time and resources on the performance of his/her public duties instead of secondary work. In addition, it ensures that the employer is always informed about the nature of secondary work and can detect a possible conflict of interest. The limits in time and finance for secondary jobs are not specified in these guidelines, as these vary between countries. Secondary jobs should not take more time than the main job. Limits help preventing public officials from diverting their main attention to secondary job (such as the limit of not earning more than 20% of the main income or not spending more than 20% of the time corresponding to their main job). The exceptions for scientific, didactical, and artistic work protect the constitutional freedom each citizen enjoys. If public officials were largely prohibited from these activities, this would risk imposing an undue restraint on their constitutional rights. The Charter of Fundamental Rights of the European Union recognises these rights in its Article 13 on the Freedom of the Arts and Sciences: "The arts and scientific research shall be free of constraint. Academic freedom shall be respected."[46] The ECtHR has considered these rights within the scope of Articles 9 (freedom of thought) and 10 (freedom of expression).[47] However, if the volume of scientific activity takes up too much time of the official, or otherwise poses a conflict of interest, it would not be allowed. For example, if a school teacher provides tuition to one of his/her students for a private fee, he/she would be in a conflict when later taking that student's exam. His/her objective judgement would be influenced by his/her private interest in having to prove that the private training was successful (by passing the exam). Therefore, in this case the "approval" would not be granted as is "usually" the case.

The incompatibility in **paragraph (c)** is based on the assumption that any of these key functions in a for-profit company would consume more time than a public official should have if he/she fulfils his/her public duties sufficiently. In addition, the public would always tend to perceive the combination of a company position with public office as a source of conflict of interest and personal enrichment by steering public business into the direction of the company. "Representation function" refers to other key functions requiring full time attention, such as being the company's procurator. The exception for state-owned companies is necessary, as the state has to be represented in state-owned companies; the conflict of interest which public officials face when representing the State in such companies are subject of Article 3. As for divesting the business in order to manage the conflict, see below at Article 10. Some countries limit the incompatibility in paragraph (c) to higher level public officials, as it would seem disproportionate for unpaid, temporary, or lower level officials. One could also think of exceptions related to the size and sector of the company (whether it relates to the public official's field of work).

Paragraph (d) is a post-employment restriction attached to previous private positions. The conflict of interest is obvious where a public official has to supervise his/her former employer. Therefore, it is probably the least important incompatibility of all those listed in Article 7. However, it provides for a clear timeline when one can – by statute – assume that the conflict of interest is over. The period of time is not specified in these guidelines, as these can and need to vary among countries. However, post-employment restrictions usually apply for periods between six months and 5 years; most countries probably fix the term between 1 to 2 years. The wording "receiving income" extends the incompatibility beyond formal employment, and includes consultancies and similar service contracts.

Beyond the formal supervision or control of a **former employer**, one should also consider extending the incompatibility to the supervision or control of the sector in which the public official was previously employed. The following case illustrates this need: "The most egregious example of this conflict is Robert Rubin, who was a partner at Goldman Sachs before becoming Assistant to the President for Economic Policy in 1993 and then Treasury Secretary in 1995. Throughout his

[46] *Charter of Fundamental Rights of the European Union* (2000), available at www.europarl.europa.eu, accessed 10 October 2015.

[47] Peers S. (2014), The EU Charter of Fundamental Rights: A Commentary, at no. 13.03.

time in government, Rubin remained an outspoken critic of financial regulations and oversaw the repeal of the Glass-Steagall Act of 1933, which mandated the separation of commercial and investment banking. The repeal of Glass-Steagall was a seminal moment that brought down the fire walls that had long protected the financial industry from itself, and is widely regarded to have contributed to the explosion of risk on Wall Street. Rubin was also one of the people who stubbornly resisted government oversight of the derivatives market, which was practically a free-for-all at the time and the unravelling of which led to the subprime mortgage crisis of 2008."[48] However, the tighter such incompatibilities are, the less the public sector will be able to attract skilled experts from the private sector.

The incompatibility of being a public official and a lobbyist – **Paragraph (e)** – is a regular component of national lobbying regulations, such as in Austria, Macedonia, or Montenegro (see below under "Foreign Examples"). The OECD's "10 Principles for Transparency and Integrity in Lobbying" call in this context to "avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post" (under Principle 7).

For Paragraph (e) and (f) to work, countries need a viable **definition** of lobbying. As of July 2015, at least **20 countries** worldwide have a specific lobbying regulation in place at the national level (depending on where one sets the threshold for counting something as a "specific lobbying regulation"): Australia, Austria, Brazil, Canada, Chile, France, Georgia, Germany, Hungary, Ireland, Israel, Lithuania, Macedonia, Montenegro, Peru, Poland, Slovenia, Taiwan, United Kingdom, and the United States. Canada, Ireland, and the United States are considered having the most progressive lobbying regulations. Australia and Ireland provide good examples of simple definitions of lobbying.[49] From a comparative perspective, one can define lobbying as "any contact of an individual with a public official in the interest of a third party in order to influence legislative, administrative or judicial decisions, unless it takes place in a formal procedure, as part of a public position, through legal counselling, or through activities of political parties."[50]

Paragraph (f) is closely related to paragraph (e): it would at least be perceived as a conflict of interest were a former lobbyist later on to supervise the clients he/she lobbied for. For example, in Germany, it created quite a scandal when "the Environment Ministry hired [...] one of the country's most influential nuclear lobbyists as the head of the reactor safety department."[51] Paragraph (f) follows above cited recommendation by the OECD.

The legal consequences in **paragraph 2** depend largely on the local legal context: Within which mandatory minimum time limits could a candidate for office or a serving public official retire from the incompatible function, such as from a management contract? Does he/she always has the possibility to relieve him/herself from the incompatible function? A verification of incompatibilities should be a standard feature of hiring procedures (see below Article 12). Incompatibilities can also occur after taking office: for example, the department of a public official could take on a new function, making him/her the supervisor of his/her former employer; or the public official could inherit a share in a legal person which would make him/her by law part of the management. At a minimum, the concrete function of the public official's job description in conflict with the private function would need to be (temporarily) suspended or transferred until the private function is divested.

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[48] Sanghoee S. (13 August 2013), *False Arrest: Does the Revolving Door Make Wall Street Reform Impossible?*, available at www.huffingtonpost.com, accessed 10 October 2015.

[49] Australia, *Lobbying Code of Conduct*, section 3.4, available at http://lobbyists.pmc.gov.au; Ireland *Regulation of Lobbying Act 2015*, Section 5, available at http://per.gov.ie, accessed 10 October 2015.

[50] Hoppe T. (2014), *A study on the feasibility of a Council of Europe legal instrument on the legal regulation of lobbying activities*, prepared for the Council of Europe's European Committee on Legal Co-operation (CDCJ), at no. B.12/page 37, available at www.coe.int, accessed 10 October 2015.

[51] The African Times (undated), *Who's governing Germany? The power and influence of corporations on political decisions*, available at www.african-times.com, accessed 10 October 2015.

Article 8 – Post-employment restrictions

(1) *[Post-employment conflict]* **Public officials cannot conduct professional activities including lobbying or be employed by a private sector entity [for a specified period of time] after leaving office where such activities or employment relate directly to the functions held or supervised by the public officials during their tenure, or otherwise constitute a conflict of interest.**

(2) *[Notification]* **Public officials have to notify the oversight entity when they are offered an activity as defined in paragraph 1 which they did not immediately decline. The notification does not release them from the restriction under paragraph 1.**

(3) *[Use of information]* **Public officials shall not use privileged information obtained in their official position or take similar improper advantage when conducting professional activities, seeking or exercising employment or appointment after leaving public office.**

(4) *[Self-dealings]* **Once the public official leaves office, the restriction of Article 2 (Self-dealings) applies respectively, until a [specified] period of time has elapsed.**

Commentary

Post-employment restrictions serve **two purposes**: They extend the loyalty duty of the public official to the public cause beyond his/her time at office. More importantly, they avoid that public officials "betray" their public duties while still in office because they are dallying already over the prospect of their post-office employment. For example, the former United States Secretary of Defence "Dick Cheney steered millions of dollars in government business to a private military contractor – whose parent company just happened to give him a high-paying job after he left the government."[52] NGOs criticised this move: "You have to question whose interests Cheney is looking after, and whether privatisation has really benefited the Department of Defence, or the defence contractors".[53]

In its "Lessons learnt from the three evaluation rounds (2000-2010)",[54] **GRECO** noted: "By the end of the second round [of evaluations], a majority of the members evaluated (26 of 40) had received recommendations to establish or enhance their systems for regulating the movement of officials to the private sector. Few members had designed systems to specifically address this movement [...]. Currently, the **period of times** for which this type of restriction applies varies in Europe between one and five years.[55]

Effective systems that address the movement of public officials into the private sector must pay attention to the **activities** of current public officials. It is during current service that official information, authority and access can readily be used by an official in hopes of securing a position from a prospective employer or to benefit a future employer. [...]. In addition to the fundamental goal of promoting public trust, the most common goals of a **system** to address the movement of public officials from public service to the private sector are: (1) ensure that specific information gained while in public service is not misused (2) ensure that the exercise of authority by a public official is not influenced by personal gain, including by the hope or expectation of future employment; and, (3) ensure that the access and contacts of current as well as former public officials are not used for the unwarranted benefits of the officials or of others.

Accordingly, **Paragraph 1** primarily deals with post-employment directly linked to previous scope of work. Some countries however go even further and prevent public officials from working in the entire sector. An example is a restraint of trade clause in the New Zealand Immigration Advisers

[52] Motherjones (2 August 2000), *Cheney's Multi-Million Dollar Revolving Door*, available at www.motherjones.com, accessed 10 October 2015.

[53] Ibid.

[54] Ibid, pages 23 and 25.

[55] Nikolov K. (October 2013), *Conflict of interest in European public law*, Journal of Financial Crime No. 20-4, at note 24.

Licensing Act 2007. The clause, introduced after a scandal involving government officials using their positions to get benefits from helping immigration applicants,[56] prohibits Ministers of Immigration, Associate Ministers of Immigration and immigration officials from becoming licensed immigration advisers one year after leaving government employment.[57] There are cases where public officials do not oversee a special sector, as is the case with the Chief of Cabinet, or where the private sector job does not relate to the public functions. The alternative "or **otherwise** constitute a conflict of interest" is targeting such cases. The above mentioned case of the United States Secretary of Defence Dick Cheney falls under this scenario.

The restriction on **lobbying** is a clarification. For example, a former minister of transportation working as a lobbyist for carmakers immediately after leaving office is at least a perceived conflict of interest: Did he/she work in the interest of carmakers already before leaving office or did is he/she using confidential information from the public office in his/her new job? As stated above under Article 7, the OECD's "10 Principles for Transparency and Integrity in Lobbying" call in this context to "avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations" (under Principle 7). In some countries, such as Canada or Taiwan, these periods can stretch even to three or five years post departure or even imply permanent restrictions as is the case for some positions in Canada and the United States (see below).

For members of **parliament** and members of **government**, more general post-employment restrictions apply in terms of **lobbying** (see below Chapter III. The challenge with such post-employment restrictions is how they can be **enforced** without the public official being under disciplinary control anymore. The only way is a general administrative or criminal sanction (see Article 26).

Post-employment restrictions go hands in glove with the question of post-employment compensation: the narrower the restriction, the higher the need to provide the public official with a transitory compensation. To this end, at least political public officials often receive a **temporary pension** after leaving their position. This pension also (partly) compensates for the fact that post-employment restrictions narrow the bandwidth of job offers the public official can legally accept. The higher the specialisation, and the lesser the likelihood of finding an adequate job outside legal restrictions, the higher the post-employment compensation needs to be. For example, a supervisor of banks would have difficulties of finding any other job than in the banking sector. Where such public positions are temporary, as sometimes in banking and securities commissions, the public official needs financial security during the period of post-employment restrictions.

Strictly speaking, **paragraph 2** goes without saying: a public official who receives a job offer falling under paragraph 1 is per definition in a conflict of interest. Paragraph 2 thus has only a clarifying function on the proper procedure. It is necessary that the employer knows about such job offers, so he/she can properly react to the new situation. For example, a public official at the ministry of transportation with a job offer from a car-maker should probably not be involved anymore in non-public European Union negotiations about a new directive setting limits for engine emissions. Paragraph 2 makes an exemption if the job offer is immediately declined. There are two reasons for this. First, the refusal of the job offer more or less ends the conflict of interest. Second, paragraph 2 would put the public official under a disproportionate risk of violating a conflict of interest provision, simply because he/she received a job offer he/she was not even interested in taking up.

Paragraph 3 again is a conflict of interest per definition, but provides more clarity on the issue. As with paragraph 1, the challenge with paragraph 3 is how it can be enforced without the public

[56] 3news (2005), *Taito Phillip Field begins six year jail sentence*, available at www.3news.co.nz, accessed 10 October 2015.

[57] Section 15 *New Zealand Immigration Advisers Licensing Act*, available at www.legislation.govt.nz, accessed 10 October 2015.

official being under disciplinary control anymore. The only way is a general administrative or criminal sanction (see Article 26). In addition, provisions on data protection and official secrecy apply. Privileged information means documents and other data sources that are not necessarily confidential but that might not have been disclosed, yet, to the general public. Also, insider knowledge about, for example, internal routines of controlling authorities should not be used for post-employment professional purposes, such as to consult clients about ways to circumvent controls.

Paragraph 4 extends the self-dealing restriction which applies during the time in office to the time after. The reason is obvious: where a former public official would close a contract with his/her former employer right after leaving office, this would look at least like a favour of his/her former colleagues to him/her. Or even worse, a public official could steer the public organisation in a certain direction where it could only procure the goods or services from him/her once having left office. For example, the former director of a hospital could arrange the medical procedures in a way that after leaving office, the hospital could procure certain special tools only from the company of his wife.

Excursus – Other types of restrictions

There is a considerable variety of other forms of restrictions than the ones mentioned in above Articles 1 to 8. They are all expressions of the basic conflict of interest definition in Article 1, or, in addition, of any of the Articles 2 to 8. Therefore, in a strict legal sense, there is no necessity for these restrictions. However, for various countries it apparently has become necessary to make explicit that these forms are prohibited. Such clarifications often stem from specific scandals where legislators felt the necessity to prohibit certain forms of conflict of interest through a special provision. The following are among the main types of such other types of restrictions:

a. Legal action against the State

There are employment and post-employment restrictions on advising third parties on legal actions against the State. They are covered by Article 1 and Article 8 of this toolkit. One national example: “An official has no right to be a representative of a natural or legal person or commissary or represent or defend in criminal, civil or administrative offences cases against the Treasury establishment except in a case when s/he is a trustee of the natural person.” (Georgia, Law on Conflict of Interest and Corruption in Public Service 1997, Article 13 paragraph 6:

b. Restrictions on advertising

Using the public office for advertising a private business falls under the general restriction of Article 1. One national example: “(1) A public official is prohibited from working in any kind of advertising or from utilising his or her name for advertising, except in cases where such is included in the duties of office of the public official. (2) Within the meaning of this Law, advertising is the public expression of any kind of personal evaluation of a public official regarding a specific merchant or the goods produced or services provided by the merchant, if the official has received remuneration for such expression.” (Latvian Law on Prevention of Conflict of Interest in Activities of Public Officials 2002, Section 17 Restrictions on Advertising)

c. Receiving compensation

The prohibition to receive other financial compensation follows from Article 1, Article 5, and Article 7 (b); in addition, any financial benefit runs the risk of constituting a bribe. One national example: “Officials, who during their exercise of public office receive salary for the office they exercise, shall not receive any other salary, unless they perform activity that is permitted by this Act.” (Croatia, Act on the Prevention of Conflict of Interest in the Exercise of Public Office, Article 9 Officials’ Compensations)

d. Trade and treaty negotiations

The prohibition to participate in post-employment trade or treaty negotiations related to the former public office is included in Article 8. For example, the United States have a special provision on this constellation: "Any person who is a former officer or employee of the executive branch of the United States [...] or any person who is a former officer or employee of the legislative branch or a former Member of Congress, who personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States within the 1-year period preceding the date on which his or her service or employment with the United States terminated, and who had access to information concerning such trade or treaty negotiation which is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates." (United States Codes, 18 U.S.C. § 207, Restrictions on former officers, employees, and elected officials of the executive and legislative branches, paragraph (b) One-Year Restrictions on Aiding or Advising).

e. Union leadership

The conflict between representing the State's human resource interests and the interest of a civil servants union falls clearly under Article 1. In Finland, there is a special provision for this conflict: "An official whose official duties include representing the State as an employer may not hold a position in an association representing state employees which would be in conflict with the official duties." (§ 17 State Civil Servants Act 1994)

f. Citizens associations

In its "Guidelines for Managing Conflict of Interest in the Public Service" (2003), the OECD points to the risk of conflict of interest from NGO membership: "'Outside' appointments – Define the circumstances, including the required authorisation procedures, under which a public official may undertake an appointment on the board or controlling body of, for example, a community group, an NGO, a professional or political organisation, [...]." (2.2.2.f). A public official advising the health ministry on new guidelines restricting meat consumption in schools might be in a conflict of interest if he/she is also on the board of an NGO promoting animal rights or vegetarianism. Macedonia dedicated a special provision to membership in citizen associations: "(1) Officials who are member of a citizens association must no abuse the information and the data at their disposal while discharging their duties, nor gain advantage for themselves or for the persons referred to in Article 3 paragraph (1) indent 5 of this Law while carrying out the activities within the scope of the citizens association. (2) Officials who are members of a citizens association must not be members of the managerial boards nor hold any managerial function in the association." (Article 20 Law on Prevention of Conflict of Interests)

g. Influencing others

Several countries prohibit a public official from influencing others to further their private interests. For example, a public official in the banking department of the ministry of finance might want to influence the head of human resources to facilitate the hiring of a friend. Such constellations are close to the offence of trading in influence[58] except that there might not be an advantage for the public official. The head of human resource him/herself might not be in conflict of interest, as neither the colleague nor his/her friend are necessarily close enough to qualify for a private interest. However, for the public official, the attempted influencing would fall under Article 1. A special provision can avoid discussions about whether the public official is actually "performing his or her official duties" (Article 1) when trying to influence a colleague. National examples of such a prohibition are: "No public office holder shall use his or her position as a public office holder to seek

[58] *Council of Europe Criminal Law Convention*, Article 12: "[...] the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person [...]", available at www.coe.int, accessed 10 October 2015.

to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests." (Canada, Conflict of Interest Act 2006, section 9)

h. Preferential treatment

Preferential treatment of certain citizens is most often related to private interests. It constitutes one of the clearest manifestations of Article 1. Canada dedicates a special provision on this constellation: "No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organisation based on the identity of the person or organisation that represents the first-mentioned person or organisation." (Conflict of Interest Act 2006, section 7)

i. Using information

It is a public duty for an official to not abuse non-public information gained in office for private purposes. Disclosure of the information might not necessarily be sanctioned, because the information might not be classified. For example, inside information on a tendered job position is usually not classified but might be valuable to an outside applicant. One could argue that such unrestricted information is public information under freedom of information laws. However, in practice it is mostly not. Freedom of information laws grant access to documentation, not to information which is only available in the form of verbal intelligence. Some countries contain a special provision on such cases: "No public office holder shall use information that is obtained in his or her position as a public office holder and that is not available to the public to further or seek to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further or to seek to improperly further another person's private interests." (Canada, Conflict of Interest Act 2006, section 8); "A person in the civil service may not use or permit to use for his own private gain or for that of his close relatives or related persons information obtained in the course of official duties, otherwise than in the manner and in the scope laid down by law." (Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service 1997, Article 13, paragraph 2)

j. Use of name and authority

It goes without saying that public officials cannot use their official position for private purposes. Lithuania is among the countries that has a special restriction on this: "A person in the civil service may not use his duties, authority and name in order to influence other persons' decision, which would result in the emergence of a conflict of interest situation." (Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service, Article 13, paragraph 1). The Czech Republic broadens this prohibition to third parties: No public official may jeopardise the interest of the public, by [...] allowing any party to use his/her first name(s) and surname or his/her image together with his/her official title for commercial advertising purposes in return for payment." (Czech Republic, Act of Law on Conflict of Interests 2006, Article 3 paragraph 2 (c))

k. Soliciting funds (as a private person)

Soliciting funds as a public official for a private cause is a clear conflict of interest: it is an abuse of the name and authority of office. The conflict of interest can still persist when the public official solicits funds as a private person: for example, a police president soliciting funds for his/her charity organisation at a private reception of businessmen in his/her city is probably a conflict of interest. The police president will be perceived not only as a private person or a member of a charity organisation, but also as the police president with a public duty. Any financial advantages received will at least create the perception that the donors can expect preferential treatment from the police president in his/her official function. Canada included an explicit prohibition into its law: "No public office holder shall personally solicit funds from any person or organisation if it would place the public office holder in a conflict of interest. (Canada, Conflict of Interest Act 2006, section 16)

l. Travel on airplanes

Free rides on private aircraft for high level public officials constantly appear in the media. For example, "in early February [2011], France's Foreign Affairs Minister, [...] came under fire when it was revealed that during her Christmas vacation in Tunisia, she had flown — for free — on a private plane belonging to a rich businessman close to the country's now deposed President, Zine el Abidine Ben Ali."[59] For official travel, legislation sometimes permits acceptance of such sponsored travel: "No minister of the Crown, minister of state or parliamentary secretary, no member of his or her family and no ministerial adviser or ministerial staff shall accept travel on non-commercial chartered or private aircraft for any purpose unless required in his or her capacity as a public office holder or in exceptional circumstances or with the prior approval of the Commissioner."[60] Thus, if France's Foreign Affairs Minister had been on a State visit to Tunisia, the sponsored travel would have been acceptable. However, even in this case, acceptance of travel from a private source would at least be perceived to be a conflict: will the Minister still be able to publicly criticise the businessman – if necessary because of political implications – when visiting Tunisia? Therefore, the Canadian "Guide for Ministers and Ministers of State" on "Accountable Government" of 2011 contains further restrictions: "Ministers, Ministers of State and Parliamentary Secretaries must not accept sponsored travel, i.e. travel whose costs are not wholly paid from the Consolidated Revenue Fund, or by the individual personally, or his or her political party, or an inter-parliamentary association or friendship group recognized by the House of Commons."[61]

m. Restrictions on family members

Some countries include family members in the circle of restrictions. As noted already under Article 5, some countries restrict gift-giving to family members of public officials. Other countries extend the prohibition on owning companies to family members of public officials. Article 35 paragraph 2 of the Albanian Law "On the Prevention of Conflicts of Interest in the Exercise of Public Functions" states: "If shares or parts of capital are registered in the name of a related person, they are considered the same as if they were registered in the name of the official himself and the property rights of the related person in them are restricted to the same extent and manner as in the case of the official himself." In the United States, the law aims at family members in the context of lobbying. The "Honest Leadership and Open Government Act" (2007)[62] prohibits Senate spouses who are registered lobbyists from engaging in lobbying contacts with any Senate office (Section 401). It exempts Senate spouses who were serving as registered lobbyists at least one year prior to the most recent election of their spouse to office, or at least one year prior to their marriage to that Member. The Act also prohibits Senators' immediate family members who are registered lobbyists from engaging in lobbying contacts with their family member's staff.

Chapter II: Management of ad-hoc conflict of interest

Preliminary note

It is a frequent misunderstanding that conflict of interest in and of itself is **corruption**: "[C]orruption also encompasses such diverse activities as nepotism, favouritism and conflict of interest, where public-sector jobs or benefits are illegally channelled to family, friends or to the benefit of the decision-makers own interests."[63] This misunderstanding persists despite the Council of Europe and other international organisations repeatedly underlining that one should under no circumstances equal conflict of interest with corruption:

[59] Time (18 February 2011), *Can France Fix Its Conflict-of-Interest Problem?*: "[...] thanks to France's blasé attitude toward conflict of interest, the problem has become common within its political class.", available at http://content.time.com, accessed 10 October 2015.

[60] Canada, *Conflict of Interest Act 2006*, section 12, available at http://laws-lois.justice.gc.ca, accessed 10 October 2015.

[61] *Guide*, at A IV d, available at http://www.pco-bcp.gc.ca, accessed 10 October 2015.

[62] *Honest Leadership and Open Government Act* 2007, available at www.congress.gov, accessed 10 October 2015.

[63] Morris S., Forms of Corruption, *CESifo DICE Report* 2/2011, page 10, available at www.cesifo-group.de, accessed 10 October 2015.

> "It isn't wrong or unethical to have a conflict of interest, what is important is that it is identified and appropriately managed."[64]
>
> "The law tends to create the impression that conflict of interest is a form of corruption by juxtaposing provisions to prevent or address conflict of interest with prohibitions on misuse of office for private gain. It is vital, by contrast for officials and regulators to be clear that a conflict of interest is a situation, not an action and does not in itself entail any wrong-doing."[65]
>
> "Such interpretations reflect a mistaken view that a conflict of interest itself is corruption."[66]
>
> "[A] conflict of interest is not necessarily corruption, which is understood as 'actual abuse of public office for private advantage'. But a conflict does have the potential for corrupt conduct."[67]
>
> "Conflict of interest (COI) refers to a situation in which an individual is in a position to exploit an official capacity for personal benefit, but has not done so yet. The presence of a conflict of interest is not an indicator of improper conduct, but rather a warning, or risk, of its possibility. The operating principle of a conflict of interest system is to assist public officials in avoiding situations where a conflict of interest can arise."[68]

Therefore, these guidelines follow the assumption that proper **management** of conflict of interest makes the difference and that a properly managed conflict is never corruption. In the words of the Southern Australian Ombudsman: "Conflicts of interest are not wrong in themselves – public officials are also private individuals and there will be occasions when their private interests come into conflict with their duty to put the public interest first at all times – but such conflicts must be disclosed and effectively managed. [...] Failure to identify, declare and manage a conflict of interest is where serious corruption often begins and this is why managing conflicts of interest is such an important corruption prevention strategy."[69]

The first step of preventing a concrete conflict of interest is probably **avoiding** it. Since avoiding conflict of interest will not make it necessary to manage any conflict, avoiding is not included in this Chapter II, but in Article 1 paragraph 3. Putting the duty of avoiding conflict of interest in the first Article of these guidelines is also necessary to make it clear that the definition of conflict of interest in Article 1 is not art for art's sake, but for preventing any abuse of public office for private interests.

Article 9 – Disclosure

In case a conflict of interest cannot be avoided by the public official according to Article 1 Paragraph 3, he/she must inform the conflict of interest manager.

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[64] Western Australia, Integrity Coordinating Group, *Conflicts of interest – Guidelines for the WA public sector*, available at https://icg.wa.gov.au, accessed 10 October 2015.

[65] Council of Europe AZPAC Project/Reed Q. (2008), *Technical Paper: Assessment of draft Law of the Republic of Azerbaijan on the Prevention of Conflict of interest in the Activities of the Public Officials*, at section 2.2, available at www.coe.int, accessed 10 October 2015.

[66] Reed Q. (2012), *Regulating conflict of interest in challenging environments*, U4 Issue 2010:2, page 4, available at www.u4.no, accessed 10 October 2015.

[67] OECD (2005), *Managing Conflict of Interest in the Public Sector: A Toolkit*, page 8, available at www.oecd.org, accessed 10 October 2015.

[68] The World Bank, *Conflict of interest Restrictions and Disclosure*, 2013, page 1, available at https://agidata.org, accessed 10 October 2015.

[69] Bingham R. (4 May 2011), *Local Government Conflicts of Interest, Speech by the Southern Australia Ombudsman at the Australian Institute of Administrative Law*, available at www.ombudsman.sa.gov.au, accessed 10 October 2015.

Commentary

Disclosure is probably the most important step in managing a conflict of interest: secrecy around a conflict of interest situation makes the public official appear as if he/she wants to handle the conflict in an improper way; whereas putting the conflict situation out in the open shows there is nothing to hide. Equally important, disclosure allows the stakeholders responsible for the public organisations to consult on the best way of managing the conflict. The public organisation should consider defining clear forms and channels for the disclosure in order to minimise any confusion that a conflict of interest could evoke for the public official.

Disclosure does not necessarily relate only to one entity. Sometimes it is necessary to disclose the conflict to **several stakeholders**: a public official working in a collegial body might have to disclose to the collegial body, to his/her head of agency, and in addition to an integrity commission outside, as all stakeholders might have to react to the conflict of interest situation. In case of a judge, the disclosure might need to happen towards the parties, towards the court president, and possibly towards the judicial council. Disclosure to parties may also be required in administrative proceedings according to requirements of applicable law.

Article 9 relates to ***ad hoc*** situations of conflict of interest. For example, the random distribution system assigns a public official a file on a construction company in which a family member has a substantial share. *Ad hoc* disclosure is distinct from an **annual declaration** of interests (Article 14): such regular declarations are important to alert supervisors and the public at large which potential conflict of interest situations might arise. In the example, the annual declaration might show the co-ownership of the family member in the construction company. The potential conflict of interest becomes a real conflict of interest the minute the public official is assigned a file on this company. In this situation, the public official has to declare the *ad hoc* conflict situation. Obviously, it is not enough that the family ownership is contained in the annual declaration: supervisors might not be aware of this declaration (even though this should be their duty, see Article 12). In any case, supervisors need to decide how this situation should be handled; they cannot, if there is no *ad hoc* disclosure.

In some countries, case-by-case notifications of conflict of interest are documented in a special **register**. For example, in Albania, “for every case of the appearance of a case by case conflict of interest, the identity of the official, his private interests, the reason for a conflict of interest, the essence of the conflict, the interested parties, the source of the data, the manner in which it was received and verified, and the decision taken based on the data, also including the decisions taken by the superiors, the superior institutions or the courts, are registered.” (Article 11 Law on the Prevention of Conflicts of Interest in the Exercise of Public Functions 2005).

Article 10 – Exclusion

(1) *[Exclusion]* **A public official shall not participate in the preparation, consideration or passing of decisions, otherwise influence decisions or fulfil duties related to his/her conflict of interest.**

(2) *[Decision]* **The conflict of interest manager decides on the appropriate way of excluding the public official, in particular by restricting access to information, by transfer of tasks to another public official or transfer of the public official to another position, or by order to abstain from voting in collegiate bodies. Until the decision by the conflict of interest manager, the public official has to abstain from any further action on the conflicting matter.**

(3) *[De minimis]* **In case of minimal private interest, the oversight entity can decide to let the public official continue working on the matter despite the conflict.**

(4) *[Documentation]* **Decisions have to be documented in writing.**

Commentary

Abstaining from participating in any procedure related to the conflict of interest is the basic solution in most if not all conflict of interest laws. Recusal often requires not only to abstain from the decision itself (e.g. a vote), but also to recuse oneself from deliberations preparing the vote. For example, a chair of a committee should hand over the whole procedure to a representative when being in a conflict of interest. Otherwise, the chair would exercise his/her influence over the committee. Abstaining only from the vote will not sufficiently undo this influence.

A **self-determined** recusal works for members of parliament and possibly judges, where there are pre-determined rules for such a recusal; most importantly, these procedural rules solve the question on who steps in for the public official who recused him/herself. For civil servants, it is not so easy. They lack the independence of parliamentarians and judges. On the contrary, they are part of a hierarchy that makes the whole institution work. Therefore, a recusal of a civil servant is always subject to approval by the supervisor. This follows already from the necessity to transfer the responsibility to someone else: only a supervisor can decide on this, not two employees among themselves. Article 11 defines who is conflict of interest manager for which category of public official. Thus, in Lithuania, it is explicitly foreseen that the "head of the institution or his authorised representative may refuse to accept the self-exclusion and obligate the person to take part in the subsequent procedure." (Article 11 paragraph 2, Law on the Adjustment of Public and Private Interests in the Civil Service 1997) Abstaining from action is not required when the public official shall prevent immediate damage to the public interest; however, normal conflict-of-interest management steps have to be taken immediately after.

Paragraph 1 speaks not only about taking "**decisions**" but also about "fulfilling duties". This distinction takes into account that public officials do not only act through "decisions", but through *de facto* actions (or inactions). For example, a public official can carry out supervision and, unless there is an incident, no identifiable decision will ever be made.

A conflict of interest does not always require action. In many cases, it is sufficient that it is disclosed. In particular in **minimal cases** of perceived conflict of interest, it would be out of proportion to always transfer tasks to another public official. Such transfers often do come with financial or non-financial costs: another public official needs to become acquainted with the matter; in cases of small rural outposts it might even be necessary to send another public official to the outpost. The variety of possible minimal interests is virtually infinite, for example, a tiny share worth a few Euros that the public official owns in a company, or occasional previous social relations with the private person such as common visits to a sports club or children attending the same class in school. The oversight entity should not only assess the private interest alone, but compare it with the matter to be handled by the public official. In the assessment of the potential impact of the private interest, the oversight entity should consider the following factors related to the official duties:

- **Importance** of the matter, financially or legally (e.g. feeding statistical data submitted by a family member into a consolidated statistical database will be of little importance as opposed to suspending that family member from the duty of submitting statistical data);
- **Controversy** around the decision (e.g. every "unimportant" formal step of issuing a building permit becomes important when it concerns the construction of a publicly disputed highway);
- The amount of **discretion** of the public official involved (e.g. issuing a student's identity card is usually not a matter of any discretion, if payment procedures and timelines are well-defined).

There are two frequently used test questions which indirectly address above considerations:[70]

- Would I be happy if my **colleagues** became aware of my involvement?
- Would I be happy if my involvement appeared in the local **newspaper**?

[70] Crime and Corruption Commission Queensland, Australia, *Identifying conflicts of interest in the public sector — checklist*, available at www.ccc.qld.gov.au, accessed 10 October 2015.

Where resolution of such situations represents common difficulties, oversight entities or conflict of interest managers should consider developing guidance reflecting above issues.

Written documentation is important as otherwise public officials could easily cover up later that procedures were not followed. Documentation also facilitates public trust and it allows for public access to information (Article 16).

Excursus: Blind trusts

Divestment of interests is an option for managing a conflict of interest. The assumption is that the public official is sufficiently free from the private business interest, once the business is not in his/her possession anymore. The most radical option is to require the public official to simply transfer ownership of the business to somebody outside his/her circle of private interest (family members etc.). A less cutting option is to require investment into a blind trust. An example can be found in model formulations of the U.S. Office of Government Ethics:

> "The primary purpose of this Trust is to confer on the Trustee the sole responsibility to administer the trust and to manage trust assets without the participation by, or the knowledge of any interested party or any representative of an interested party. This includes the duty to decide when and to what extent the original assets are to be sold or disposed of and in what investments the proceeds of sale are to be reinvested."[71]

A few (former) transition countries foresee blind trust options as well. For example the Croatian Act on the Prevention of Conflict of Interest in the Exercise of Public Office states the following (Article 11): "In the exercise of public office, an official who owns 0.5% and more stocks, i.e. shares in a company, shall transfer his/her share based management rights onto another person, except for persons referred to in Article 4 of this Act [close persons], or onto a special body. That person, i.e. the special body (commissioner) shall act in his/her name and for the benefit/gain of the official with regard to the exercise of membership rights and share in the company."[72] If blind trusts are to work in practice, they need an environment where the level of compliance with regulations is high and oversight is effective. This is a challenge for most transition countries. Additionally, in transition countries the public at large would usually tend to perceive such blind trusts as fake arrangements. As this legislative toolkit is designed primarily for transition countries, it does not include blind trusts as an option.

Article 11 – Conflict of interest managers

(1) *[Definition]* **Conflict of interest managers are designated staff members or organisational units responsible for managing conflicts of interest in coordination with the public official concerned.**

(2) *[Hierarchies]* **For public officials in hierarchical organisations, supervisors in the line of hierarchy are responsible for managing conflicts of interest. Heads of public organisations who are the ultimately responsible for the entire organisation can delegate this function to an integrity focal point inside the organisation.**

(3) *[Other officials]* **Chapter IV designates conflict of interest managers for public officials in special sectors.**

(4) *[Responsibilities]* **The responsibility of conflict of interest managers includes:**

(a) Taking decisions under Article 10;

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[71] *Model Qualified Blind Trust Provisions*, OMB No. 3209-0007 (Revised 9/2013), available at www.oge.gov.ca, accessed 10 October 2015; for the detailed Canadian requirements, see Section 27 subsection 4 Conflict of Interest Act 2006.

[72] See a similar, but more detailed regulation in Serbia, *Anti-Corruption Agency Act* 2008, Article 35 Transfer of Managing Rights for Duration of Public Office, available at www.osce.org, accessed 10 October 2015.

(b) Regularly reviewing the annual interest declarations of immediate subordinates;

(c) Providing advice and guidance;

(d) Identifying and minimising areas of heightened risks for conflicts;

(e) Ensuring training and awareness of subordinates on managing conflicts;

(f) Receiving and processing complaints about conflicts;

(g) Taking measures necessary to protect individuals who have provided information regarding conflicts of interest;

(h) Regularly reviewing compliance with and efficiency of implementation of rules;

(i) Ensuring that third parties are aware of rules.

(5) A central oversight body can be designated to take on functions listed in paragraph 4 (in particular lit. a, c, e, and f), with regard to a part of or all public officials.

Commentary

The public official needs a structure to refer to primarily to decide what to do in cases of conflict of interest. This legislative toolkit calls this instance "conflict of interest manager" (**Paragraph 1**). One could think of other terms, such as "supervisor" or "ethics supervisor". However, this would be too limited. The assistance in managing conflict of interest often does not come from supervisors (in a hierarchical sense), but from inside or outside stakeholders with no supervisory function, such as an ethics commission. Internationally, a great variety exists for such conflict of interest managers; including:

- Internally:
  - Supervisors in the hierarchical line;[73]
  - Internal ethics or conflict of interest focal points in each public organisation, such as commissioners or commissions;[74]
  - Heads of public organisations;[75]
- Externally
  - Integrity Commissioners;[76]
  - Integrity Commissions;[77]
  - Anti-corruption Agencies;[78]
  - Ombudsperson;[79]
  - Court of Auditors;[80]
  - Self-Administrative bodies, such as judicial councils or parliamentary committees.

[73] Albania, *LAW NO. 9367 "On the Prevention of Conflict of Interest in the Exercise of Public Functions"* (2005) as amended in 2014, Article 37 subsection 2, available at www.hidaa.gov.al, accessed 10 October 2015.

[74] Azerbaijan, Article 22 of the *Law of the Republic of Azerbaijan On the Code of Ethics and Conduct of Civil Servants* (2007) (internal Ethics Commissioners), available at www.stat.gov.az, accessed 10 October 2015.

[75] Lithuania, Article 11 subsection 2, *Conflict of Interest Law* 1997, available at http://publicofficialsfinancialdisclosure.worldbank.org, accessed 10 October 2015.

[76] Canada, *Conflict of Interest Act 2006*, section 28, available at http://laws-lois.justice.gc.ca, accessed 10 October 2015.

[77] Bulgaria, *Conflict of Interest Prevention and Ascertainment Act* (2010), Article 19 subsection 2, available at www.mi.government.bg, accessed 10 October 2015.

[78] Serbia, *Anti-Corruption Agency Act* 2008, available at www.osce.org, accessed 10 October 2015.

[79] Australia, *Victoria Ombudsman*, available at www.ombudsman.vic.gov.au, accessed 10 October 2015.

[80] New Zealand, *Local Authorities (Members' Interests) Act* 1968, Section 3 (3), available at www.legislation.govt.nz, accessed 10 October 2015.

The supervisor is often the conflict manager for civil servants in **hierarchical administrations** (**Paragraph 2**). The supervisor has the advantage of good knowledge about the character of work of the public official in question and therefore, can be well prepared to evaluate the risks associated with a conflict of interest. However, this is not always the case. In Serbia for example, the Anti-corruption Agency takes the decision: "Should the Agency establish that a conflict of interest specified in paragraph 1 of this Article exists, it shall accordingly notify the official and the body wherein such official holds public office and propose measures for eliminating conflict of interest." (Article 32 paragraph 3, Anti-Corruption Agency Act 2008) In systems where adequate understanding about conflicts of interest is not found throughout the public sector, centralised external bodies can serve as competence centres from where correct awareness gradually spreads.

A **combination** of the above options is also possible. For example, Ethics Commissions sometimes are only competent for high-level public officials (e.g. in Armenia), whereas hierarchical supervisors and ethics officers manage conflicts of interest of their subordinates in each public organisation.

One should note that in specific sectors, **decentralised** specialised ethics commissions could have an advantage as they will know what conflicts of interest can arise in specific sectors and what the management of the situation will entail. For example, one might question the ability of an anti-corruption agency to fully oversee all implications of a conflict of interest in complex biological research or in financial market products.

Given the wide range of possibilities, this legislative toolkit takes a rather open approach on this question. In general though, an external ethics body for **high-level public officials** is an advisable option, since they often have no supervisor in a hierarchical sense (**Paragraph 3**). In addition, their possible violations of conflict of interest provisions can have more far-reaching economic consequences and be more politically sensitive than those of lower level public officials.

As for the responsibilities of conflict of interest managers, it is a frequent misunderstanding that all they have to do is to wait for a subordinate to bring a conflict of interest situation to their attention – if ever. **Paragraph 4** lists all other responsibilities. For example, most countries and public organisations do not make sufficient use of the annual declaration of financial and personal interest (asset declarations). Often, these declarations pile up in a central integrity body, which, ideally, checks them for their consistency and truthfulness. However, such a central body does not know about the day-to-day duties of public officials: What is the job description of each civil servant in a ministry? Which cases does a prosecutor deal with? Only stakeholders close to the public officials, such as supervisors or internal ethics officers can monitor this. So, for example, a head of department needs to know the content of asset declarations of his/her subordinates. So, if one of the subordinate's husbands has a service company, the supervisor could avoid delegating any work to this subordinate and thus avoid a conflict of interest situation from the beginning. Still, rarely if ever one finds such a duty of supervisors to actively inform themselves on the content of asset declarations. If such declarations are not published online, such information is even more difficult to obtain.

Beyond the regime of regular declarations, the OECD Guidelines point to several more responsibilities of the management in preventing wrongly solved conflict of interest:

> "Ensure that public officials **know** what is required of them in relation to identifying and declaring conflict of interest situations.
>
> **Transparency of decision-making** -- Registrations and declarations of private interests, as well as the arrangements for resolving conflicts, should be clearly recorded in formal documents, to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified and managed. Further disclosure of information about a conflict of interest may also be appropriate in supporting the overall policy objective, for example by

demonstrating how the disclosure of a specific conflict of interest was recorded and considered in the minutes of a relevant meeting.

Monitoring and evaluating the effectiveness of the policy -- Over time, organisations should ensure that the policy remains effective and relevant in dealing with current and anticipated conflicts in a continuously evolving environment, and change or redevelop the policy as necessary.

Publish the Conflict of Interest policy -- Give all new public officials, upon initial appointment and on taking up a new position or function, a clear and concise statement of the current Conflict of Interest policy.

Provide guidance -- Support public officials with information and advice, including real-world examples and discussions on how specific conflict situations have been handled in the past and are expected to be handled in the future. In particular, consult with staff on the application of the policy, and ensure that the policy's rationale is understood and accepted.

Provide assistance -- Identify sources of appropriate assistance for public officials who are in doubt about the application of the policy, and widely publicise how to obtain such advice. Make such advice available to clients of the organisation and others, including contractors, agents, and partnering bodies, to assist stakeholders to be well-informed. Such advice may be especially valuable to parties who may feel that the public organisation's Conflict of Interest policy is not fully effective but are reluctant to complain formally to the organisation concerned.

Review **'at-risk'** areas for potential conflict of interest situations.

Meeting procedures -- Enable participants in official decision-making to foresee potential conflicts, where feasible: for example by providing meeting agendas in advance; record in meeting proceedings any conflicts that arise and the measures taken to resolve them.

Involve employees, their representatives and other interested parties in the review of existing Conflict of Interest policy. Their opinion, as users, on the daily problems faced in the implementation of the Conflict of Interest policy can substantially contribute to the improvement of existing measures.

Consult on future prevention measures to bring a practical aspect into the policy-making process and to build a common understanding that is vital for the implementation of agreed policy.

Assist understanding by providing **training** for public officials to develop an understanding of the relevant general principles and specific rules, and to help them improve decision-making skills for practical application.

Provide support mechanisms for assisting managers in reviewing and improving their **skills** in identifying and resolving or managing conflicts in their day-to-day work."[81]

In addition, managers/supervisors need to actively react to post-office employment situations (Article 8). The OECD poses the following two questions in this context:

"Does the organisation actively maintain procedures which **identify** potential conflicts of interest where a public official who is about to leave public employment is negotiating a future appointment or employment, or other relevant activity, with an outside body?

Where an official has left the organisation for employment in a non-government body or activity, does the organisation **retrospectively assess** the decisions made

[81] Recommendation of the Council on *OECD Guidelines* for Managing Conflict of Interest in the Public Service, 28 May 2003 – C(2003)107, at pages 11 and 12, available at www.oecd.org, accessed 10 October 2015.

by the official in his/her official capacity to ensure that those decisions were not compromised by undeclared conflicts of interest?"[82]

Paragraph 4 (g) is in particular relevant for systems without **whistleblower** protection laws as referred to in Article 16 (2). One should equally note in this regard that conflict of interest managers should receive training on how to deal with whistleblowers. In addition, where they have to raise awareness on conflict of interest rules, this should include informing public officials on their protection under whistleblower rules.

It is also important that the **private sector** is aware of rules (paragraph 4 h). To this end, conflict of interest oversight bodies often provide guidance specifically tailored to private sector businesses who potentially enter into contracts with the public sector. Such guidance answers questions on the limits of hospitality or gifts, or on circumstances under which a business can hire a former public sector employee, etc.[83]

Paragraph 5 speaks of a "**central oversight body**". It takes into account the fact that not only "managers and superiors are entitled to provide counselling to subordinates in resolving conflict-of-interest situations", or "a dedicated person within the organisation (for example, ethics officers, human resource management or legal staff)", but also "external organisations".[84] Thus, paragraph 5 reflects the practice in many countries where an anti-corruption agency or an ethics commission takes on the function of advising all or higher level public officials in managing their conflict of interest situations. Other possible "central oversight bodies" could be the court of auditors or the ombudsperson. It goes without saying that any central anti-corruption prevention body should enjoy the "necessary independence" as required under Article 6 paragraph 2 of the UNCAC.

Chapter III: Oversight

Preliminary note

Oversight is probably the weakest part of systems to address conflict of interest. Often, the system relies only on public officials disclosing their personal interests in annual declarations, and in *ad hoc* situations. Otherwise, supervisors only react once the media report about a case of misconduct. Such systems are insufficient. One needs to design a system of oversight that involves public sector entities, their contract partners, and the public at large. Such a system consists of the following:

- Conflict of interest managers who implement regulations in Chapter I and II.
- Heads of each public organisation, who are ultimately responsible for compliance and for effective conflict of interest management.
- Public organisations and their contracting partners need to review possible conflict of interest.
- Verifying the truthfulness of regular declarations and the existence of incompatibilities under Article 7.
- Access by the public at large to information related to conflict of interest and its prevention.
- Complaints mechanisms for public officials and citizens.

The following Articles lay out such a system.

[82] OECD (2005), *Managing Conflict of Interest in the Public Sector: A Toolkit*, page 31, available at www.oecd.org, accessed 10 October 2015.

[83] Massachusetts State Ethics Commission, official website, *Introduction to the Conflict of Interest Law for the Private Sector*, available at www.mass.gov, accessed 10 October 2015; Germany, Private Sector/Federal Administration Anti-Corruption Initiative, *Answers to frequently asked questions about accepting gifts, hospitality or other benefits*, available at www.bmi.bund.de, accessed 10 October 2015.

[84] OECD (2003), *Managing Conflict of Interest in the Public Service, OECD Guidelines and Country Experiences*, pages 81, 83, available at www.keepeek.com, accessed 10 October 2015.

Article 12 – Commencement of job

[Hiring] **Human resource units are jointly responsible with conflict of interest managers for verifying the absence of incompatibilities of candidates.**

Commentary

Declaring and verifying the non-existence of incompatibilities of candidates should be standard procedure for hiring candidates. For example, higher level public officials could submit their first declaration before taking office, i.e. when they are still candidates, and not only after taking office (Article 14 paragraph 1). In Bulgaria, for example, public officials submit their declaration only "within seven days after the election or appointment" (Article 13 Conflict of Interest Prevention and Ascertainment Act 2010). As the absolute minimum for candidates in lower risk positions, they should be required to sign a simple statement that their appointment would not result in an incompatibility or such incompatibility shall be promptly resolved.

Article 13 – Regular declaration of private interests by public officials

(1) *[Frequency]* **Public officials – except for [further defined] lower pay grades – shall present their declaration of interests, income, assets and liabilities on the following occasions:**

- **(a) Upon commencement: within a set number of days after appointment (during the selection process before appointment: for positions of especially high corruption risk).**
- **(b) Updating: annually, on the date determined by the competent authority.**
- **(c) Upon conclusion: within a set number of days of concluding the performance of public functions.**
- **(d) For positions with high corruption risk, one or more years after having carried out public function.**

(2) *[Contents]* **The declaration contains the following information:**

- **(a) Full details on the obligated person, indicating that person's identity document, taxation and/or labour documentation and civil status, occupation and function performed, and the state body or state-owned corporation in which that function is performed.**
- **(b) The date and place for presentation of the declaration of interests, income, assets and liabilities.**
- **(c) Detailed information on the persons who make up the family group, indicating their identity document, taxation and/or labour documentation, if any, and civil status. In each case, it must specify their occupation or activity.**
- **(d) Details of real property of any kind, located within the country or abroad, held in ownership, co-ownership, community of property, fiduciary property, any other form of ownership or lease, and significant improvements that have been made to such property. The form must indicate the address, location, registration identification, percentage, liens, date of acquisition, value paid at that date, and source of funds used for each acquisition made subsequent to appointment.**
- **(e) Detail of registered personal property of any kind, located within the country or abroad, held in ownership, co-ownership, community of property, and any other form of ownership. The form must record their type, trademark, model, year of manufacture, and identification numbers; registration data, date of acquisition, value**

paid at that date, and the origin of the funds used for each purchase made subsequent to the appointment.

(f) Details of other personal property, where the market purchase value exceeds [...]. The record must show the date of purchase, the value and currency paid at that date, and the origin of the funds used for each purchase made subsequent to the appointment.

(g) Details on capital invested in securities, shares and other instruments, whether or not tradable in the country or abroad. The form must indicate the security or instrument representing the value, its registration number, the date of issuance, the issuer, and the quantity, determined or capable of determination, which it represents in legal currency on the date of the declaration; the date of acquisition, the value paid on that date, and the source of the funds used at each acquisition that takes place subsequent to the appointment.

(h) Details of rights in communal, personal or corporate undertakings, constituted in the country or abroad, either in administration or in capital. The form must identify the name, corporate purpose, tax identification of the company, percentage and nature of the rights of the obligated person, and identification of any related natural or legal person through which the interest is held. It must also indicate the date of acquisition of each right, the value paid at that date, and the origin of the funds used for each acquisition made subsequent to the appointment of the obligated person.

(i) Details of participation on boards of directors, administrative and supervisory boards, advisory boards, or any collegial board, whether remunerated or honorary.

(j) Indication of the balance of accounts and other financial products in banks or other financial institutions, national or foreign, and cash holdings in national or foreign currency. It must indicate the name of the bank or financial institution in question.

(k) Listing of mortgages, pledges or common loans and debts, indicating their component obligations and the type of obligation, the debtor or creditor and the amount owed.

(l) Annual income derived from the position for which the declaration is made as well as from other activities, work in a relationship of dependency or the exercise of independent or professional activities.

(m) Annual income and outlays related to pensions and social security systems.

(n) Details of other property, either real or personal, including securities, that is held by a third party in part or in full for the benefit of the obligated person, the name of the third party, the date the property was acquired and how it was acquired, the value of the property on the date it was acquired, the current value and any income or payments made to the obligated person based on that property.

(o) Identification of any public posts or positions held by the obligated person, paid or honorary, as director, employee, consultant or representative of any commercial or non-profit undertaking, specifying the organisation contracting the official. In the case of a declaration upon commencement, the information must cover the two years immediately preceding the declaration. In the case of updates, the information shall cover the year prior to the declaration.

(p) Identification and brief description of the gifts and similar advantages, received as a result of the position, the approximate value of which exceeds the equivalent of a set value.

(q) Express declaration that the data and background provided are truthful and accurate.

(r) Express declaration that no relevant properties or data have been omitted.

(s) Identification of the private organisations (political party affiliations, associations) that a public official has participated in, from a set number of years preceding the time the declaration is submitted.

(3) *[Verification]* **A central verification body verifies declarations as follows:**

(a) Declarations are verified for compliance with declaration obligations and the accuracy of the submitted information.

(b) Verifications take place at least on a substantial sample of all declarations, based on a written sampling methodology. The sample of public officials is based on a random choice, as well as on risk criteria. Verifications also take place following open and anonymous complaints, media reports, notifications by other authorities, and any other substantial irregularity.

(c) For the accuracy of submitted information, the oversight body needs to cross-check the data with a wide range of state databases. The oversight body has access to publicly available data or data of private persons subject to conditions defined in the respective law regulating the powers of the oversight body.

(4) *[Submission and other aspects]* **Further aspects of the declarations, in particular their function of preventing illicit gain and the procedure of submission is subject to the respective law.**

Commentary

Asset declarations serve a dual function**: illicit gain** as well as **conflict of interest**. Both aspects are closely intertwined. For example, a large share in a company can be an indicator of illicit gain: How did the public official finance this acquisition? At the same time, the share can be a source of conflict of interest, once the company contracts with his/her public organisation. Many rules concerning asset declarations relate to the illicit gain aspect of asset declarations. These rules have highly technical and complex implications. At the same time, there is a vast number of publications on this issue of asset declaration.[85]

This legislative toolkit does not intend to **duplicate** above efforts, not least given the limited scope of these commentaries. Article 14 paragraph 1 and 2 draw largely on the OAS Model Law on Declarations, whereas paragraph 3 draws on the above mentioned Eastern Partnership Practitioner Manual and on the Western Balkan Recommendation (see below at international standards). As for the term “anonymous complaints” in paragraph 3 (b), see comments under Article 16. Paragraph 4 simply “delegates” the other procedural details away from this legislative toolkit.

There is one modification in paragraph 1 compared to the OAS Model Law on Declarations: the first declaration is due for the selection procedure, whereas the Model Law only requires declaration “upon commencement”. The earlier declaration is due to Article 12 of this legislative toolkit which calls for incompatibility screening of **candidates**.

The exception for lower **pay grades** relates to the fact that technically, some employees are public officials, but have neither sufficient income nor sufficient public power for a regular declaration being of any added value. For example, it is difficult to think of any financial or personal interest a

[85] - Council of Europe Eastern Partnership Project (2014), Practitioner manual on processing and analysing income and asset declarations of public officials, *Technical Paper*, available in English and Russian at www.coe.int, accessed 10 October 2015; World Bank/UNODC Stolen Asset Recovery Initiative, *Public Office, Private Interests*: Accountability Through Income and Asset Disclosure (2012), available at www.star.worldbank.org, accessed 10 October 2015; World Bank/UNODC Stolen Asset Recovery Initiative (2012), *Income and Asset Declarations*: Tools and Trade-offs, available at www.unodc.org, accessed 10 October 2015; World Bank/UNODC Stolen Asset Recovery Initiative (2013), *Income and Asset Disclosure, Case Study Illustrations*, available at http://elibrary.worldbank.org, accessed 10 October 2015.; OECD, (2011) *Asset Declarations for Public Officials* – A Tool to Prevent Corruption, available at www.oecd.org, accessed 10 October 2015; RAI (2012), *Rules and Experiences on Integrity Issues*, available at www.rai-see.org, accessed 10 October 2015.

receptionist in a ministry could possibly declare related to his/her job duties. Pay grades play a proxy for decision-making power: usually, the lower the pay grade, the less decision-making power an official has. When following this approach, lower pay grades need to be defined nationally answering the following question: Which levels of public service do typically not have enough decision-making power as to justify regular declaration of personal and financial interest? As for identifying areas of higher corruption **risk**, there are examples of national regulations providing guidance:[86]

> "The following areas of activity are usually especially vulnerable to corruption:
>
> a. areas in which staff influence on decision-making may lead to advantages of significant value to others, and
>
> b. activities involving at least one of the following:
>
> - frequent outside contacts, especially monitoring and supervisory activities,
> - management of large budgets, award of public contracts, subsidies, grants or other funds,
> - imposing of conditions, granting of concessions, approvals, permits and the like, setting and levying of fees,
> - processing of transactions and operations using internal information not intended for third parties.
>
> This list is not exhaustive. In certain cases, activities may be especially vulnerable to corruption even in the absence of these characteristics."

Article 14 – Compliance declarations by contractors

(1) *[Compliance declarations]* **Contractors with public organisations have to submit a declaration on complying with the provisions in Chapter I. The body competent for public procurement provides guidance on how to ensure compliance with this Paragraph.**

(2) *[Verification]* **Public organisations contracting goods and services should set up a mechanism for actively detecting possible conflicts of interest of their public officials with the intended contractor. The mechanism should include review of the database of annual declarations, registers for citizens, companies, and business, as well as non-state open source information. Article 13 applies respectively. This function can be assigned to an external integrity focal point.**

Commentary

A conflict of interest law should not place the burden of compliance only on public officials, but also on third parties entering a contractual relation with public organisations. Therefore, the business restriction of Article 2 aims at both, public officials as well as contractors of public organisations. The compliance declaration of **Paragraph 1** is an expression of the contractor's obligation. It is obvious that the contractor cannot be liable for any undetected conflict of interest concerning all public officials at the public organisations. However, the compliance declaration could place a reasonable burden on the contractor, such as to make involved staff aware of the public sector conflict of interest regulations, to require internal disclosure of close relations with public officials, and to review the public database of annual declarations of public officials. As the exact outline of the compliance declaration depends on the local context, it is subject to a further decree by the entity responsible for public procurement. It is worth mentioning that a 2011 Directive Proposal by

[86] German Ministry of Interior, Recommendation on No. 2 of the Directive Identifying and analysing areas of activity especially vulnerable to corruption, *Rules on Integrity*, page 30, available at www.bmi.bund.de, accessed 10 October 2015.

the European Commission called on member States to ensure "that candidates and tenderers are required to submit at the beginning of the procurement procedure a declaration on the existence of any privileged links with the persons referred to in paragraph 2(b) [chairperson or members of the decision-making bodies of the contracting authority], which are likely to place those persons in a situation of conflict of interests".[87] However, the adopted version of the Directive contains a more general wording for preventing conflict of interest.[88]

The verification in **Paragraph 2** consists mainly of a check of the company or business register to see who owns the company or business, and/or controls it otherwise. At the same time, one needs to check the database of annual declarations with a keyword search for the company in order to see if any public official or close person is connected to the company or business. Advanced databases for declarations allow such key word searches. For example, the public declarations database in Georgia has a "quick search" field, which invites users to "Just type whom or what you are looking for: e.g. Giorgi Maisuradze, Mercedes, villa etc."[89] Some countries have advanced systems of connecting various databases or of automated applications. For example, the "Commission for the Prevention of Corruption in Slovenia uses databases to enhance control of compliance of public officials with limitations regarding business activities. There is a periodic and automatic crosscheck of data from the Supervizor system, the commercial register and reports of public institutions of entities, in relation to which limitations of business activities would apply."[90] In Romania, a new system of *ex ante* verification shall detect conflicts of interests automatically. The new system is meant to "automatically detect whether participants in the public bid are relatives, or are connected to people in the contracting institution's management".[91] In such cases, the system would send a warning to the contracting authority.

Article 15 – Freedom of information

(1) *[Managing]* **Disclosures and decisions on managing conflicts of interest (Chapter II) and compliance declarations under Article 14 are public information under freedom of information laws.**

(2) *[Declarations]* **Declarations are published online and are freely accessible, with data in searchable, machine-readable format.**

(3) *[Statistics]* **Each public organisation is responsible for annually publishing online, with data in searchable, machine-readable format, statistical information on how it managed conflicts of interest. This includes information on applied sanctions (Chapter IV).**

(4) *[Business contracts]* **Public organisations have to publish online the details of contractors of goods and services.**

Commentary

Article 16 follows the rationale that transparency allows for public scrutiny, whereas public scrutiny helps detecting cases of conflict of interest. Furthermore, public scrutiny creates additional pressure on public organisations to actually implement conflict of interest laws.

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[87] European Commission, *Proposal for a Directive of the European Parliament and of the Council on public procurement*, COM/2011/0896 final - 2011/0438 (COD), Article 21 subsection 3 (b), available at http://eur-lex.europa.eu, accessed 10 October 2015.

[88] *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement*, Article 24 Conflicts of interest, available at http://eur-lex.europa.eu, accessed 10 October 2015.

[89] *Georgian webportal on asset declarations*, available at https://declaration.gov.ge/eng/, accessed 10 October 2015.

[90] OECD (2015), *Prevention of Corruption in the Public Sector*, page 79, available at www.oecd.org, accessed 10 October 2015.

[91] Romania Insider (13 October 2014), *Romania creates new system to automatically detect conflict of interest in public auctions*, available at www.romania-insider.com, accessed 10 October 2015.

Paragraph 1 concerns mainly *ad hoc* disclosures under Article 9 and subsequent decisions under Article 10. It also concerns the management of gifts under Article 5. Some countries, such as Albania, document *ad hoc* declarations in special registries (see above under Article 9). These documents could be subject to freedom of information requests, where, for example, a journalist would like to investigate whether a conflict of interest was properly dealt with. Freedom of information is in particular essential where conflict of interest is handled without further "hierarchical" supervision. For example, where the Court of Auditors handles conflict of interest of any of its members as a collegial body, accountability to the public at large is of essential importance. It seems highly advisable in such constellations to provide transparency on conflict of interest situations and their management not only upon request, but proactively.

The online access of declarations is important so that citizens can monitor conflicts of interest of public officials (**Paragraph 2**). Furthermore, supervisors need to have easy access to declarations so they can inform themselves on potential conflicts of interest of their subordinates. Contractors need access in order to comply with their obligations under Article 14. The machine-readable format is important so citizens can automatically search the data, which is not possible with data "entrapped" in picture images of scanned documents. The published declarations should be regularly updated with regards to possible corrections and changes in the data (including access to the earlier versions of the information) provided that such are permitted under applicable law. It goes without saying that core data can be redacted, such as the location of properties, number plates of vehicles, or identification numbers of current accounts.[92]

The lack of data on the implementation of laws (**Paragraph 3**) is a repeating mantra not only in the area of conflict of interest, but other areas of anti-corruption laws as well, such as bribery or violations of codes of conduct: "GRECO has often noted the lack of adequate information or statistical data concerning criminal convictions or disciplinary measures imposed on public officials for corruption offences or breaches of rules of professional conduct relating to such offences (e.g. failure to report accessory activities which are liable to cause a conflict of interests). In certain circumstances statistical data can be helpful in conducting analysis of trends."[93] Moreover, such data can guide citizens on what information should be requested from which institution under freedom of information laws (Paragraph 1).

Most procurement laws nowadays contain a transparency clause such as **Paragraph 4**. Such a provision is also part of the European Union Directive 2014/24/EU on public procurement.[94] Some countries now even publish entire contracts proactively, including the United Kingdom, Slovakia, Georgia, and some States of the German Federation. In Slovakia, contracts are invalid if they are not published within three months.

Article 16 – Complaints

(1) *[Anonymous]* **Complaints can be submitted by any public official or citizen, in open or anonymous form, to the public organisation concerned, external audit and oversight bodies, and to authorities responsible for administering sanctions.**

(2) *[Whistleblowing]* **Protection of whistleblowers under the applicable laws applies to persons who report on incidents of conflict of interest.**

(3) *[Duty to report]* **A public official shall provide information regarding conflicts of interest known to him or her, in which other public officials are involved, to the head of the public organisation or other competent body.**

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[92] *Western Balkan Recommendations*, no. I.2, available at www.respaweb.eu, accessed 10 October 2015.

[93] GRECO (2012), *Lessons learnt from the three evaluation rounds (2000-2010)*, page 9, available at www.coe.int, accessed 10 October 2015.

[94] *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement* and repealing Directive 2004/18/EC, Articles 50 and 51, available at http://eur-lex.europa.eu, accessed 10 October 2015.

Commentary

The Bulgarian "Conflict of Interest Prevention and Ascertainment Act" (2010) explicitly forbids investigations based on **anonymous** complaints: "A conflict of interest may not be ascertained on an anonymous alert" (Article 23 paragraph 2). This is not in line with Article 13 para. 2 UNCAC which calls for anonymous hotlines to be accessible to all relevant anti-corruption bodies referred to in the UNCAC, such as law enforcement or auditing agencies. Furthermore, a regional recommendation by several integrity bodies from the Western Balkans also calls for "anonymous complaints" to be a valid basis for audits of asset declarations (recommendation E.12).[95] A comparative study conducted in several countries found that many successful audits of asset declarations were triggered by informants.[96] In fact, it is often estranged family members or hostile colleagues who provide information on undisclosed conflict of interest, but often do not dare to do so openly. In practical terms, it is hard to imagine why any country would want to forego to follow-up on complaints where an anonymous informant provides complete facts corroborated by documentation on a serious conflict of interest violation. To this end, systems which do not foresee anonymous complaints, such as the Irish Standards in Public Office Commission, have been criticised.[97] Ethics bodies with such limitations always try to find a way around in practice, for example by admitting complaints through a middleman.[98]

In order to avoid random abuse of the anonymous complaints mechanism, one could require for **Paragraph 1** that a complaint be substantiated, i.e. that it be supported by additional information that goes beyond the mere allegation of an undisclosed conflict of interest.

There have been national regulations in the past where complaints were reserved exclusively to parliamentarians. For example, in Montenegro it is virtually impossible for citizens to report the violation of the Parliament's code of conduct, since this right is reserved solely for the Speaker of the Parliament, MPs, and the President of the MP group.[99] In European Union countries, such a limitation does not exist in most if not all member states. Therefore, this legislative toolkit makes it explicitly clear that **citizens** should be allowed to lodge complaints.[100]

Citizens who have lodged complaints openly should receive **feedback** regarding actions taken and the outcome thereof. Countries should consider solutions to enable feedback also to anonymous reports through online tools, where the anonymous complainant can submit a report and receive a code which allows him/her to check later whether the recipient body requests any additional details.

Whistleblower legislation should usually include reporting on incidents of conflict of interest. The Council of Europe Recommendation on the protection of whistleblowers (2014)[101] requests protection for a whistleblower who reports on "corruption" or "abuse of authority/public position". In order to avoid any discussions, **Paragraph 2** makes this explicitly clear. If a country does not have sufficient legislation on whistleblower protection, the legislation on conflicts of interest should contain guarantees of confidentiality for the person who, in good faith, reports a conflict of interest of another person and other safeguards against retaliation such as transfer of the whistleblower to a less advantageous position, groundless sanctioning, or dismissal.

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[95] *Western Balkan Recommendations*, available at www.respaweb.eu, accessed 10 October 2015.

[96] ReSPA/Tilman Hoppe (2013), *Asset declarations in practice – A regional study of Western Balkan countries*, page 132, available at www.respaweb.eu, accessed 10 October 2015.

[97] European Union (2014), *Anti-Corruption Report Ireland*, COM(2014) 38 final, page 6, available at http://ec.europa.eu, accessed 10 October 2015.

[98] Standards in Public Office Commission, *Making a Complaint under the Ethics in Public Office Acts 1995 and 2001*, available at www.sipo.gov.ie, accessed 10 October 2015.

[99] Institut Alternativa (17 April 2015), *Citizens without the possibility to report the violation of the Code of Ethics for MPs*, available at http://institut-alternativa.org, accessed 10 October 2015.

[100] See the respective recommendation in: European Commission (2015), *Montenegro Progress Report 2015*, p.7, available at ec.europa.eu, accessed 10 December 2015.

[101] *CM/Rec(2014)7*, explanation no. 43, available at www.coe.int, accessed 10 October 2015.

Similarly, public officials are usually obliged to report on instances of corruption. This should include violations of conflicts of interest regulations. Again, in order to avoid any gap or unnecessary discussion, **Paragraph 3** underlines the reporting obligation for conflict of interest.

Article 17 – Audits and external oversight

Compliance with, and efficiency of, implementation of conflict of interest regulations are subject to regular external audits, and to external oversight, including supervising authorities, integrity bodies, court of auditors, ombudspersons, or parliamentary inquiry committees.

Commentary

If a public organisation is transparent on how it manages conflict of interest of its public officials (Article 15), the public at large can monitor to what extent the public organisation complies with conflict of interest regulations. However, citizens' access to public information is always limited: there are restrictions concerning private data or State secrets; access under freedom of information laws is usually limited to written documentation; citizens have no right to peruse entire **files** or to ask public officials for **testimony**, or to **discuss** the rationale of current procedures. At the same time, it is not enough to let a public organisation review its own implementation of conflict of interest rules – the public organisation is always in a "conflict of interest" to give itself a positive testimonial. For this reason, external audit and oversight bodies from the public sector need a mandate to review compliance with conflict of interest regulations. Such a mandate can lead to public reports, such as for example the "Special report" by the European Court of Auditors on "Management of conflict of interest in selected EU agencies",[102] or the decision by the European Ombudsman on "Handling of a potential conflict of interest arising from a staff member's move to the private sector".[103] There are also examples for parliamentary inquiries, such as an inquiry by the New South Wales Parliament, which found that an executive public official "had a significant and ongoing conflict of interest" and that his public organisation "failed to adequately address the conflict".[104]

It is important that audit and oversight bodies have sufficient resources and **powers** for exercising their functions. This includes in particular immediate and unimpeded access to a wide range of state **databases** and to any other official records and documents. The audit and oversight bodies should also have the power to use publicly available private data (e.g. internet) or information given by private natural or legal persons on a voluntary basis. With these powers, an oversight body could, for example, review a random selection of procurement files and cross-check with the civil registry, the business registry, and information from tax authorities, whether there is any link between the winning bidder and any public official of the public authority concerned.

An interesting example of special audit powers is Macedonia. After elections, the State Commission for Prevention of Corruption can conduct a special audit of any public sector contract or other public decision such as permits. The provision could serve to detect political favours exercised by newly elected public officials.

[102] *Special report*, No 15/2012, available at www.eca.europa.eu, accessed 10 October 2015.

[103] *Decision on complaint 775/2010/ANA* against the European Food Safety Authority upon complaint by a non-governmental organisation, available at www.ombudsman.europa.eu, accessed 10 October 2015.

[104] *Final Report* (2015), available at www.parliament.nsw.gov.au, accessed 10 October 2015.

Chapter IV: Special provisions

Preliminary note

Chapter I and Chapter II contain general rules which are applicable to roughly 90% of all public officials in any given country. However, these general rules do not always work with certain categories of public officials:

- The **President** of the country does not have a supervisor in a line of hierarchy he/she can turn to for advice;
- The **Cabinet** signing off on a new law on (higher) public salaries is inherently in conflict of interest when the salary raise includes them as well;
- **Judges** are independent, which makes it difficult to subject their conflict of interest management to the court president;
- **Prosecutors** face conflict of interest situations specific to their profession: should a witness in a trial happen to be a family member, the outcome of the trial will not affect the prosecutor privately; still, most laws define this as a conflict of interest.
- In contrast to civil servants, members of **parliament** inevitably have to decide on laws which affect them also privately, such as draft legislation on income tax.
- If a member of **parliament** has to recuse him or herself from voting in case of a conflict of interest, this could change the outcome of a critical vote of national interest (for example a vote of bailing out a bank to avoid a financial breakdown).

It is for this reason that for example in Lithuania, the provision on self-exclusion is not "applicable to the President of the Republic, members of the Seimas [Parliament], judges, prosecutors, investigators, persons conducting the inquiry, as well as other officers for whom the methods of safeguarding supremacy of public interests are defined by the laws regulating their activity."

Article 18 – Members of government; the President

All provisions of this law apply to Members of Government, their deputies, and the President with the following modifications:

(1) *[Private interests]* **Private interests do not constitute a conflict of interest if the regulatory matter in question:**

- **(a) is of general application;**
- **(b) affects the Member or the President as one of a broad class of the public;**
- **(c) consists of being a party to a legal action relating to actions of the Member as a Member of Government or the President; or**
- **(d) concerns the remuneration or benefits of all Members or the President as provided under law.**

(2) *[Political relations]* **The following restrictions do not apply to Members of Government, their deputies, and the President:**

- **(a) Article 1 paragraph 2 (e) on private interests concerning political relations insofar as political appointments and decisions are concerned;**
- **(b) Article 4 paragraph 1 on political communication.**

(3) *[Paid work]* **In deviation from Article 7 paragraph 1 (b), Members of Government and the President are prohibited from any kind of paid work or commercial activity [unless certain defined exceptions apply].**

(4) *[Business restriction]* **The restriction in Article 2 applies to all public organisations.**

(5) *[Post-employment]* **Post-employment restrictions (Article 8) apply to Members of Government in as far as they have carried out preparatory, decision-making or supervisory functions related to individual private sector entities. Lobbying the Parliament is prohibited for a specified period of time after leaving office.**

(6) *[Managing]* **Instead of Chapter II, the following procedure applies: the Member has to disclose any circumstances which might give grounds for complaint of conflict of interest, to the Cabinet [or the central oversight body]. Further details, including recusal, are regulated in the Government's rules of procedure. The President provides disclosure to the public through a public statement [or to the central oversight body].**

Commentary

Members of Government (and the President) constantly take decisions on draft laws in which they have a private interest: taxes, traffic fines, or even on non-pecuniary issues such as abortion. Members of Government (and the President) cannot avoid having a private interest in laws of general application. Therefore, conflict of interest laws need to make an exemption. It is usually called the "shared interest exemption", as Members of Government (and the President) share the benefit or detriment of a decision with all (or a substantial proportion of) citizens. The degree of private interest increases from **Paragraph 1** (a) to (d). Members of Parliament are in a similar situation; hence, a similar provision applies to them (Article 19 paragraph 1).

An example for **Paragraph 1 (a)** would be a law decreasing value-added taxes – it applies to all citizens. A law decreasing taxes on real estate concerns only a sector of society, which is however broadly defined (**Paragraph 1 (b)**). There might be Members of Government affected by this decision (if they own real estate); however, it would be simply impractical if a Member of Government would have to set a conflict of interest procedure in motion, each time he/she is part of a broad class of people affected by a Cabinet decision. In this context, regular declarations of personal and financial interests (Article 13) come into play: they allow the public to monitor to what extent a Member of Government furthers his/her interests. If necessary, the electorate can punish a politician at the next elections. In other words: private interests of Members of Government are already – ideally – all disclosed through annual declarations.

However, if Members of Government take decisions on individual cases, for example an anti-trust decision or a state guarantee, Paragraph 1 should not apply: it is therefore confined to "**regulatory** matters".

Paragraph 1 (b) has potential for **abuse**. Members of Government could define "broad class of the public" in a narrow way, and for example adopt a bylaw which mostly grants some Members of Government and their immediate network financial favours. It is however clear, that such a circle of persons is the exact opposite of a "broad class of the public". The potential for abuse should not be a reason to leave out the exceptions of Paragraph 1. Potential for abuse exists with many integrity rules, and without the exceptions in Paragraph 1, Article 18 could easily be discredited as dysfunctional.

The Government might be the counterparty to a constitutional lawsuit by Parliament. **Paragraph 1 (c)** clarifies that this does not put the Members of Government in a private interest, even if they might want to win the case.

Paragraph 1 (d) concerns the so called allowance exemption. It does not apply where individual benefits of individual Members of the Government are decided (the size of a housing grant or similar).
Members of Government and the President are politicians by definition. They negotiate political deals, favour their party colleagues into political appointments, such as ministers and deputy ministers, and publicly promote political positions. In this regard, they contrast with ordinary civil servants. Therefore, **Paragraph 2** allows for political decisions and communications of Members of

Government and the President. However, administrative decisions, such as the hiring of civil servants in a ministry, are still exempt from political patronage.

Paragraph 3 follows the assumption that top-level public officials have to devote their entire time to the position. Furthermore, any private income or business would question their independence from private interests. However, there might be the need for some small scale exceptions, for example, when a minister wants to write a book.

Top-level public officials have by definition a strong overall influence on and network within the public sector. Whenever a top-level public official, or a legal person under his/her control, concludes a business contract with any public sector entity, it would be hard to blame a fair-minded and informed member of the public for thinking that the public official used his/her influence to win the contract. **Paragraph 4** thus prohibits this kind of deals. Similar prohibitions are found for example in Canada (see annex).

Ministers oversee a large field of work. For example, a minister of agriculture in the end oversees all farming business in a country. If the minister is a former farmer, he/she could not work again in farming, if the strict prohibition of Article 8 would apply to him/her. Therefore, **paragraph 5** narrows the restriction to specific entities the minister dealt with, such as a specific farm receiving an individual subsidy for example.

Who should decide how a top-level government official should handle a conflict of interest – an Ethics Commission, the Cabinet, or the official him/herself? The practice varies among countries. **Paragraph 6** reflects this variety by allowing several options. However, it is clear that Members of Government and the President have to disclose conflicts of interest, and, if necessary, have to recuse themselves from the matter. The question who would stand in for them depends largely on constitutional and procedural law. Paragraph 4 therefore refers to the local context of these laws.

Article 19 – Members of parliament

All provisions of this law apply to Members of Parliament with the following modifications:

(1) *[Private interests]* **Private interests do not constitute a conflict of interest if the matter in question:**

- **(a) is of general application;**
- **(b) affects the Member or the other person as one of a broad class of the public;**
- **(c) consists of being a party to a legal action relating to actions of the Member as a Member of Parliament;**
- **(d) or concerns the remuneration or benefits of all Members as provided under law.**

(2) *[Political relations]* **The following restrictions do not apply:**

- **(a) Article 1 paragraph 2 (e) on private interests concerning political relations;**
- **(b) Article 4 paragraph 1 on political communication.**

(3) *[Paid work]* **In deviation from Article 7 paragraph 1 (b), Members of Parliament are prohibited from any kind of paid work or commercial ac*tivity, e*xcept in the cases defined in the laws on their status. Article 7 paragraph 1 (c)** *[prohibition on companies]* **does not apply.**

(4) *[Post-employment]* **Post-employment restrictions (Article 8) apply to Members of Parliament in as far as they have carried out preparatory, decision-making or supervisory functions related to individual private sector entities. Lobbying the Parliament is prohibited for a specified period of time after leaving office.**

(5) *[Managing]* **Instead of Chapter II, the following procedure applies: the Member has to disclose any circumstances which are not contained in the regular declarations (Article**

13) and which might give grounds for complaint of conflict of interest, to the parliamentary body in which he or she is about to debate or vote. Further details are regulated in the Parliament's rules of procedure.

(6) *[Conflict of interest managers]* **For Members of Parliament, the parliamentary commission for ethics and discipline [or a similar body or the central oversight body] provides advice and guidance.**

Commentary

Paragraphs 1 and 2 have the same wording for Members of Parliament as they have for Members of Government since the rationale is in both cases the same. The exception in paragraph 1 is is even more important for Members of Parliament, than for Members of Government. The Government only takes a preliminary decision on draft laws, whereas Parliament takes the final decision on primary legislation. Furthermore, Members of Parliament are often elected exactly to promote the interests of a certain group in Parliament – this is an intrinsic part of parliamentary democracy. Thus, if, all lawyers in Parliament would have to recuse when legislation on lawyers is up for vote, Parliament would not function. There is hardly any legislation, where not a large group of Members of Parliaments would need to recuse (Members with children, real estate, etc.). The only control possible in these cases is therefore to provide transparency on the voting in Parliament and private interests of Members; in this way parliamentarians are accountable to the public at large. Obviously, many citizens will probably perceive a Member of Parliament with a farming business as "corrupt", who votes in the interest of farmers. However, there is no viable alternative and as far as can be seen no democracy that would require recusal in such cases.

As for paid work of Members of Parliament (**Paragraph 3**), practice differs among countries. The Venice Commission stated on this issue:[105]

> "81. On the other hand, private occupations are in principle compatible with parliamentary mandates. They are viewed as a means of preventing the exercise of a parliamentary mandate from becoming a fully-fledged profession and of enabling professional groups to be represented in parliament. However, this principle has been undermined by a series of scandals based on collusion between politics and finance and certain private occupations have, as a result, been declared incompatible with political office.
>
> 82. Many countries, largely but not exclusively those influenced by French tradition, have introduced regulations governing plurality of mandates in addition to those governing incompatibilities in the strict sense. These restrictions are motivated largely by "the desire to ensure that parliamentarians have sufficient time at their disposal to exercise their mandates properly…".

There are two options for limiting risks from paid work of Members of Parliament. One method is "to ban MPs from taking on certain roles, through provisions in the constitution or dedicated laws on incompatibility or conflict of interest. This implies that certain roles are inherently incompatible with holding parliamentary office and/or that MPs cannot be trusted to exercise judgment independent of their interests. The alternative is to allow MPs to hold other interests but require them to disclose the details in registers of interests and/or declare them before speaking in parliament on relevant matters. This model grants the MP some discretion to decide when there is a risk of a conflict, although research suggests that, in the United Kingdom at least, the disclosure requirement has not always been well respected. [...] In practice, countries frequently combine the two approaches, prohibiting the holding of some interests but allowing others – as long as the

[105] Venice Commission (2012), *CDL-AD(2012)027-e*, no. 81 and 82, available at www.venice.coe.int, accessed 10 October 2015.

details are disclosed."[106] This toolkit follows the combined approach of prohibiting certain activities as defined in Chapter I (such as on lobbying, Article 7 paragraph 1 (e)), and of declaring paid activities and other income (Article 13).

Post-employment restrictions (**Paragraph 4**) have to be more specific for Members of Parliament. They often supervise whole sectors, for example as a member of the legal committee they supervise the Ministry of Justice and its portfolio. It would be unreasonable to prohibit a Member of Parliament to exercise his/her profession as lawyer if voted out of Parliament because of such a general occupation with the legal profession. However, if they act on individual private sector entities, a conflict of interest becomes apparent. For example, a Member of Parliament might be part of an inquiry committee looking into a political finance scandal involving a big commercial bank. It would be simply unacceptable if the Member would take up a job with the bank right after leaving parliament: the job would appear as a gratification for something the Member has apparently done (or refrained from doing) in the inquiry committee in favour of the bank.

As far as post-employment **lobbying** is concerned, the same applies in principle to Members of Parliament as does to public officials of the executive branch: they are prohibited from lobbying their former "employer", as this would relate to their former field of work. The equivalent means for Parliamentarians that they are prohibited from lobbying Parliament after they leave work. The United States, for example, have therefore included such a restriction in their law.

In principle, Members of Parliament could abstain from taking part in a debate or voting as a form of managing a conflict of interest (**Paragraph 5**). Some countries follow this model, for example Australia and Canada.[107] The House of Representatives in Australia has regulated the matter as follows:

> "No Member may sit on a committee if he or she has a **particular direct pecuniary** interest in a matter under inquiry by the committee. If the right of a Member to sit on a committee is challenged, the committee may report the matter to the House for resolution."[108]

The regulation has been put into practice as follows:

> "'Personal interest' has been interpreted in the very narrow sense of an interest peculiar to a particular person. If, for example, a Member were a producer of beef he or she would not, for that reason alone, be under any obligation to disqualify himself or herself from serving on a committee inquiring into beef prices, as the interest would be one held in common with many other people in the community. [...] In 1977 a member of the Joint Committee on the Australian Capital Territory [ACT] chose not to take part in proceedings of the committee whilst items in which that member had an investment interest were under discussion. In 1981 a member of the Joint Committee of Public Accounts did not take part in that part of an inquiry dealing with the ACT Schools Authority because the member had chaired the Authority in the past."[109]

A similar regulation is found in Canada. The regulation is a good example of what exceptions one needs to formulate to make the conflict of interest exclusions functional:

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[106] OSCE (2013), *Background Study: Professional and Ethical Standards for Parliamentarians*, page 43, available at www.osce.org, accessed 10 October 2015.

[107] National Democratic Institute for International Affairs (1999), Legislative Research Series, Paper #4, *Legislative Ethics: A Comparative Analysis*, page 8, available at www.ndi.org, available at www.oecd.org, accessed 10 October 2015; OSCE, ibid.

[108] Australia, House of Representatives, *House of Representatives Practice* (5th Edition), Chapter 18 Parliamentary committees, page 635 "Personal interest", available at www.aph.gov.au, accessed 10 October 2015.

[109] Ibid, at footnote 69.

> "Debate and voting
> [Paragraph] 13. A Member shall not participate in debate on or vote on a question in which he or she has a private interest.

However, most European countries do not require recusal, but only *ad hoc* disclosure. In Germany, for example, Rule 6 of the German Parliament's Code of Conduct requires case-by-case declarations at sessions only for conflicting interests not contained in the annual declarations:

> Rule 6, Disclosure of interests as a committee member:
>
> Every Member of the Bundestag in receipt of remuneration for his or her activities in connection with a subject to be debated in a committee of the Bundestag shall, prior to the deliberations, disclose as a member of that committee any link between these interests and the subject to be debated where this is not evident from the information published pursuant to Rule 3 [regular/annual declarations].

This legislative toolkit follows the approach of **disclosure** for the following reason: obligations to refrain from voting are problematic. There might be votes on important questions of national interest with close margins of majority. Conflict of interest provisions could be abused so as to exclude members of the opposition from taking part in the vote. However, one should also keep in mind that there is a similar important argument for excluding Members of Parliament from voting when being in conflict of interest: the extent to which Members of Parliament seem to abuse their function for private business interests is outstanding in some transition countries, in particular those with very high overall levels of corruption. However, the question is whether having these members abstaining from voting on matters related to their private interests will be of much added value – usually, these members can rely on efficient networks in Parliament to have their interests pushed through even without their participation. In this regard, disclosure of interests probably seems to be the better option.

Regarding *ad hoc* disclosure, it is important to keep in mind that **annual declarations** do not contain all possible conflict of interest situations. For example, an MP's husband might suffer from a rare kind of sickness. The MP finds herself in the position to vote for allocating more money into research on this sickness (at the expense of research on other sicknesses). *Ad hoc* conflicts are also possible with financial interest. An MP might expect a huge inheritance from a relative. The MP should declare his/her private interest when voting on a tax law entailing a significant tax relief to his/her very specific inheritance constellation.

As for supervision of conflict of interest in parliament (**Paragraph 5**), one can basically distinguish the following three options:[110]

- Self-control through parliamentary committees (Germany, Greece, United Kingdom);
- Autonomous bodies, such as an Ombudsman (Scandinavian countries), Commissioner (Canada), or an Integrity Commission (Moldova, Armenia);
- Criminal investigation bodies for criminal cases of conflict of interest such as abuse of office, embezzlement, political finance offences, etc. (all countries).

For example, in Canada the Conflict of Interest and Ethics Commissioner administers the "Conflict of Interest Code for Members of the House of Commons" (2004). The Commissioner, who is also in charge of executive public officials, is mandated under the Parliament of Canada Act to "perform the duties and functions assigned by the House of Commons for governing the conduct of its members when they are carrying out the duties and functions of their office as members of that House" (paragraph 86(1)). It is important in particular for transition countries that oversight of

[110] ECPRD (2001), *Parliamentary Codes of Conduct in Europe*, page 19, available at www.coe.int, accessed 10 October 2015.

conflict of interest does not rest solely in the hands of Parliament itself. This would create a risk of parliamentarians favouring themselves through a network of close political affiliations.[111]

As for **gifts** for parliamentarians, there are basically three main approaches internationally:[112]

- Ban − Some countries forbid MPs from accepting gifts, e.g., United States members of Congress may not accept gifts worth more than 50 US dollars.
- Disclosure − Other countries allow the acceptance of gifts of any value, but require that they must be declared, as in the Czech Republic.
- Hybrid − A third group of countries allows any gift to be received and requires that gifts are declared only if they exceed a certain value, e.g., 50 € in the Netherlands (although some parties in the Netherlands impose tighter rules on their MPs).

This legislative toolkit does not envision any special rules for Members of Parliament. In transition countries, it seems the preferable option to take a rather strict approach, such as the one practised in the United States, in order to gain public trust.

As far as **lobbying** in office is concerned, no special rules apply to Members of Parliament. They should not work on the payroll of, for example, a lobbying firm, to push through the private interests of their clients. It is, however, important to understand that parliamentarians are lobbyists per definition: for example, a dairy farmer elected to Parliament by a constituency with a large number of dairy farms would be expected to articulate their interests in parliament. Or, a Member of Parliament might even push Parliament to save an individual construction business and the workplaces related to it. Therefore, any lobbying definition needs to be designed in a way that it excludes lobbying which is part of an official's tasks. As long as parliamentarians "lobby" for certain interests based only on the remuneration they receive from the State, they are fulfilling their official task. Once they receive additional remuneration for representing interests in Parliament, the lobbying prohibition would apply.

In practice, **sponsoring** is not an issue of much relevance for parliaments. Financing of politics is regulated by laws on political parties and electoral campaigns. The administrations of parliaments do not have many activities suitable for sponsoring. For example, the sponsoring report on Germany does not list any case of sponsoring for the administration of the German Parliament. However, Article 19 does not exclude Parliaments from Article 6 (Sponsoring) for the following reason: Parliament exercises "regulatory and supervisory" functions and therefore, should not be cooperating with sponsors.

The restriction on **self-dealing** of Article 2 is also not of much, if indeed any, relevance for Parliaments. Usually, Parliament's administrations do not have much procurement volume, except for supplies for operational needs. However, if a parliamentarian would like to entertain a business contract with the Parliament, the restriction of Article 2 should apply.

It is probably fair to say that **political contributions** cause conflict of interest as well:[113] where a member of parliament receives a large donation for his/her campaign, this will – at least by

[111] See also the Inter-Parliamentary Union guide, page 103, as quoted by the National Democratic Institute for International Affairs, ibid: "Self-regulation is often insufficient to effectively enforce ethics regulations. For this reason, many countries have tasked an independent or non-partisan entity to monitor compliance with ethical codes – as in the case of the Parliamentary Commissioner for Standards in the United Kingdom. The code of conduct is enforced by the Committee on Standards and Privileges, and it is the duty of the Commissioner to advise the Committee, maintain the Register of Members' interests, advise members, confidentially, on registration matters, monitor the operation of the code and the register; and finally, receive and, if appropriate, investigate complaints from legislators and citizens. Whilst the Commissioner cannot impose penalties, a power left to the Committee, he or she brings to the role greater levels of impartiality than might reasonably arise from the self-monitoring of an ethics committee."

[112] Distinction as by OSCE, ibid, page 47.

[113] In this sense: Lowenstein D.H. (1989), On Campaign Finance Reform, the Root of All Evil is Deeply Rooted, 18 Hofstra Law Review 301, 323.

perception – have an influence on how he/she will exercise their public duties once elected. However, political finance laws are not part of this toolkit as they are a specialised matter.[114]

Article 20 – Judges

All provisions of this law apply to judges with the following modifications:

(1) *[Conflict]* **In addition to Article 1, a judge is in conflict of interest where:**

(a) He/she has a private interest with regard to a party or its representative;

(b) He/she or any person defined in Article 1 paragraph 2 is a witness on crucial facts in a dispute;

(c) He/she would hear or determine an appeal from the decision of a case or issue tried by him or her.

(2) *[Private interest]* **Private interests do not constitute a conflict of interest, if all other judges in the country would have a similar conflict of interest.**

(3) *[Incompatibilities]* **In addition to Article 7, the following incompatibilities apply to judges: the profession of lawyer, bailiff, notary, or insolvency practitioner.**

(4) *[Post employment]* **The following additional post-employment restriction applies to judges: Judges cannot provide legal services for a specified period of time after leaving office, to any private party related to which they acted as judge, or at the courts at which they acted as judge during a specified past period of time.**

(5) *[Managing]* **Instead of Chapter II, the following procedures apply (with further details being subject to procedural law):**

(a) The judge has to disclose to the parties any circumstances which might give grounds for complaint of conflict of interest.

(b) The recusal may be initiated by a judge on his or her own initiative or by a party. Due diligence is required with identifying possible conflicts of interest and an initiative for recusal has to be taken at the earliest stage possible. A motion is not admissible once the interest is disclosed and the parties continue the trial.

(c) The judge shall recuse him/herself in case of conflict of interest and shall make arrangements for the reallocation of the case.

(6) *[Conflict of interest manager]* **For judges, the judicial self-administration body or a similar unit [or the central oversight body] exercise the function of conflict of interest manager.**

(7) *[Appeal]* **Failure of recusal is grounds for appeal.**

(8) *[Paralegals]* **The provisions of this article apply *mutatis mutandis* to paralegals and similar court employees [as defined further].**

Commentary

Most issues under paragraphs 1 to 4 are usually part of the **procedural codes**, as they need to be consistent with the particularities of each procedure. Incompatibilities and post employment restrictions can also be found in the laws on the status of judges. Conflict of interest is only shown

[114] See: *Guidelines on Political Party Regulation*, OSCE/ODIHR and Venice Commission, Strasbourg, 25 October 2010, Study no. 595/2010, CDL-AD(2010)024, Chapter XII, available at www.venice.coe.int, accessed 10 October 2015.; Council of Europe, *Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns* of 8 April 2003 (Committee of Ministers Recommendation Rec(2003)4), available at https://wcd.coe.int, accessed 10 October 2015.

as an Article of this Toolkit in order to illustrate how conflict of interest of judges would fit into an overall system on regulating conflict of interest.

Paragraphs 1 to 4 describe in detail for trial settings what under the general rule of Article 1 would apply anyhow. For judges, it should be pointed out that a conflict of interest and **partiality** overlap, but are not the same. Whenever a judge has a private interest, there is – at least a risk of – partiality. However, for the reverse case, when a judge is partial, he/she does not necessarily have a conflict of interest. For example, a judge may personally be for or against the right to an abortion, and thus be partial on this question, but he/she would have *per se* no private interest in this question.

Paragraph 1 (a): Any representative, in particular a **lawyer**, has a personal interest in winning cases. Such an interest is obvious in systems, such as the United States, where the lawyer gets a contingency fee (depending on the success). But even without such success fees, winning cases is necessary for retaining clients and building reputation. Therefore, a judge should not have any private interest related to a lawyer: this avoids any (perceived) interest in having the lawyer win the case.

Paragraph 1 (b): A **witness** usually has no personal interest in the outcome of a court proceeding. From this perspective, it would not matter whether the witness is of private interest to the judge. However, the credibility of a witness testimony is also a question of honour. In addition, a judge needs to be able to question a witness without compromising, and, if need be, needs to put a witness under the risk of criminal liability for perjury. From this perspective, it is obvious that a judge may not be privately related to a witness, at least, where crucial facts are in dispute and the testimony depends on the credibility of the witness. At the same time, it is clear that there are no concerns when the testimony is undisputed. Similar should apply to experts where their testimony is crucial and disputed. Paragraph 1 (b) follows by and large guidance on conflicts of interest found in particular in Anglo-Saxon countries.[115]

Paragraph 1 (c) is a universal procedural role: it is obvious that a judge will have a private interest in looking "right" on **appeal**. Conceding that one erred on an earlier professional decision is not an easy situation, in particular where a profession's main objective is "being right". Paragraph 1 (c) does not preclude self-remedy rules contained in many procedural codes, according to which the judge of first instance (or a paralegal) can correct any mistake in his/her earlier decision, before a second instance is bothered with it.[116]

Paragraphs 1 (a) to (c) are only a non-conclusive list of explicit situations where the **general rule** of Article 1 applies. An example not included in paragraphs 1 (a) to (c) would be where a judge decides a point of law which may affect the judge in his/her personal capacity[117] (setting a favourable precedent for an own pending dispute).

Paragraph 2 (shared interest exemption) follows the same rationale as Paragraph 1 of Article 18. For example, where the case concerns the validity of a salary cut or raise in the judiciary, all judges share the same personal interest. However, if all judges of a particular court would appear to be in

[115] *United Kingdom Guide to Judicial Conduct 2013*, no. 7.2.7 ("Where a witness (including an expert witness) is personally well known to the judge all the circumstances should be considered including whether the credibility of the witness is in issue, the nature of the issue to be decided and the closeness of the friendship."), available at www.judiciary.gov.uk, accessed 10 October 2015. GRECO, in its Fourth Evaluation Round, found no shortcoming regarding conflict of interest regulation regarding the previous version of the Guide of 2011; see also the *Australian Guide to Judicial Conduct* (Second Edition, 2007), page 25 ("Where a person who is in a first degree relationship to the judge is known to be a witness, the judge generally should decline to take the case, unless the witness is to give only undisputed narrative testimony. In such a case, and if no objection is taken by the parties, the judge may decide to sit, but may well choose not to do so."), available at www.aija.org.au, accessed 10 October 2015.

[116] See for example Section 321a "Redress granted in the event a party's right to be given an effective and fair legal hearing has been violated", *German Civil Procedure Code*, available at www.gesetze-im-internet.de, accessed 10 October 2015.

[117] United Kingdom, Guide to Judicial Conduct 2013, ibid, no. 3.9.

a conflict of interest, for example, because their former colleague is being tried, procedures should be available for the transfer of such a case to another court where possible.

All professions of **paragraph 3** work under the supervision of or at least depending on decisions by a judge. Thus, the same person working on both sides would be a clear conflict of interest. In this context, one should note the "Council of Europe Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities":

> "Judges should be aware that their membership of certain non professional organisations may infringe their independence or impartiality. Each member state should determine which activities are incompatible with judges' independence and impartiality. For instance, incompatible activities have been identified, such as an electoral mandate, the profession of lawyer, bailiff, notary, ecclesiastic or military functions, plurality of judicial functions, etc. Having regard to the necessity of avoiding actual or perceived conflicts of interest, member states may consider making information about additional activities publicly available, for instance in the form of registers of interests. Furthermore, in order to ensure that judges have the time to perform their primary function, that is to adjudicate, the plurality of mandates in various commissions should be restricted and cases in which the law prescribes for judges to sit on a commission, council, etc, should be limited."[118]

On compatibility of judge's office with **political** activity, the UNODC Commentary on the Bangalore Principles of Judicial Conduct noted:

> "The main [international] divergence, however, was in respect of political activity. In one European country, judges were elected on the basis of their party membership. In some other European countries, judges had the right to engage in politics and be elected as members of local councils (even while remaining as judges) or of parliament (their judicial status being in this case suspended). Civil law judges, therefore, argued that at present there was no general international consensus on whether judges should be free to participate in politics or not. They suggested that each country should strike its own balance between judges' freedom of opinion and expression on matters of social significance, and the requirement of neutrality. They conceded, however, that even though membership of a political party or participation in public debate on the major social problems might not be prohibited, judges must at least refrain from any political activity liable to compromise their independence or jeopardize the appearance of impartiality."[119]

Judges sometimes exercise a lawyer's profession after retiring, be it for the income, be it out of professional interest. A judge arguing before his former immediate colleagues grants him/her at least a perceived advantage. **Paragraph 4** also prohibits taking on former court parties as clients, since the remunerated assignment could appear as a reward for an earlier favourable decision as a judge. In view of many available schemes of circumventing post-employment restrictions, it is recommended to provide more detailed guidance, for example in by-laws. Possible schemes of circumvention include judges not being formal representatives of clients but only "senior counsels" of law firms.

Paragraph 5 (a) is a deviation from the general rules under Chapter II: civil servants do not have to disclose their conflict to any party they are dealing with. With judges, there is a decisive difference: once a judge is assigned to a case, court parties have a right to know why the case was transferred to another judge; this rule avoids arbitrary reallocation of cases. Furthermore, a conflict of interest can be grounds for an appeal (paragraph 7). The parties need to know about private interests in order to exercise their rights. Above all, though, the disclosure ensures that the issue is clarified at the earliest possible stage by all stakeholders affected, and that it will not come up only

[118] *Recommendation CM/Rec(2010)12* of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, no. 29, available at https://wcd.coe.int, accessed 10 October 2015.

[119] *UNODC commentary*, page 16, available at www.unodc.org, accessed 10 October 2015.

at the end of a lengthy trial, possibly rendering all efforts futile if the judge then recuses because of a conflict of interest.

Paragraph 5 (b) gives any of the stakeholders affected the possibility to bring the conflict of interest up. Paragraph 5 (b) also prevents court parties from abusing conflict of interest provisions by choosing to bring the issue up only at a stage when the evidence turns against them or it appears that the judge would decide the case against them.

Paragraph 5 (c) is in principle an expression of judicial independence. However, there is a dilemma: if a judge is free to decide on his/her own on the recusal, a "lazy" judge could easily get rid of cases. In addition, for one-bench-courts in small communities, this would require each time for another judge to travel to that court district. However, if a judge is not free to decide on his/her own recusal, but would for example need the consent of the court president or a Chief Justice (in Anglo-Saxon systems), this might affect the internal independence of a judge.

There seems to be no explicit guidance in the international standards as to whether a judge can be "forced", for example by a judicial council of court president, to sit on a case he/she feels to be partial about.[120] This toolkit therefore opts for not taking on such a possibility. However, there appears to be no reason why a judge should not accept the decision by an independent judicial self-administration body. Therefore, it would be equally possible to have the judicial self-administration body advise or even bindingly decide on such matters.

However, it should be noted that international recommendations do expect that judges will take care to reduce the frequency of situations when recusal is needed. The UNODC Commentary on the Bangalore Principles of Judicial Conduct recommends that a judge "organise his or her personal and business affairs in a way that minimizes the potential for conflict with judicial duties".[121]

Paragraph 5 (c) also makes it clear that (non-)recusal of a judge is not at the disposal of the **parties**. There are two reasons for this: court parties should not be free to "choose" their judge, even if they agree on this. More importantly, court parties are in a weak position when a judge in a possible conflict of interest asks them to consent to his/her sitting on the case: refusing the consent might offend the judge and possibly reflect back on the non-consenting court party.

The first line of **Paragraph 5** emphasises the fact that procedural laws vary to great extent. In practice, it is hard if not impossible to fully isolate the topic of conflict of interest in its entirety and "outsource" it to a law separate from procedural law. For example, the role and position of witnesses is often different in criminal or civil trials: in criminal trials, in many systems the judge decides on hearing witnesses *ex officio*, whereas in civil cases, hearing a witness mostly requires a motion by the parties. Therefore, immersing Paragraph 5 into procedural law will require careful adaptation to each national context.

Paragraph 6 reflects No. 74 of the Council of Europe Recommendation CM/Rec(2010)12: "Judges should be able to seek advice on ethics from a body within the judiciary."

A judge might not recuse him/herself despite a conflict of interest. **Paragraph 7** ensures that the result of such a mismanaged conflict of interest will not be to the disadvantage of any of the court parties.

Paragraph 8 recognises that other court personnel also should be subject to conflict of interest rules. Depending on the role of the staff member (assistant judge, court administrator, desk worker,

[120] Council of Europe *Recommendation CM/Rec(2010)12* of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, no. 29, available at https://wcd.coe.int, accessed 10 October 2015 (does not address the issue of recusal); Principle I 2 f, Council of Europe *Recommendation (94)12* of the Committee of Ministers on the Independence, Efficiency and Role of of judges, replaced by Rec(20109)12, available at https://wcd.coe.int, accessed 10 October 2015.

[121] *UNODC commentary*, p.63, available at www.unodc.org, accessed 10 October 2015.

etc.), provisions of the Article 20 shall be applicable to a greater or lesser degree. They represent greatest relevance for personnel with substantial participation in the administration of justice, for example persons who fill the role of a judge in certain proceedings, draft legal decisions or manage case allocation.

Article 21 – Prosecutors

Article 20 applies *mutatis mutandis* except for paragraph 5. The term "party" in Article 20 paragraph 1 (a) includes the judge.

Commentary

Prosecutors face similar courtroom situations as a judge. Therefore, Article 20, paragraphs 1 to 4 apply in an analogous manner. Aside from the particularities of a courtroom situation, prosecutors face similar conflict of interest challenges as ordinary civil servants. Therefore, this toolkit applies the same conflict of interest restrictions to them as to ordinary civil servants. This includes post-employment restrictions. As GRECO noted in this context:

> "[T]here is a growing tendency for prosecutors to leave the judiciary and to take up opportunities in the private sector, where they potentially end up representing clients vis à vis their former colleagues. The absence of rules regulating this practice leaves room for clear potential conflicts of interests, through inside information and informal networks involving former professional connections and acquaintances and feeds perceptions of a lack of objectivity of prosecutors. In order to avoid conflicts of interest, GRECO therefore recommends that clear rules/guidelines be introduced for situations where prosecutors move to the private sector."[122]

Prosecutors do not enjoy judicial independence, but work in a line of hierarchical duty. Therefore, they have to manage their conflict of interest in the same way as civil servants; thus, paragraph 5 of Article 20 does not apply to them. However, there may be procedures that also allow a party to initiate recusal of a prosecutor.

In the meaning of **paragraph 6** of Article 20, the oversight body for conflict of interest could likely be a prosecutorial council wherever such an organ exists. The establishment of such a council is not mandatory under international standards. The Venice Commission stated in 2010:

> "A Prosecutorial Council is becoming increasingly widespread in the political systems of individual states. A number of countries have established prosecutorial councils but there is no standard to do so."[123]

Similarly, the Consultative Council of European Prosecutors (CCPE)[124] has not formulated any standard on this topic. The CCPE President stated in 2013:

> "[A]ll the national systems within the Council of Europe enjoy full legitimacy: no single public prosecution model can be defined, even as a preference or guideline".[125]

[122] GRECO, Fourth Evaluation Round, *Evaluation Report on Slovenia*, no. 207, January 2015, at no. 152, available at www.coe.int, accessed 10 October 2015.

[123] Venice Commission (January 2011), *Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service*, par. 42, available at www.coe.int, accessed 10 October 2015.

[124] *CCPE webpage*, available at www.coe.int, accessed 10 October 2015.

[125] 18th IAP Conference – Plenary 4: *Essential ethical standards for prosecutors – How to assure integrity*, presentation by Antonio Mura, President of the Consultative Council of European Prosecutors (CCPE), Deputy Prosecutor General at the Italian Supreme Court, Council of Europe Standards on Public Prosecutors, Moscow (Russia), 12th September 2013, available at www.coe.int, accessed 10 October 2015.

Article 22 – Independent public officials

All provisions of this law apply to independent public officials who are not judges or members of parliament with the following modifications to Chapter II:

(1) *[Collegial decisions]* **If independent public officials decide in a collegial body, they have to disclose any conflict of interest to this body. The collegial body [or the central oversight body] decides how the public official has to manage the conflict.**

(2) *[Individual decisions]* **If independent public officials make decisions individually, they have to disclose any conflict of interest to the public [and to the central oversight body and/or the body they usually report to] and decide on the management of the conflict at their own discretion [unless they fall under the competence of the central oversight body]. The decision regarding the conflict of interest shall be recorded in written and is equally disclosed to the public.**

Commentary

Certain public officials have no superiors in a strict sense of the word. This concerns for example ombudspersons, independent regulatory authorities, the attorney general or the prosecutor general. Where such public officials work in a collegial body, such as a court of auditors, they disclose their *ad hoc* conflict of interest situations to the collegial body. The collegial body can then decide on the best solution for the conflict – exclusion from voting, transfer of a certain task to another member of the collegial body (if there is an internal division of responsibilities), or mere disclosure of the circumstances. In all cases it should be clear that the authority to decide on the best solution does not imply a licence to ignore or neglect conflicts of interest. Countries may also choose to subject independent officials to control by a central oversight body, such as an ethics commission or anti-corruption body. In case of independent public officials acting alone (e.g. an ombudsperson), a central oversight body should be the entity deciding on managing the conflict. Otherwise, the public at large should be the "judge" of the conflict of interest and whether the public official chose an acceptable solution.

It should also be noted that for certain independent public officials, pre-employment restrictions are often stricter than for the general civil service. This concerns in particular political activities. For example, a person may not be elected as a member of the Council of the Anti-Corruption Agency of Montenegro, "if he/she, within the last ten years, performed or performs: 1) Function of an MP or councillor; 2) Function of a member of the Government of Montenegro; 3) Function in a political party (party president, member of presidency, their deputies, member of the executive and the central committee or other officials in a political party)."[126]

Article 23 – Local governments

All provisions of this law apply to members of local councils and of local executive organs with the following modifications:

(1) *[Councils]* **For members of local councils, Article 19** *[Members of Parliament]* **applies respectively. In addition to disclosure (Article 18 paragraph 5), members have to abstain from voting. Members can apply for exemptions to the Auditor General [or the Ministry for Local Governments, or the central oversight body], in case the restriction would not be in the public interest, in particular when it would affect a substantial number of councillors. Members are prohibited from any kind of paid work or commercial activity unless within the limits determined by law.**

(2) *[Executive organs]* **For members of local executive organs, Article 18** *[Members of government]* **paragraphs 1** *[Private interests]* **and 2** *[Political relations]* **apply respectively;**

[126] Montenegro, *Law on Prevention of Corruption*, Article 84, available at www.antikorupcija.me, accessed 10 October 2015.

disclosure under paragraph 4 is done to the local council [and the ministry competent for local governments, or the central oversight body].

(3) *[Business activities]* **Members of local councils and of local executive organs can apply for exemptions to Article 2** *[Restrictions on business activities]* **to the Auditor General [or the ministry competent for local governments, or the central oversight body], in case the restriction would cause a disadvantage to the public financial interest.**

(4) *[Incompatibilities]* **Members of local councils and of local executive organs who exercise their function on a part-time basis are exempt from the incompatibilities in this Article and Article 7 paragraph (b)** *[paid work]* **and (c)** *[companies]*.

Commentary

In their basic structure, local governance levels are largely mirror images of national governance: they have a parliament-like council, and an executive branch. Therefore, Article 23 refers in large parts to Articles 18 and 19. There are three main differences, though, when it comes to conflict of interest:

- At the local level, public officials often work only part-time. This is true in particular for local councillors.
- Decisions on the local level are not as essential for the national interest as are (some) decisions by the national Parliament. At the same time, they directly affect the interests of public officials more often. For example, a decision on lowering prices for industrial water in a municipality will affect all councillors who are farmers or own farm land.
- There are sometimes less possibilities of avoiding conflict of interest in smaller communities. For example, when procuring the catering of local events, there might only be one or two restaurants in the vicinity being able to deliver hot food to that event. The likelihood of any of the restaurant owners being related to a local public official is probably higher than in the case of catering for an event at the national Parliament.

Article 23 tries to address all three differences.

Paragraph 1 calls for local councillors to abstain from voting, whereas Article 19 requires Members of the national Parliament to only disclose their conflict of interest. A local council has much less potential to change the boundaries of fundamental rights of citizens than a national Parliament has. A local council decides on zoning plans or utility connection charges, whereas national Parliaments decide on the constitution, criminal offences, or international treaties. Having political majorities change because of a conflict of interest is thus less detrimental at the local level than it is on the national level. To avoid problems with fulfilling quorum requirements, the Local Government Act of Sweden even provides an explicit exception whereby the assembly may deal with matters with a quorum reduced by the disqualified member.[127] Laws that define procedures for local governments or the local governments themselves may opt for even stricter standards whereby the member with a conflict of interest is required not only to abstain from voting, but also refrain from preparing motions or speaking officially on the matter.

It is necessary that local councillors can apply for an **exemption** from conflict of interest restrictions. There are often situations where a large number of local councillors is in a conflict of interest. The above mentioned water irrigation system is such an example. A municipality might want to decide to invest in an irrigation channel bringing cheap industrial water to the lands of the municipality. A large number of councillors might privately profit from this public investment as it reduces the costs of their farming. Voting for it will put them into a conflict of interest. At the same time, it would be absurd if such a decision could not be taken, for example because the minimum quorum for taking a decision in the council would not be reached as most councillors are in a

[127] Sweden, *Local Government Act*, Chapter 5 Section 20, available at www.government.se, accessed 10 October 2015.

conflict of interest. In such cases, an external oversight body could ensure that the decision is in the public interest.[128]

Under the Australian Queensland Local Government Act 2009, **other people** who are entitled to vote at a council meeting decide whether a councillor has a conflict of interest, or could reasonably be perceived to have a conflict of interest. If the council decides that the councillor does not have such a conflict of interest, he or she can continue to participate and vote in the meeting.

In New Zealand, the Local Authorities (Members' Interests) Act 1968 allows for the **Auditor-General** to approve of a contract related decision where a councillor would otherwise be in conflict of interest.

For members of local government, **paragraph 2** foresees no exception in the same way as foreseen for local councillors under paragraph 1. This is due to the fact that members of local government can have representatives in case they are in a conflict of interest.

Paragraph 3 foresees a similar exception to conflict of interest situations as does paragraph 1 for local councillors. In local contexts, conflict of interest restrictions can sometimes lead to results which are to the detriment of the public interest. The above case of catering for local events is an example. The only two restaurants in a municipality might be excluded from providing services for public events, because the owners are related to municipal officials. Transporting catering from another city might either be impossible, or might increase the costs by 30%.

Some countries have stricter incompatibility rules for local governments than at the national level. For example, in New Zealand anyone being involved in contracts with the local government where the total financial envelope exceeds NZ$25,000 in any financial year does not qualify as a candidate for local elections (see above explanations under Article 2).

Paragraph 4 takes into account the fact that at the local level, functions are often part-time and thus require their office holders to have other income.

Article 24 – Other special sectors

Laws regulating other specialised public professions can contain further restrictions and procedures.

Commentary

This Legislative Toolkit contains conflict of interest rules for all three branches of State power. It also looks at the prosecutorial sector as well as at independent public officials aside from judges and parliamentarians. However, there is a myriad of special professions in the public sector, each of which brings about their own particular conflicts between public duties and possible private interests. The general rules of this Legislative Toolkit apply to all of them. However, it is advisable to clarify in more detail and with concrete boundaries for each special profession what a relevant private interest is and how to manage it. For example: Is a member of a central bank allowed to take out a loan from a commercial bank which the central bank supervises? Could a member of a court of auditors be a member of a political party? Are members of central election commissions allowed to make donations to political parties? Should a doctor disclose that he/she has a financial

[128] South Australian Ombudsman, Speech given at the Australian Institute of Administrative Law, 4 May 2011, *Local Government Conflicts of Interest*, available at www.ombudsman.sa.gov.au, accessed 10 October 2015: "We are all aware that it's often the same people that run the football club, and the local festivals. Sometimes they're politically active. They're on the board of the nursing home, they volunteer for the land-care group, and they organize the Anzac Day march. They do the charity collections, and in the same spirit, they are members of the council. They contribute a huge amount to the social capital of our society. No one with an interest in strong local government, which is close to and representative of its communities, wants to see that 'connectedness' disappear."

agreement with a pharmaceutical company when prescribing medication of this company? Could a university professor privately tutor candidates taking an entrance exam? Can police chiefs speak at conferences of manufacturers for police equipment if the industry finances their travel and hotel fares? Answers to these questions are found in laws regulating the profession, in code of conducts, or in bylaws set by public institutions themselves. It would go beyond the scope of this Legislative Toolkit to examine possible approaches for each of the hundreds of specialised professions.

Chapter V: Consequences

Article 25 – Criminal or administrative offences; legal persons

(1) *[Offences]* **The following violations are sanctioned [criminally and/or administratively] offences:**

- **(a) A failure of a public official or former public official or a family member to comply with restrictions and incompatibilities as prescribed in Chapter I and IV;**
- **(b) A failure of a public official to comply with the provisions on managing a conflict of interest as prescribed in Chapter II and IV;**
- **(c) A failure of a public official or a family member to comply with the provisions on regular declaration of private interests (Article 13);**
- **(d) The intentional or reckless failure to act by a conflict of interest manager when a public official fails to comply with his/her obligations.**
- **(e) A failure of a contractor to comply with the provision on declaration of interest (Article 14) and the restriction on business activities (Article 2);**
- **(f) A failure of a state-owned company and its management to comply with the provision in Article 3;**
- **(g) A failure of a sponsor or donor to comply with Article 6;**

(2) *[Confiscation]* **Any financial advantage from a violation under paragraph 1 is subject to confiscation under criminal or administrative law.**

(3) *[Legal persons]* **The offences in paragraph 1 qualify for liability of legal persons.**

Commentary

International conventions criminalise public officials who put their private interest above the public interest: bribery, abuse of office, and trading in influence. In all cases of **paragraph 1**, a conflict of interest has not necessarily materialised yet: the public official might have simply failed to disclose a conflict of interest, without any further damage having occurred, yet (such as a building permit having been issued in a situation of an actual conflict of interest). Nonetheless, it is important to sanction each case. Otherwise, conflict of interest rules remain largely declarations of intent on paper without much implementation. It is a frequent complaint by international monitors that there is a substantial lack of compliance with conflict of interest provisions in many countries.

Paragraph 1 **(a) to (c)** concerns failures by the public official him/herself. Former public officials are mentioned related to post-employment restrictions. Paragraph 1 **(d)** includes the conflict of interest manager into the liability. This is an important feature. Conflict of interest managers are in most cases supervisors in the hierarchical line. They will often feel no incentive to look for conflict of interest risks of their subordinates, but instead passively wait for their employees to disclose any *ad hoc* private interest.

Paragraphs (e) to (g) target third parties involved in conflict of interest situations. Again, it is also important in this context to not limit sanctions to public officials, but to also include contractors of public entities, sponsors, or state-owned companies. Otherwise, what incentive would a business

have to comply, for example, with sponsorship restrictions, if it was not for a sanction? In the area of public procurement, additional civil sanctions apply to bidders and contractors (see below at Article 27). Liability of legal persons would also hold state-owned companies accountable for a failure to adopt and implement an effective internal policy on conflict of interest as required under paragraph 2 of Article 3.

Paragraph 2 concerns cases where the public official benefited from the conflict of interest violation. Such cases cannot always be addressed through suing for civil damages. The State will not always have a material damage. For example, a public official might grant his/her relative a favourable business licence. The profit of this business could be substantial. However, there is no equivalent damage to the public budget. A similar case could be a police officer selling confidential information on suspects to private detectives – the money made by the police officer is not money which the State would have otherwise generated from that information. Still, the public official violating the conflict of interest provision should not be able to keep the financial advantage, but **forfeit** it to the State. Cases where the state did not suffer any harm (such as the loss of privileged information) might be excluded from confiscation. This could be the case where the public official had two incompatible functions. It might be disproportionate to confiscate one or both salaries in such a case.

Paragraph 3 is an important building stone for achieving effective deterrence: in the area of foreign bribery, liability of **legal persons** has generated billions in fines from legal persons all over the world.[129] It would have never been possible to collect such amounts from the natural persons committing the violation. Therefore, all international anti-corruption conventions foresee liability of legal persons committing corruption offences. For conflict of interest offences, where legal persons are involved, similar should apply. This will incentivise legal persons to prevent conflict of interest violations by their employees. For example, legal persons could be involved in conflict of interest violations regarding a public sector contract (Article 2), as a state-owned company (Article 3), as employer of the public official (Article 7), as gift giver (Article 5), or as a sponsor (Article 6). Usually, criminal or administrative offences codes include a general liability of the legal persons clause, applicable to a catalogue of offences. Paragraph 3 includes the offences of paragraph 1 into this catalogue.

Article 25 does not include any statement on which an institution has the **competence** of applying sanctions. The underlying assumption for this is that this question will be sufficiently dealt with under criminal law or the law on administrative misdemeanours. If not, it is important to include this feature.

Article 26 – Disciplinary liability

Violations under Article 25 constitute disciplinary offences. Sanctions include dismissal from office in cases of grave offence as defined in laws on disciplinary liability. A disciplinary sanction does not exclude the application of criminal, administrative, or civil liability.

a. Commentary

Article 26 **sentence 1** states the obvious – conflict of interest violations are disciplinary offences. Within national legal traditions, laws on disciplinary liability approach defining offences in different ways, and this legislative toolkit does not prescribe concrete definitions of disciplinary offences. However, it is recommended to consider including conflict of interest violations explicitly among disciplinary offences rather than to rely on general provisions such as a failure to fulfil official duties. It is important that the full range of sanctions be available, including dismissal from office. The disciplinary proceeding should not be linked to the criminal proceeding. Otherwise, the

[129] Council of Europe/Hoppe T. (2015), *Liability of Legal Persons for Corruption Offences, Training manual and reference source*, page 11, available at www.coe.int, accessed 10 October 2015.

disciplinary body would need to wait for a criminal court until it could dismiss an employee for a grave violation. Therefore, **sentence 2** calls for grave offences to be defined in the disciplinary laws.

Obviously, disciplinary regimes vary depending on the branch of power: usually **judges** and **parliamentarians** have their own independent disciplinary oversight mechanisms, and, in the case of parliamentarians, their own range of sanctions.

Sentence 3 reflects a universal principle: civil or disciplinary trials do not trigger the *ne bis in idem* prohibition for a criminal trial. In order to avoid any unnecessary discussion and attempts of circumventing liability, sentence 3 repeats what the Explanatory Report on Article 4 of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms states: "Article 4, since it only applies to trial and conviction of a person in criminal proceedings, does not prevent him from being made subject, for the same act, to action of a different character (for example, disciplinary action in the case of an official) as well as to criminal proceedings."[130]

Article 27 – Civil liability; ban on procurement

(1) *[Damages]* **In accordance with the principles of the national legal system, a person who has engaged in conduct constituting an offence under Article 25 shall be liable for any resulting damages to the State or a private natural or legal person. The imposition of compensation under this paragraph 1 does not preclude any other criminal or civil or administrative remedy, which is available by law.**

(2) *[Injunction]* **Any former public official who engages in conduct restricted under Article 8, or provisions referring to it, may be prohibited by a court order from engaging in such conduct. The filing of a petition under this paragraph does not preclude any other remedy which is available by law.**

(3) *[Procurement]* **For violations under Article 25 paragraph 1 (e) to (g) a ban on public procurement applies under the national procurement legislation, in proportion to the seriousness of the violation.**

Commentary

Paragraph 1 goes back to Article 3 of the Council of Europe Civil Law Convention on Corruption, which foresees compensation for damages for acts of corruption.

The injunction under **paragraph 2** is necessary in cases where a former public official continues to violate conflict of interest provisions and is either not subject to sanctions, or accepts them in case the benefit from the violation is bigger than the sanction. In addition, it might be easier to obtain a civil injunction (based on a preponderance of evidence, or even only a balancing of interests), than obtaining a criminal sanction through a possibly lengthy trial.

Paragraph 3 is a reference to procurement blacklists found in many countries,[131] and even maintained by the big development banks, such as the World Bank.[132]

[130] European Court of Human Rights, *Commentary on the provisions of the Protocol from the Explanatory report of the Treaty Office*, Article 4, available at http://conventions.coe.int, accessed 10 October 2015.

[131] Transparency International (28 February 2013), *Blacklisting in Public Procurement*, TI Helpdesk answer, available at www.transparency.org, accessed 10 October 2015.

[132] World Bank, *Listing of Ineligible Firms & Individuals, Fraud and Corruption*, available at http://web.worldbank.org, accessed 10 October 2015.

Article 28 – Voidance of civil and public legal acts

(1) *[Contracts]* **Contracts involving a prohibited conflict of interest shall be voidable in line with the principles of applicable civil or administrative law. Voidance is not mandatory if the contract was in the public interest and would have been concluded had the conflict not existed. The public organisation, the central oversight body, any party to a proceeding related to the contract, or civil society organisations with fighting corruption being among its statutory purposes can apply for a court decision on the validity of the contract.**

(2) *[Administrative acts]* **The equivalent applies to administrative legal acts.**

Commentary

Many countries follow a strict zero tolerance approach: all legal acts adopted in a situation of actual conflict of interest are null and void.[133] The rationale behind such an approach is that the legal order will not accept any outcome/product of a wrongly solved conflict of interest.

The international standards set by the Council of Europe and the OECD do not contain any guidance on this issue. In light of this, the zero tolerance approach seems progressive. However, there are many strong arguments against the automatic voidance of legal acts following a wrongly solved conflict of interest:

- The product of a wrongly solved conflict of interest can still be beneficial for the state. For example, a public official might fail to notify his/her supervisor about a real conflict of interest. However, the decision he/she rendered prohibited a company from disposing toxic waste into the sewage system. If this decision would automatically be null and void, the company could go ahead and dispose of the toxic waste into the sewage system (until the same decision would be rendered in the absence of a conflict of interest). Even worse, a public official might have struck an advantageous deal for the state by concluding a very favourable contract. This contract would be null and void and a lucrative opportunity for the state might be lost forever.
- A Damocles sword of voidance would hang over all public decisions, as nobody could ever really know to what extent evidence of a wrongly handled conflict of interest might appear later on.
- The indefinite consequence of voidance, even after a public decision was enforced and remained uncontested for 100 years, violates general principles of rule of law. What if innocent people built a house on land which was sold by the state and for which a building permit was issued – should both decisions really be automatically void, and what should be the consequences of the voidance?
- The indefinite possibility of voidance also stands in contrast to the time limits for appealing judicial decisions rendered by incompatible judges (see below).
- The consequence of voidance might be completely disproportionate sanctions in cases of minor and possibly only perceived conflict of interest. If, for example, a public official has a remote blood relative whom he hates but who could profit slightly from the decision, it would be disproportionate to void the public decision which might possibly harm many other people for no valid reason.

Therefore, this toolkit takes a nuanced approach. A court of law is the instance which decides on the validity of the legal act, balancing all interests involved. **Paragraph 1** permits any interested party to apply to court and challenge the validity of public contracts. For example, a minister might

[133] See e.g. Serbia, *Anti-Corruption Agency Act* 2008, Article 35 Transfer of Managing Rights for Duration of Public Office, available at www.osce.org, accessed 10 October 2015, article 32 subsection 5: "An act whose passing involved the official who was disqualified due to conflict of interest shall be null and void."

be involved in a disputed procurement procedure. Because of this high-level involvement, the central oversight body might be hesitant or even actively influenced against pursuing the matter. In this case, a civil society organisation could step in as an additional oversight stakeholder. In order to further mitigate risks related to the indefinite possibility of voidance, countries may choose to set time limits for the submission of an application regarding the validity of a contract, for example, a month since the applicant learnt or should have learnt about the conflict of interest and a certain number of years since the contested contract was concluded.

Paragraph 2 refers only to administrative acts, but not to laws or regulations. For the purpose of this legal toolkit, administrative acts are defined as decisions on individual cases, addressing a determined number of people, whereas laws or regulations address an unknown number of people or cases. By definition, an unknown number of people are affected when a law or regulation is later found void. People have trust in the validity of regulations when going to college, planning their tax duties, or acquiring property financed by a loan. In each of these cases, the consequences are grave if regulations are later found to be unconstitutional. This consequence is therefore usually limited to substantial violations of the constitution, and the decision on this question is reserved to constitutional courts. It would seem disproportionate to render a law void simply because one or a few parliamentarians had been in a conflict of interest. Should a law on approving membership of a country with the Council of Europe or the European Union be invalid, even after years, only because somebody involved had a conflict of interest? Furthermore, an effective system of sanctions as foreseen under this chapter would seem to provide a sufficient deterrent for such cases to occur.

Time limits for challenging an administrative decision should be set so as to be in conformity with the principles of the administrative law of the country.

Article 29 – Ban on office and promotions

(1) *[Promotions]* **Public officials who are recognised by final legal decision as offenders under Article 25 may not be given incentives or promotions for a specified period of time. If the incentives or promotions have been given in the period between the detection of the violation and the coming into force of the final legal decision, they may not be kept.**

(2) *[Ban]* **In case of a criminal offence, a ban on office of a specified number of years is mandatory. A ban also applies where an official refuses to resolve an actual conflict of interest of which he or she is aware of.**

Commentary

A ban on public office is a frequent sanction in transition countries for corruption offences including conflict of interest violations. The ban on promotions under **paragraph 1** is the somewhat milder sanction, where a public official has not been dismissed as a result of the conflict of interest.

The Venice Commission has found provisions to be unconstitutional, where the ban on office applies mandatorily, irrespective of the gravity of offence:[134]

> "56. A four-year ban from running for elections is of itself an extremely serious sanction. […]
>
> 57. The Commission understands that this sanction was introduced in response to the specific circumstances prevailing in BiH at the time of the adoption of LCoI [the Law on Conflict of Interest]. Nevertheless, there is a clear risk that the sanction be disproportionate, and impinge on the fundamental right to be elected, which is guaranteed by Article 3 of Protocol No. 1 to the European Convention on Human Rights.

[134] Venice Commission, *Opinion CDL-AD (2008)014*, available at www.venice.coe.int, accessed 10 October 2015.

> 58. In the Commission's opinion, it would be appropriate to revise this system of imposition of sanctions, making it dependent on the seriousness of the breach. A scale of sanctions should be introduced including for example the obligation to regularize the situation within a given time (possibly coupled with a fine) in cases of simple failure to register a relevant interest as required. [...]"

However, the Venice Commission also made it clear that "most severe sanctions such as a political ban should be reserved for the most serious breaches, such as the refusal by an official to resolve an actual conflict of which he or she is aware." **Paragraph 2** is a reflection of this observation. It reserves a mandatory ban to criminal offences (possibly under Article 25), but also leaves it open to cases where a public official intentionally refuses to comply with conflict of interest provisions.

Excursus – Other issues for regulation

Articles 1 to 29 of this toolkit provide the essence of a comprehensive conflict of interest regulation for the entire public sector. Obviously, it is necessary to review a number of laws so they align with or support the specific conflict of interest legislation. Among the issues to be considered are:

- Status of public officials including specific constitutional principles applicable to members of parliament, presidents and government members
- Procedures (in particular administrative procedures)
- Freedom of information and public disclosure
- State secrecies and data protection
- Civil and business registration
- Status of state owned enterprises
- Procurement
- Lobbying legislation
- Local governance
- Investigation and prosecution of misdemeanours and criminal offences
- Disciplinary liability
- Central oversight body

Annex – International standards and foreign examples of regulation

The following shows for each Article of this legislative toolkit the relevant international standards and the foreign example of regulation, on the basis of which the provisions of the toolkit where modelled.

Article 1

International standards

Council of Europe Model code of conduct for public officials:[135]

> Article 13 – Conflict of interest
>
> 1. Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.
>
> 2. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.
>
> 3. Since the public official is usually the only person who knows whether he or she is in that situation, the public official has a personal responsibility to:
>
> - be alert to any actual or potential conflict of interest;
>
> - take steps to avoid such conflict; [...]

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003)[136]

> Defining a "conflict of interest"
>
> No. 10: A 'conflict of interest' involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.
>
> No. 14: In this definition, 'private interests' are not limited to financial or pecuniary interests, or those interests which generate a direct personal benefit to the public official. A conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations and associations, and family interests, if those interests could reasonably be considered likely to influence improperly the official's performance of their duties.

United Nations International Code of Conduct for Public Officials (1996):

> 4. Public officials shall not use their official authority for the improper advancement of their own or their family's personal or financial interest. They shall not engage in any transaction, acquire any position or function or have any financial, commercial or other comparable interest that is incompatible with their office, functions and duties or the discharge thereof.

[135] Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials. Appendix, *Model code of conduct* for public officials, available at www.coe.int, accessed 10 October 2015.

[136] Recommendation of the Council on *OECD Guidelines* for Managing Conflict of Interest in the Public Service, 28 May 2003 – C(2003)107, available at www.oecd.org, accessed 10 October 2015.

5. Public officials, to the extent required by their position, shall, in accordance with laws or administrative policies, declare business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest. In situations of possible or perceived conflict of interest between the duties and private interests of public officials, they shall comply with the measures established to reduce or eliminate such conflict of interest.

6. Public officials shall at no time improperly use public moneys, property, services or information that is acquired in the performance of, or as a result of, their official duties for activities not related to their official work.

Foreign examples

Paragraph 1

Slovenia, Integrity and Prevention of Corruption Act 2010:

> Article 37 (Obligation to avoid a conflict of interest)
>
> (1) An official person shall pay attention to any actual or possible conflict of interest and shall make every effort to avoid it.

Paragraphs 2 and 3

Slovenia, Integrity and Prevention of Corruption Act 2010, Article 4 paragraphs 9 and 10:

> "Conflict of interest" means circumstances in which the private interest of an official person influences or appears to influence the impartial and objective performance of his public duties;
>
> "Private interest of an official person" means a *pecuniary or non-pecuniary* benefit which is either to his advantage or to the advantage of his family members or other natural or legal persons with whom he maintains or has maintained personal, business or political relations;

Latvia, Law on Prevention of Conflict of Interest in Activities of Public Officials 2002, Section 1 paragraph 5):

> conflict of interests – a situation where in performing the duties of office of the public official, the public official *must take a decision or participate in taking of a decision* or perform other activities related to the office of the public official which affect or may affect the *personal or financial interests* of this public official, his or her relatives or counterparties;

Serbia, Anti-Corruption Agency Act 2008:

> Article 2, indent 5 and 6
>
> "private interest" is any kind of benefit or advantage to the official or associated person;
>
> "conflict of interests" is a situation where an official has a private interest that affects, *may affect* or may be perceived to affect actions of an official in discharge, of office or official duty in a manner that compromises public interest;

[The addition "may affect" relates to potential conflict of interest.]

Montenegro, Law on Prevention of Corruption 2014:

Article 7 paragraph 2

> The conflict of interest in the exercise of public function shall be deemed to exist when a private interest of a public official affects or may affect the impartiality of the public official in the exercise of public function.

[Perceived conflict of interest is missing in this definition.]

Article 6, paragraphs 1 and 2

> 1) Public interest is the material and non-material interest for the good and prosperity of all citizens on equal terms; 2) Private interest of a public official means *ownership or other material or non-material interest* of a public official or the persons related to him;

Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service 1997, Article 2, paragraphs 2-4:

> 2. Private interests mean private economic or non-economic interest of a person in the civil service (or a person close to him) which may effect his decision-making in the discharge of his official duties.
>
> 3. Public interests mean the public's expectations with regard to impartial and just decision making of the persons in the civil service.
>
> 4. Conflict of interest means a situation where a person in the civil service, when discharging his duties or carrying out instructions, is obliged to make a *decision or participate in decision-making or carry out instructions* relating to his private interests.

[The restriction to decisions and implementation of instructions could theoretically be too narrow: depending on the interpretation policy advice by civil servants might not fall under this restriction, neither might supervisory activities.]

Paragraph 2 (a) to (e)

Slovenia, Integrity and Prevention of Corruption Act 2010, Article 4 paragraph 4:

> "**Family members**" means spouses, children, adopted children, parents, adoptive parents, brothers, sisters, or any other persons living with an individual in the same household or in a common-law partnership;

Latvia, Law on Prevention of Conflict of Interest in Activities of Public Officials 2002, Section 1 paragraph 6:

> **relative** – father, mother, grandmother, grandfather, child, grandchild, adoptee, adopter, brother, sister, half-sister, half-brother, spouse;

Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service 1997, Article 2, paragraph 5:

> **Close persons** means the parents (adoptive parents), children (adopted children), brothers (adopted brothers), sisters (adopted sisters), grandparents, grandchildren, spouse, cohabitee, partner, when the partnership is registered in accordance with the procedure laid down by law, of a person in the civil service, as well as children of the spouse, cohabitee, partner, when the partnership is registered in accordance with the procedure laid down by law, the spouses, cohabitees, partners, when the partnership is registered in accordance with the procedure laid down by law, of the children, brothers, sisters, grandchildren.

Serbia Anti-Corruption Agency Act 2008, Article 2 indent 4:

> "**associated person**" is a spouse or a common-law partner of the official, lineal blood relative of the official, lateral blood relative to the second degree of kinship, adoptive parent or adoptee of the official, as well as any other legal entity or natural person who may be reasonably assumed to be associated in interest with the official.

Latvia, Law on Prevention of Conflict of Interest in Activities of Public Officials 2002, Section 1 paragraph 4:

> "counterparty [**≈business** relation] – a natural or legal person or an association of natural or legal persons established on the basis of a contract, which in accordance with the provisions of this Law is in declarable business relations with a public official".

Article 2

International standards

UNCITRAL Model Law on Public Procurement (2011)

> Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest
> 1. A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:
> [...]
> (b) The supplier or contractor has an unfair competitive advantage or a conflict of interest, in violation of provisions of law of this State.

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003)[137]

> 2.2.2 paragraph c)
> Contracts – Consider the circumstances in which the preparation, negotiation, management, or enforcement of a contract involving the public organisation could be compromised by a conflict of interest on the part of a public official within the public organisation.

Foreign examples

Paragraph 1

Montenegro, Law on Prevention of Corruption 2014:

> Article 14 Contracts on Services and Business Cooperation
>
> (3) The authority in which the public official exercises a public function shall not conclude a contract with the company or other legal person in which the public official and a person related to him/her have a private interest.

Albania, Law on the Prevention of Conflicts of Interest in the Exercise of Public Functions 2005:

> Article 21 – Prohibition of Entering into Contracts

[137] Recommendation of the Council on *OECD Guidelines* for Managing Conflict of Interest in the Public Service, 28 May 2003 – C(2003)107, available at www.oecd.org, accessed 10 October 2015.

1. No individual, when he is equated with an official holding one of the functions defined in Chapter III, Section 2 of this law, judges and prosecutors at the first instance and appeal courts, and no commercial company, partnership or simple partnership, where this official possesses, actively or passively, shares or parts of capital, at whatever amount, cannot enter into a contract or sub-contract with any public institution.

With regard to officials of medium management level provided for in Article 31 and the officials provided for in Article 32, Chapter III, Section 2, of this Law, the prohibition in accordance with the first paragraph of this point shall apply only in terms of entering into contracts within the territory and jurisdiction of the institution where the official works. This prohibition shall apply even where a subordinate institution is a party.

When the official is mayor or deputy mayor of a municipality or commune or the chairman of a regional council, member of the respective council or official of a high management level of a unit of local government, in the relative meaning of that term for the relevant laws, the prohibition according to point 1 of this article, because of the private interests of the official, specified in this point, is applied only in the case of entering into contracts, as the case may be, with the municipality, commune or region where the official exercises functions. This prohibition is applied even in the cases of entering into contracts with public institutions, under the dependency of this unit.

Paragraph 2

Montenegro, Law on Prevention of Corruption 2014

Article 14 Contracts on Services and Business Cooperation

(2) A public official shall not conclude a contract on the provision of services with an authority or company that has a contractual relation or performs tasks for an authority in which the public official exercises his/her function, unless the value of these contracts is less than €1,000 per year.

Paragraph 3

Slovenia, Integrity and Prevention of Corruption Act 2010, Article 35 paragraphs 6):

The restrictions under the provisions of this Article do not apply to operation on the basis of contracts concluded prior to the official taking office.

New Zealand, Local Authorities (Members' Interests) Act 1968

Section 3, Disqualifying contracts between local authorities and their members

(1) Except as provided in paragraph (3), no person shall be capable of being elected as or appointed to be or of being a member of a local authority or of any committee of a local authority, if the total of all payments made or to be made by or on behalf of the local authority in respect of all contracts made by it in which that person is concerned or interested exceeds $25,000 in any financial year.

Article 3

International standards

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003)[138]

> 2.2.2, paragraph f)
> 'Outside' appointments -- Define the circumstances, including the required authorisation procedures, under which a public official may undertake an appointment on the board or controlling body of, for example, a community group, an NGO, a professional or political organisation, another government entity, a **government-owned corporation**, or a commercial organisation which is involved in a contractual, regulatory, partnership, or sponsorship arrangement with their employing organisation.

The OECD "Guidelines on Corporate Governance of State-Owned Enterprises"[139] contain further instructions on areas where such enterprises need to pay internally attention to conflict of interest.

Foreign examples

Latvia, Law on Prevention of Conflict of Interest in Activities of Public Officials 2002:

> Section 9. Restrictions on the Obtaining of Income
>
> (4) A public official while he or she is a representative of the holder of the State or local government capital share in a capital company, as well as three years after the fulfilment of these duties is prohibited:
>
> 1) to receive, directly or through the intermediation of third parties, any kind of financial benefit, including financial resources, not related to the performance of his or her duties;
>
> 2) to accept gifts from the relevant capital company or members of its supervisory or executive bodies;
>
> 3) to acquire capital shares, stocks or property of the relevant capital company;
>
> 4) to hold other offices in the relevant capital company.
>
> (5) A public official, who in accordance with Section 7, Paragraph five, Clause 3.2 of this Law holds an office in a capital company, in which a State or local government is a shareholder, is prohibited from gaining income from such capital company, in which the State or local government capital company is a shareholder and in which the public official holds the relevant office.

Germany, Principles of Good Corporate Governance for Indirect or Direct Holdings of the Federation 2009:[140]

> 4.4 Conflicts of interest
>
> 4.4.1 For the duration of their work for the corporation, the members of the management shall be subject to an encompassing prohibition of competition.

[138] Recommendation of the Council on *OECD Guidelines* for Managing Conflict of Interest in the Public Service, 28 May 2003 – C(2003)107, available at www.oecd.org, accessed 10 October 2015.

[139] Ibid.

[140] *Principles of Good Corporate Governance*, available at www.bundesfinanzministerium.de, accessed 10 October 2015.

4.4.2 Members of the management are under obligation to pursue the object of the company.

The members of the management and the employees of the company may not demand or accept from third parties any gratuities or other benefits in connection with their activities, neither for themselves nor for other persons, nor may they grant unjustified benefits to third parties.

No member of the management may pursue personal interests in taking decisions for the company, nor may any such member exploit for himself or herself business opportunities opening up for the company.

4.4.3 Each member of the management shall immediately disclose to the supervisory body any conflicts of interest and shall inform the other members of the management thereof.

All transactions between the corporation on the one hand and the members of the management on the other hand, or persons related to them or companies or ventures with which they are personally affiliated, must comply with standards usual to the industry. Related party transactions of a significant nature require the approval of the supervisory body, unless this body will represent the corporation in concluding the transaction and its approval can thus be implied.

4.4.4 The members of the management shall pursue additional occupations only with the approval of the supervisory body; this shall apply in particular to memberships in supervisory bodies.

Article 4

International standards

Council of Europe Model code of conduct for public officials:[141]

Article 4

1. The public official should carry out his or her duties in accordance with the law, and with those lawful instructions and ethical standards which relate to his or her functions.

2. The public official should act in a politically neutral manner and should not attempt to frustrate the lawful policies, decisions or actions of the public authorities.

Article 16 – Political or public activity

1. Subject to respect for fundamental and constitutional rights, the public official should take care that none of his or her political activities or involvement on political or public debates impairs the confidence of the public and his or her employers in his or her ability to perform his or her duties impartially and loyally.

2. In the exercise of his or her duties, the public official should not allow himself or herself to be used for partisan political purposes.

[141] Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials. Appendix, *Model code of conduct* for public officials, available at www.coe.int, accessed 10 October 2015.

3. The public official should comply with any restrictions on political activity lawfully imposed on certain categories of public officials by reason of their position or the nature of their duties.

Council of Europe's Venice Commission, OSCE/ODIHR, Guidelines on Political Party Regulation, 2010[142]

d) Abuse of State Resources

207. The abuse of state resources is universally condemned by international norms. While there is a natural and unavoidable incumbency advantage, legislation must be careful to not perpetuate or enhance such advantages. Incumbent candidates and parties must not use state funds or resources (i.e. materials, work contracts, transportation, employees) to their own advantage. Paragraph 5.4 of the OSCE Copenhagen Document provides, in this regard, that member states will maintain "a clear separation between the State and political parties; in particular, political parties will not be merged with the State".

208. To allow for the effective regulation of the use of state resources, legislation should clearly define what is considered abuse. For instance, while incumbents are often given free use of postal systems (seen as necessary to communicate their acts of governance with the public), mailings including party propaganda or candidate platforms are a misuse of this free resource. Legislation must address such abuses.

209. The abuse of state resources may include the manipulation or intimidation of public employees. It is not unheard of for a government to require its workers to attend a pro government rally. Such practices should be expressly and universally banned by law.

210. Public employees (civil servants) should not be required by a political party to make payments to the party. This is a practice the law should prohibit as an abuse of state resources.

United Nations International Code of Conduct for Public Officials (1996):

11. The political or other activity of public officials outside the scope of their office shall, in accordance with laws and administrative policies, not be such as to impair public confidence in the impartial performance of their functions and duties.

Foreign examples

Canada, Public Service of Ontario Act, 2006:[143]

Prohibited political activities

77. A public servant shall not,

(a) engage in political activity in the workplace;

(b) engage in political activity while wearing a uniform associated with a position in the public service of Ontario;

[142] *Guidelines on Political Party Regulation*, OSCE/ODIHR and Venice Commission, Strasbourg, 25 October 2010, Study no. 595/2010, CDL-AD(2010)024, Chapter XII, available at www.venice.coe.int, accessed 10 October 2015.

[143] *Public Service of Ontario Act 2006*, available at www.ontario.ca, accessed 10 October 2015.

(c) use government premises, equipment or supplies when engaging in political activity; or

(d) associate his or her position with political activity, except if the public servant is or is seeking to become a candidate in a federal, provincial or municipal election, and then only to the extent necessary to identify the public servant's position and work experience.

79. (1) Subject to paragraph (2), unless a public servant has been granted an unpaid leave of absence under section 80, he or she shall not, [...]

(b) solicit funds on behalf of a federal or provincial party or a federal, provincial or municipal candidate if his or her duties include, (i) supervising other public servants, or (ii) dealing directly with members of the public if those members of the public may perceive him or her as a person able to exercise power over them;

Serbia, Anti-Corruption Agency Act 2008:

Article 29 – Holding a Function in Political Party, and/or Political Entity

An official may performs a function in political party, and/or political entity and participate in its activities if this shall not impede efficient discharge of the public office, provided that such engagement is not prohibited by law. An official may not use the public resources and public meetings that he attends in capacity of official for promotion of any political parties, and/or political entities. As an exception to paragraph 2 of this Act an official may use public resources for personal security if use of such resources is governed by relevant regulations or decision of the services tasked with security of officials, and/or political entity. An official is required at all times to unequivocally present to his interlocutors and the general public whether he is presenting the viewpoints of the body in which he holds an office or viewpoints of a political party, and/or political entity. Provisions of paragraph 4 of this article shall not apply to officials elected directly by citizens.

Canada, Conflict of Interest Act 2006:

Political activities (4) Nothing in this section prohibits or restricts the political activities of a reporting public office holder. [...]

Fundraising 16. No public office holder shall personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest.

Article 5

International standards

Council of Europe Model code of conduct for public officials[144]

Article 18 – Gifts

1. The public official should not demand or accept gifts, favours, hospitality or any other benefit for himself or his or her family, close relatives and friends, or persons or organisations with whom he or she has or has had business or political relations which may influence or appear to influence the impartiality with which he or

[144] Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials. Appendix, *Model code of conduct* for public officials, available at www.coe.int, accessed 10 October 2015.

she carries out his or her duties or may be or appear to be a reward relating to his or her duties. This does not include conventional hospitality or minor gifts.

2. Where the public official is in doubt whether he or she can accept a gift or hospitality, he or she should seek the advice of his or her superior.

Article 19 – Reaction to improper offers

If the public official is offered an undue advantage he or she should take the following steps to protect himself or herself:

- refuse the undue advantage; there is no need to accept it for use as evidence;
- try to identify the person who made the offer;
- avoid lengthy contacts, but knowing the reason for the offer could be useful in evidence;
- if the gift cannot be refused or returned to the sender, it should be preserved,
- but handled as little as possible;
- obtain witnesses if possible, such as colleagues working nearby;
- prepare as soon as possible a written record of the attempt, preferably in an official notebook;
- report the attempt as soon as possible to his or her supervisor or directly to the appropriate law enforcement authority;
- continue to work normally, particularly on the matter in relation to which the undue advantage was offered.

United Nations Convention against Corruption (UNCAC):

Article 8. Codes of conduct for public officials

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

United Nations International Code of Conduct for Public Officials (1996):

9. Public officials shall not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their duties or their judgement.

Foreign examples

Latvia, Law on Prevention of Conflict of Interest in Activities of Public Officials 2002

Section 13 General Restrictions on Accepting Gifts

(3) Within the meaning of this Law a gift shall not deemed to be:

1) flowers;

2) souvenirs, books or representation articles if from one person within one year the received souvenirs, books or representation articles total value in monetary terms does not exceed the amount of one minimal monthly wage;

3) awards, prizes or honours the provision of which is provided for in external laws and regulations;

4) any benefit and guarantee, which the public official in fulfilling his or her duties of office, is ensured in accordance with the procedures laid down in laws and regulations by the State or local government authority in which the relevant person fulfils the duties of office;

5) services and various types of rebates, which are offered by commercial companies, individual merchants, as well as farms and fishery enterprises and which publicly accessible;

6) services and discounts, which are offered by commercial companies, individual merchants, as well as farms and fishery enterprises and which are specially intended for the soldiers of professional service of the National Armed Forces, who have been participants to international operations.

Canada, Conflict of Interest Act 2006:

Section 12

No minister of the Crown, minister of state or parliamentary secretary, no member of his or her family and no ministerial adviser or ministerial staff shall accept travel on non-commercial chartered or private aircraft for any purpose unless required in his or her capacity as a public office holder or in exceptional circumstances or with the prior approval of the Commissioner.

Serbia, Anti-Corruption Agency Act 2008:

Chapter IV. Gifts

Article 39

An official may not accept gifts in connection with discharge of a public office, except for protocol or other appropriate gifts, however, even in such cases the gift may not be in money or securities.

An official is required to hand over the protocol gift to the body competent to manage property in public ownership, unless the value of the gift does not exceed 5% of the value of the average net salary in the Republic of Serbia.

An official may not retain an appropriate gift whose value exceeds 5% of the average monthly net salary in the Republic of Serbia and/or appropriate gifts received during a calendar year whose aggregate value exceeds one average net salary in the Republic of Serbia.

The criteria for establishing what is deemed an appropriate gift and the duty of reporting and recordation thereof is determined by the Agency.

If necessary, the Agency establishes the value of the gift.

Rejecting Gifts Article 40

An official who has been offered a gift that he is not allowed to accept shall reject such offer or promise and inform the giver that the gift, if accepted, will become public property.

If the official could not reject the gift, he/she shall hand over the gift to the body competent to manage property in public ownership.

An official is required to submit a written report on the event specified in paragraph 1 of this Article to his direct superior and the Agency, as soon as possible.

Duty to Report and Maintain Records of Gifts Article 41

An official is obliged to report any gift received in connection with discharge of the public office to the state or other body, organisation or public service wherein he holds public office.

The state or other body, organisation or public service referred in paragraph 1 of this Article are obliged to keep separate records on the gifts specified in paragraph 1 of this Article. A copy of the records for the previous year shall be submitted to the Agency not later than 1 March of the current year.

The Agency shall notify the state or other body, organisation or public service referred in paragraph 1 of this Article of any determined violation of law.

The Agency shall publish a catalogue of the gifts for the previous year and notifications specified in paragraph 2 of this Article by 1 June of the current year.

Prohibition of Receiving Gifts by Associated Person Article 42

An associated person may not receive gifts in connection with discharge of the public office of the official with whom such person is associated.

As an exception to paragraph 1 of this Article an associated person may receive a protocol gift.

An official shall not be held responsible if he can prove that he could not affect the behaviour of the associated person who received the gift or that the gift received is not related to discharge of his public office.

A gift specified in paragraph 1 of this Article shall be subject to provisions of Articles 39 and 41 of this Act.

Montenegro, Law on Prevention of Corruption 2014:

Article 16 Prohibition on Receiving Gifts

Public officials shall not accept money, securities or precious metal in connection with the exercise of public function, regardless of their value.

Public officials shall not accept gifts in connection with the exercise of public function, except for protocol and appropriate gifts.

Protocol gift shall mean a gift from representatives of other states or international organisations, which is given when paying or receiving a visit, or on other occasions, as well as other gifts presented in similar circumstances.

Appropriate gift shall mean a gift to the value of € 50. If, within a year, a public official receives more than one appropriate gift from the same donor, the total value of such gifts shall not exceed the amount of € 50, and if a public official receives gifts from several donors in this period, the value of such gifts shall not exceed € 100.

The prohibition or restriction referred to in paragraph 1 and 2 of this Article shall also apply to married and common-law spouses and children of public officials if they live in the same household, if the receipt of money, securities, or precious metals and gifts is in connection with the public official, or the exercise of public function. Gift value shall be calculated on the basis of its market value on the date of receipt.

Article 17 Refusing Gifts

A public official who is offered a gift he/she shall not receive shall refuse the offer, i.e. inform the donor that he/she cannot accept the gift.

A public official shall, within eight days of the offer under paragraph 1 of this Article, prepare a written report on the offer made and submit it to the authority in which he/she exercises a public function.

If a public official, in the case referred to in paragraph 1 of this Article, could not refuse the gift or return the gift back to the donor, he/she shall hand over the gift to the authority in which he/she exercises the public function, and the gift shall become state property or property of the municipality.

Article 6

International standards

There are no international standards on sponsoring (yet). Work by international organisations so far focuses on corruption risks in sponsoring of sports events.[145]

Foreign examples

Germany, General administrative regulation to promote activities by the Federal Government through contributions from the private sector (sponsoring, donations and other gifts) of 7 July 2003:[146]

1 Scope, definitions

This administrative regulation applies to the donation of cash and non-cash contributions and services by parties from the private sector (sponsors) to one or more bodies of the federal government (beneficiaries), via which the sponsor promotes an activity pursued by the federal government with the aim of attaining an advantage in the form of a promotional or publicity-enhancing effect (sponsoring). Activities for the purposes of this administrative regulation are such which the government body concerned performs in discharging its public duties and in presenting itself to the outside world. Bodies of the federal government are the highest federal authorities, the authorities of the direct and indirect federal

[145] UN Global Compact (2014), *Fighting Corruption in Sport Sponsorship and Hospitality*, available at www.globalcompact.de, accessed 10 October 2015.

[146] Germany (2003), *General Administrative Regulation on Sponsoring*, available at www.unodc.org, accessed 10 October 2015.

administration and the courts of the federal government. This regulation also applies to the armed forces.

Consequently, if the party from the private sector and the government body agree on appropriate cost sharing in pursuit of similar objectives, this shall not constitute sponsoring.

The following provisions shall apply correspondingly to gifts by parties from the private sector (in particular donations and other contributions) to the federal administration.

2 Purpose of the administrative regulation

In suitable instances, sponsoring helps to achieve administrative objectives. It is nevertheless incumbent upon the public administration to avoid any appearance of external influence coming to bear, in order to uphold the integrity and neutrality of the state. Consequently, the public administration may only open itself up to sponsoring in accordance with the following circumscribing provisions.

3 Basic principles

The following basic principles are to be observed in reaching decisions on the use of sponsoring:

3.1 As a general principle, public duties are to be financed via budgetary funds. Sponsoring is thus only possible as a supplementary measure subject to the conditions stated in points 3.2 to 3.4.

3.2 As a general principle, decisions on the solicitation and acceptance of sponsoring are to be taken according to a restrictive approach.

3.2.1 Sponsoring is strictly prohibited in the area of interventional administration (e.g. in the form of direct or indirect support in the area of the sovereign duties performed by the federal government's police, financial authorities and customs, by way of non-cash contributions, for example). Outside of the area of interventional administration (e.g. the financing of public relations measures by the police, provided that this does not result in any influence being exerted in the area of interventional administration), sponsoring may be approved by way of exception.

3.2.2 Outside of the area of interventional administration sponsoring is permissible, e.g. in the areas of culture, sport, health, environmental protection, education and science, the promotion of foreign trade, political public relations in Germany and abroad and at representative events staged by the federal government, provided that there is no possibility of influence being brought to bear on the administration in discharging its duties and that no impression of any such influence arises.

3.3 The acceptance of offered or solicited sponsoring shall require the written consent of the highest administrative authority. The latter may delegate its powers in this respect. Should the government body to which the power of consent is delegated be the intended beneficiary of the sponsoring, the consent of the next-highest government body must be obtained beforehand, if the benefiting body is not authorised to make the final decision. A post responsible for sponsorship issues (sponsorship officer) is to be established within each of the highest federal authorities; this post is to be involved in matters relating to sponsorship and is to cooperate closely with the contact for the prevention of corruption. When it is planned to solicit sponsoring, the decision of the head of the government body concerned is to be obtained prior to approaching potential sponsors. The head of

the body concerned involves the sponsorship officer in cases to be decided by the highest federal authority. The head may delegate the decision-making authority within the highest federal authorities pursuant to sentence 5.

3.4 Insofar as sponsoring is permissible in isolated instances in these areas, approval shall be dependent on the following criteria:

a) Sponsoring is to be disclosed to the public. The scope and form of sponsoring and the sponsors are to be made transparent for every sponsoring measure, in order to avoid any impression of partiality on the part of the public administration. Measures to ensure transparency include

- booking the cash payments from sponsoring under the appropriate revenue items for ex-post control purposes,
- disclosure of the cash and non-cash contributions and services received from sponsoring in a bi-annual report from the Federal Ministry of the Interior. Individual sponsoring payments up to the equivalent of € 5000 may be summarised as collective items in this report.

b) Each individual case is to be decided on the basis of verifiable criteria. Equality of competition and opportunity must be ensured among potential sponsors. The decision in favour of a sponsor must be objective and unbiased and must be based on pertinent and comprehensible considerations. The sponsors' individual reliability, financial capacity, business practices and principles and customer and media profiles represent possible criteria for the decision.

c) All sponsorship agreements are to be placed on record. It is to be specified in writing what activity is sponsored, what specific contributions the sponsor makes and what obligations the government body assumes.

The sole obligation which is permissible on the part of the government body is an undertaking to present the sponsor, in particular to specify the sponsor's name, company and brand and to present the sponsor's logo and other signs in connection with the event concerned. Agreements establishing direct links between sponsorship contributions and services to be rendered in return for such contributions are not permissible.

d) When offers of sponsorship are accepted, the contents of the appurtenant agreements must not establish any further obligations or arouse any further expectations.

e) The government body must not publicly extol the sponsor and the sponsor's products beyond the obligation specified in letter c). Activities relating to the promotion of foreign trade are exempted from this restriction.

f) When contractors to the government body are considered as sponsors, it is to be ensured that competitors are included in the process with equal opportunities in accordance with letter b). The acceptance of a sponsorship contribution must not give rise to any ties which might restrict or preclude public competition.

g) Prior to accepting sponsoring, it is to be ensured that budgetary funds for ensuing subsequent expenditure (e.g. vehicle maintenance costs, television charges, operating costs or similar) are available for the intended purpose.

h) Examples of activities eligible for sponsorship are stated in the annex to this administrative regulation.

4 Final provisions

The highest federal authorities may draw up supplementary provisions, in particular further restrictions relating to sponsoring. Existing restrictions shall remain unaffected.

Annex
Examples of activities eligible for sponsorship

- Public relations events
- Public relations abroad at events which are also organised by the diplomatic missions abroad
- Events and fairs to promote Germany's export sector and individual industries in Germany and abroad
- Events to publicise and promote Germany as a business location in Germany and abroad
- Events in connection with sports, cultural and educational policy in Germany and abroad
- Events and measures to promote general environmental awareness
- The promotion of health and the prevention of illness
- Other representative events
- Representative events to present the Federal Republic of Germany to other countries
- Press relations at key events in Germany and abroad
- Press relations and looking after delegations in connection with major events in Germany and abroad
- Supporting representation of the federal German armed forces in Germany and abroad
- Donations to libraries and media libraries in supplementation of the official resources
- Assumption of all or a portion of the production costs for demonstration materials and specialised information in the form of various media (e.g. printing of conference proceedings and information brochures, production of CDs, etc.)
- Complete or partial financing of an item of equipment by a support group

Montenegro, Law on Prevention of Corruption 2014:

Article 21 Sponsorships and Donations to Authorities

A public official shall not conclude a sponsorship agreement on his/her behalf.

A public official shall not conclude a sponsorship agreement or receive donations on behalf of the authority in which he/she performs a public function, which affect or could affect the legality, objectivity and impartiality of work of the authority.

A public official may ask the Agency for an opinion whether a sponsorship represents the one defined in paragraph 2 of this Article. If a public official acts contrary to paragraph 1 and 2 of this Article, the concluded contract shall be subject to the provisions of the Law on Contracts relating to the nullity of contracts.

For the purpose of this Law, sponsorship shall mean the transfer of certain material or non-material goods, movable or immovable property or other services to the authorities in exchange for oral or written references or advertising a sponsor's logo or the sponsor's product logo or other services, in accordance with the law.

For the purpose of this Law, donation shall mean the transfer without charge or unencumbered transfer of certain material or non-material goods, movable or immovable property to authorities.

Article 22 Disclosure of Information on Sponsorships and Donations

An authority shall, by the end of March of the current year for the previous year, submit to the Agency a written report on received sponsorships and donations, with a copy of the documentation related to these sponsorships or donations.

If, on the basis of the report referred to in paragraph 1 of this Article, or on the basis of its own information, the Agency determines that the received sponsorships and donations affected or could affect the legality, objectivity and impartiality of work of the public authority, it shall give its opinion thereon and notify the competent authority to undertake measures within its jurisdiction, in accordance with the law.

The authority shall abrogate decisions adopted under the influence of received sponsorships or donations, in accordance with the law and notifying the Agency thereon.

The Agency shall keep a register of sponsorships and donations referred to in paragraph 1 of this Article, which contains information about the decisions referred to in paragraph 3 of this Article, and shall publish it on its website.

The manner of keeping the register referred to in paragraph 4 of this Article and content of the report referred to in paragraph 1 of this Article shall be prescribed by the Ministry.

Article 7

International standards

Council of Europe Model code of conduct for public officials:[147]

Article 15 – Incompatible outside interests

1. The public official should not engage in any activity or transaction or acquire any position or function, whether paid or unpaid, that is incompatible with or detracts from the proper performance of his or her duties as a public official. Where it is not clear whether an activity is compatible, he or she should seek advice from his or her superior.

2. Subject to the provisions of the law, the public official should be required to notify and seek the approval of his or her public service employer to carry out certain activities, whether paid or unpaid, or to accept certain positions or functions outside his or her public service employment.

[147] Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials. Appendix, *Model code of conduct* for public officials, available at www.coe.int, accessed 10 October 2015.

3. The public official should comply with any lawful requirement to declare membership of, or association with, organisations that could detract from his or her position or proper performance of his or her duties as a public official.

Article 13 – Conflict of interest

5. Any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment.

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003):[148]

1.1. Identify relevant conflict of interest situations

1.1.1. Provide a clear and realistic description of what circumstances and relationships can lead to a conflict of interest situation.

b) The description should also recognise that, while some conflict-of-interest situations may be unavoidable in practice, public organisations have the responsibility to define those particular situations and activities that are incompatible with their role or public function because public confidence in the integrity, impartiality, and personal disinterestedness of public officials who perform public functions could be damaged if a conflict remains unresolved.

OECD's "10 Principles for Transparency and Integrity in Lobbying", Principle 7:

Principle 7. Countries should foster a culture of integrity in public organisations and decision making by providing clear rules and guidelines of conduct for public officials.

Countries should consider establishing restrictions for public officials leaving office in the following situations: [...] To avoid post-public service 'switching sides' in specific processes in which the former officials were substantially involved. It may be necessary to impose a 'cooling-off' period that temporarily restricts former public officials from lobbying their past organisations. Conversely, countries may consider a similar temporary cooling-off period restriction on appointing or hiring a lobbyist to fill a regulatory or an advisory post.

United Nations International Code of Conduct for Public Officials (1996):

4. Public officials shall not use their official authority for the improper advancement of their own or their family's personal or financial interest. They shall not engage in any transaction, acquire any position or function or have any financial, commercial or other comparable interest that is incompatible with their office, functions and duties or the discharge thereof.

Foreign examples

Paragraph 1

Sub-paragraph (a)

Serbia, Anti-Corruption Agency Act 2008:

[148] Recommendation of the Council on *OECD Guidelines* for Managing Conflict of Interest in the Public Service, 28 May 2003 – C(2003)107, available at www.oecd.org, accessed 10 October 2015.

Article 28 Prohibition to Discharge Other Public Office

An official may hold only one public office unless obligated by law or other regulation to discharge several public functions.

As an exception to paragraph 1 of this Article an official may hold other public office with approval of the Agency.

An official elected to public office directly by citizens may, without seeking approval from the Agency, hold other public offices to which he/she is elected directly by citizens, except in cases of incompatibility determined by the Constitution. [...]

Sub-paragraph (b)

Latvia, Act on the Prevention of Conflict of Interest in the Exercise of Public Office:

Section 7

V. [...] [Public officials] are permitted to combine their office of public official only with:

3) the work of teacher, scientist, doctor, professional athlete and creative work.

Montenegro, Law on Prevention of Corruption 2014:

Article 9 Performance of other Public Affairs

A public official may be engaged in scientific, educational, cultural, artistic and sports activities and acquire income from copyrights, patent rights and other similar rights, intellectual and industrial property, unless otherwise specified by law.

Serbia, Anti-Corruption Agency Act 2008:

Article 30 Engaging in Other Job or Activity

An official may not perform other jobs or engagements during his tenure in public office that require full-time working hours or full-time employment.

As an exception to paragraph 1 of this Article, an official may engage in research, educational, cultural, humanitarian and sports activities without Agency approval if by doing so he does not compromise efficient and impartial discharge and dignity of public office. An official is required to report incomes from these activities to the Agency.

If the Agency determines that engagement or job referred to in paragraph 2 of this Article compromises impartial discharge of public office or represents a conflict of interest it shall set a deadline wherein the official is required to cease such engagement or job. [...]

Sub-paragraph (c)

Croatia, Act on the Prevention of Conflict of Interest in the Exercise of Public Office:

Article 11

(5) Officials may not be members of managements or supervisory boards of companies.

(6) Exceptionally, officials may be members of up to two (2) supervisory boards of companies, institutions and extrabudgetary funds, which are of special state interest, unless provided otherwise by a special act stipulating that an official is a member of supervisory board in a certain company, institution and extrabudgetary fund on the basis of his/her position. For the membership in supervisory boards of companies, in institutions and extrabudgetary funds, officials shall not be entitled to any compensation, except for the right to compensation of travel- and other expenses. Upon the proposal by the Government of the Republic of Croatia, the Croatian Parliament shall determine a list of companies of special state interest.

Sub-paragraph (d)

United States Board of Governors of the Federal Reserve System, Revised Policies Concerning Conflicts of Interest and Issuance of Examiner Credentials (1995)[149]

V. Recusal from Examinations and Inspections

B. Former Employer. (1) General Rule -- An examiner may not participate in an examination or inspection of a financial institution or its affiliates if the examiner was employed by that institution within the past twelve months.

After the one-year period has elapsed, the Reserve Bank shall determine whether the examiner's former position with the financial institution and current responsibilities at the Reserve Bank indicate a need to continue the restriction in order to avoid the appearance of a conflict of interest. This determination should be appropriately documented and made available for subsequent review when requested by Board staff.

(2) Exception -- The one year recusal requirement may be waived if, after consultation with the Reserve Bank's Ethics Official and consideration of the relevant facts, the examiner's supervising officer determines that no violation of law nor appearance of conflict of interest would occur as a result of the assignment. Factors to consider in making this determination include: (a) the examiner's former position and years of employment at the institution; (b) the examiner's level of responsibility in the matter; and (c) the need for the examiner on the assignment. Any such determination must be appropriately documented and made available for subsequent review when requested by Board staff.

Sub-paragraph (e)

Austria, Section 8 Law on Lobbying:[150]

A public functionary is prohibited from acting as a lobbyist in the field of his/her work.

Macedonia, Article 8 para. 1 Law on Lobbying:[151]

Elected and appointed officials who have professional functions in the legislative, executive and local government are not allowed to lobby during their term.

Montenegro, Article 14 No. 1, 2, 4 Law on Lobbying:[152]

[149] United States Board of Governors of the Federal Reserve System, *Revised Policies*, available at www.federalreserve.gov, accessed 10 October 2015.

[150] *Austrian Law on Lobbying* (2013), available at www.ris.bka.gv.at, accessed 10 October 2015.

[151] Macedonia, *Law on Lobbying*, available at www.dksk.org.mk, accessed 10 October 2015.

[152] Montenegro, *Law on Lobbying*, available at http://antikorupcija.me, accessed 10 October 2015.

Conducting lobbying activities shall be prohibited to: 1) a public official and persons related to him/her; 2) a member of the administrative or supervisory board of a company or legal entity in which the state or local government share property ownership; [...] 4) a member of a management body of a state fund and foundation or their legal representative.

Sub-paragraph (f)

Canada, Section 10.11 Lobbying Act:[153]

> "No individual shall, during a period of five years after the day on which the individual ceases to be a designated public office holder carry on" lobbying activities.

Taiwan, Article 10 Lobbying Act:[154]

> Public officials "shall not lobby [...] on behalf of legal persons or organizations in three years after leaving office".

Paragraph 2

Slovenia, Integrity and Prevention of Corruption Act 2010:

> Article 28 (Termination of activity, office or membership)
>
> (1) An official who, prior to taking office, performed an activity or held an office that is incompatible with his office under this Act or is contrary to the preceding Article shall cease to perform the activity or hold office no later than within 30 days of the date of his election or appointment or the approval of his mandate.
>
> (2) An official who, prior to taking office, was a member of bodies whose membership is incompatible with his office under this Act or is contrary to the preceding Article, shall immediately submit his resignation or make a request to have his membership terminated; the membership shall be terminated within 30 days of the date of his appointment to office.
>
> Article 29 (Warning by the Commission and the consequences of a failure to comply)
>
> (1) If an official does not cease to perform an activity, hold membership, or hold an office that is incompatible with his office under this Act within the time limit referred to in the preceding paragraph, the Commission shall warn the official and set the time limit by which the official must cease to perform the activity or hold office. The time limit set by the Commission may not be shorter than 15 days or longer than three months. The Commission shall warn the official who, after taking office, commences an activity, gains membership or takes an office which is incompatible with his office under this Act on incompatibility and shall set the time limit by which the official must eliminate the incompatibility in question. This time limit may not be shorter than 15 days or longer than three months.
>
> (2) If the Commission establishes that the official continues to perform the activity, hold a membership, or hold an office after the time limit set by the Commission has expired, it shall inform the relevant authority competent to propose or commence a procedure for the removal of the official from office. The competent authority shall inform the Commission of its final decision.

[153] Canada, *Lobbying Act*, available at www.ocl-cal.gc.ca, accessed 10 October 2015.

[154] Taiwan, *Lobbying Act*, available at www.tychakka.gov.tw, accessed 10 October 2015.

(3) The provisions of the preceding paragraph do not apply to directly elected officials. If the Commission establishes that the facts referred to in the preceding paragraph in connection with directly elected officials are true then it shall inform the public of its findings and publish them on its website.

Czech Republic, Act of Law on Conflict of Interests 2006:

Article 4

(3) The public officials included in Section 1 shall terminate all activities specified therein without unnecessary delay after assuming a public office, within 30 days at the latest. If it is not possible to meet the time limit specified in the previous sentence because of reasons beyond the public official's control, he/she shall report such a fact in writing to the relevant administration body and adopt all measures warranting that all activities specified in Section 1 are terminated as soon as possible. This provision in no way affects the public official's obligations resulting from and/related to special legal regulations.

Article 8

International standards

Council of Europe Model code of conduct for public officials:

Article 26 – Leaving the public service

1. The public official should not take improper advantage of his or her public office to obtain the opportunity of employment outside the public service.

2. The public official should not allow the prospect of other employment to create for him or her an actual, potential or apparent conflict of interest. He or she should immediately disclose to his or her supervisor any concrete offer of employment that could create a conflict of interest. He or she should also disclose to his or her superior his or her acceptance of any offer of employment.

3. In accordance with the law, for an appropriate period of time, the former public official should not act for any person or body in respect of any matter on which he or she acted for, or advised, the public service and which would result in a particular benefit to that person or body.

4. The former public official should not use or disclose confidential information acquired by him or her as a public official unless lawfully authorised to do so.

5. The public official should comply with any lawful rules that apply to him or her regarding the acceptance of appointments on leaving the public service.

Article 27 – Dealing with former public officials

The public official should not give preferential treatment or privileged access to the public service to former public officials.

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003)[155]

> 2.2.2, paragraph f)
>
> 'Outside' appointments -- Define the circumstances, including the required authorisation procedures, under which a public official may undertake an appointment on the board or controlling body of, for example, a community group, an NGO, a professional or political organisation, another government entity, a government-owned corporation, or a commercial organisation which is involved in a contractual, regulatory, partnership, or sponsorship arrangement with their employing organisation.
>
> No. 16, Serving the public interest, 5th indent
>
> Public officials are expected not to take improper advantage of a public office or official position which they held previously, including privileged information obtained in that position, especially when seeking employment or appointment after leaving public office.

United Nations International Code of Conduct for Public Officials (1996):

> 7. Public officials shall comply with measures established by law or by administrative policies in order that after leaving their official positions they will not take improper advantage of their previous office.
>
> 10. Matters of a confidential nature in the possession of public officials shall be kept confidential unless national legislation, the performance of duty or the needs of justice strictly require otherwise. Such restrictions shall also apply after separation from service.

Foreign examples

Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service 1997, Article 2, paragraphs 2-4:

> Article 18. Limitations when concluding employment contracts
>
> After leaving office in the civil service a person shall have no right, within a period of one year, to take up employment of company head, deputy head, company board or management board member and run other offices directly related to decision-making in company management, property management, financial accounting and control sphere, provided that during the period of one year immediately prior to the termination of his service in public office his duties were directly related to the supervision or control of the business of said undertakings or the person participated in consideration and making of favourable for these companies decisions for obtaining state orders or financial assistance in the course of public contests or otherwise.
>
> Article 20. Limitations of representation
>
> 1. After official separation from office in the civil service, a person may not for a period of one year represent natural or legal persons in the institution in which he held office for a period of one year immediately prior to his leaving the service.

[155] Recommendation of the Council on *OECD Guidelines* for Managing Conflict of Interest in the Public Service, 28 May 2003 – C(2003)107, available at www.oecd.org, accessed 10 October 2015.

2. After official separation from office in the civil service, a person may not for a period of one year represent natural or legal persons in other central or local institutions on the issues which had been assigned to his official functions.

3. A person in the civil service shall be prohibited from keeping official relations with former office holders in the civil service in respect of whom the limitations specified in paragraph 1 hereof apply. A person in the civil service must promptly notify the head of the institution where he holds an office or his authorised representative of such official relations.

Montenegro, Law on Prevention of Corruption 2014:

Article 15 Restrictions upon Termination of Public Function

For a period of two years following the termination of public function, a public official shall not:

1) Act, before the authority in which he/she exercised a public function, as a representative or attorney of a legal person, entrepreneur or international or other organization having or establishing a contractual or business relationship with this authority;

2) Establish a working relationship or business cooperation with the legal person, entrepreneur or international or other organization that, based on the decisions of the authority in which a public official has exercised function, acquires gain;

3) Represent a natural or legal person before the authority in which he/she exercised a public function in a case in which he participated, as a public official, in the decision-making process;

4) Perform management or audit activities in the legal person in which, at least one year prior to the termination of public function, his/her duties were related to supervisory or control activities;

5) Enter into a contract or other form of business cooperation with the authority in which he/she exercised a public function;

6) Use, for the purpose of obtaining a benefit for himself/herself or another person, or to harm another person, the knowledge and information acquired in the performance of public function, unless the knowledge and information are available to the public.

Serbia, Anti-Corruption Agency Act 2008:

Article 38 Prohibition of Other Employment or Business Relations Following Termination of Public Office

During the period of two years after termination of the public office, the official whose office has ceased may not take employment or establish business cooperation with a legal entity, entrepreneur or international organisation engaged in activity relating to the office the official held, except under approval of the Agency.

The official whose office has ceased shall, prior to employment or business cooperation specified in paragraph 1 of this Article, seek approval of the Agency, which shall pass decision on this request within 15 days.

> Should the Agency fail to pass a decision specified in paragraph 2 of this Article within the deadline, it shall be deemed that approval for employment or business cooperation has been given.
>
> The ban referred in paragraph 1 of this Article does not refer to an official elected directly by citizens.

Canada, Section 10.11 Lobbying Act:[156]

> No individual shall, during a period of five years after the day on which the individual ceases to be a designated public office holder carry on [lobbying activities] [...].

Canada, Conflict of Interest Act 2006:

> 34. (1) No former public office holder shall act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown.
>
> (2) No former public office holder shall give advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public.

Taiwan, Article 10 Lobbying Act:[157]

> Public officials "shall not lobby [...] on behalf of legal persons or organizations for three years after leaving office".

Ireland, Regulation of Lobbying Act 2015:

> Restrictions on post-term employment as lobbyist
>
> 22. (1) A person who has been a relevant designated public official shall not—
> (a) carry on lobbying activities in circumstances to which this section applies, or
> (b) be employed by, or provide services to, a person carrying on lobbying activities in such circumstances, during the relevant period except with the consent of the Commission.
> (2) In this section—
> "relevant designated public official" means a person who is a designated public official by virtue of paragraph (a), (e) or (f) of section 6(1);
> "relevant period" means the period of one year beginning with the day on which the person ceases to be a relevant designated public official. [....]

United States, Code of Laws ("United States Code"):

> 18 U.S.C. § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches
>
> (a) RESTRICTIONS ON ALL OFFICERS AND EMPLOYEES OF THE EXECUTIVE BRANCH AND CERTAIN OTHER AGENCIES.—
>
> (1) PERMANENT RESTRICTIONS ON REPRESENTATION ON PARTICULAR MATTERS.—Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any

[156] Canada, *Lobbying Act*, available at www.ocl-cal.gc.ca, accessed 10 October 2015.

[157] Taiwan, *Lobbying Act*, available at www.tychakka.gov.tw, accessed 10 October 2015.

independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—
(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) in which the person participated personally and substantially as such officer or employee, and
(C) which involved a specific party or specific parties at the time of such participation,
shall be punished as provided in section 216 of this title.

(2) TWO-YEAR RESTRICTIONS CONCERNING PARTICULAR MATTERS UNDER OFFICIAL RESPONSIBILITY.—Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter—
(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
(C) which involved a specific party or specific parties at the time it was so pending,
shall be punished as provided in section 216 of this title.

Pub. L. 112-105 § 17 (STOCK Act). Post-employment negotiation restrictions
(a) RESTRICTION EXTENDED TO EXECUTIVE AND JUDICIAL BRANCHES.—Notwithstanding any other provision of law, an individual required to file a financial disclosure report under section 101 of the Ethics in Government Act of 1978 (5 U.S.C. App. 101) may not directly negotiate or have any agreement of future employment or compensation unless such individual, within 3 business days after the commencement of such negotiation or agreement of future employment or compensation, files with the individual's supervising ethics office a statement, signed by such individual, regarding such negotiations or agreement, including the name of the private entity or entities involved in such negotiations or agreement, and the date such negotiations or agreement commenced.
(b) RECUSAL.—An individual filing a statement under paragraph (a) shall recuse himself or herself whenever there is a conflict of interest, or appearance of a conflict of interest, for such individual with respect to the subject matter of the statement, and shall notify the individual's supervising ethics office of such recusal. An individual making such recusal shall, upon such recusal, submit to the supervising ethics office the statement under paragraph (a) with respect to which the recusal was made.

Article 9

International standards

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003):

> No. 16, Engendering an organisational culture which is intolerant of conflicts of interest, 2nd indent
>
> Organisational practices should encourage public officials to disclose and discuss conflict of interest matters, and provide reasonable measures to protect disclosures from misuse by others.
>
> 1.2.1 b)
>
> In-service disclosure in office -- Make public officials aware that they must promptly disclose all relevant information about a conflict when circumstances change after their initial disclosure has been made, or when new situations arise, resulting in an emergent conflict of interest. As with formal registration, ad hoc disclosure itself is not necessarily required to be a public process: internal declaration may be sufficient to encourage public confidence that integrity is being managed appropriately.

United Nations International Code of Conduct for Public Officials (1996):

> 5. Public officials, to the extent required by their position, shall, in accordance with laws or administrative policies, declare business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest. In situations of possible or perceived conflict of interest between the duties and private interests of public officials, they shall comply with the measures established to reduce or eliminate such conflict of interest.

Foreign examples

Serbia, Anti-Corruption Agency Act 2008:

> Article 32 Duty to notify of conflict of interest
>
> On taking the office and during discharge of public office, the official shall notify in writing his superior and the Agency within eight days regarding any doubts concerning his conflict of interest or an associated person's conflict of interest.

Montenegro, Law on Prevention of Corruption 2014:

> Article 8 Statement of Conflict of Interest
>
> If, in the authority in which he/she exercises a public function, a public official participates in the discussion and decision-making in the matter in which he/she or a person related to the public official has a private interest, he/she shall inform other participants in the discussion and decision-making thereon by making a statement on the existence of private interest, prior to his/her participation in the discussion, and no later than before the beginning of the decision-making.

Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service 1997:

> Article 11 Duty of self-exclusion

2. A person in the civil service must notify, prior to the commencement of or during the procedure of the preparation, consideration or passing of the decision, his direct chief or the person authorised by the institution head, also persons who take part in the above procedure of preparation, consideration or passing of the decision, of the existing conflict of interest and must exclude himself from participation therein. [...]

Article 10

International standards

Council of Europe Model code of conduct for public officials:

Article 13 – Conflict of interest

3. Since the public official is usually the only person who knows whether he or she is in that situation, the public official has a personal responsibility to: [...]

- comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict.

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003):

1.2.2. Set clear rules on what is expected of public officials in dealing with conflict of interest situations.

a) Dealing with conflicting private interests -- Public officials should be required to accept responsibility for identifying their relevant private interests. An organisation's policy statement should make it clear that the registration or declaration of a private interest does not in itself resolve a conflict. Additional measures to resolve or manage the conflict positively must be considered.

b) Resolution and management options -- Options for positive resolution or management of a continuing or pervasive conflict can include one or more of several strategies as appropriate, for example:

- Divestment or liquidation of the interest by the public official.
- Recusal of the public official from involvement in an affected decision-making process.
- Restriction of access by the affected public official to particular information.
- Transfer of the public official to duty in a non-conflicting function.
- Re-arrangement of the public official's duties and responsibilities.
- Assignment of the conflicting interest in a genuinely 'blind trust' arrangement.
- Resignation of the public official from the conflicting private-capacity function, and/or
- Resignation of the public official from their public office.

c) Recusal and restriction -- Where a particular conflict is not likely to recur frequently, it may be appropriate for the public official concerned to maintain their current position but not participate in decision-making on the affected matters, for example by having an affected decision made by an independent third party, or by abstaining from voting on decisions, or withdrawing from discussion of affected proposals and plans, or not receiving relevant documents and other information relating to their private interest. The option of re-assigning certain functions of the

public official concerned should also be available, where a particular conflict is considered likely to continue, thereby making ad hoc recusal inappropriate. Particular care must be exercised to ensure that all affected parties to the decision know of the measures taken to protect the integrity of the decision-making process where recusal is adopted.

d) Resignation -- Public officials should be required to remove the conflicting private interest if they wish to retain their public position and the conflict of interest cannot be resolved in any other way (for example by one or more of the measures suggested above). Where a serious conflict of interest cannot be resolved in any other way, the public official should be required to resign from their official position. The Conflict of Interest policy (together with the relevant employment law and/or employment contract provisions) should provide the possibility that their official position can be terminated in accordance with a defined procedure in such circumstances.

e) Transparency of decision-making -- Registrations and declarations of private interests, as well as the arrangements for resolving conflicts, should be clearly recorded in formal documents, to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified and managed. Further disclosure of information about a conflict of interest may also be appropriate in supporting the overall policy objective, for example by demonstrating how the disclosure of a specific conflict of interest was recorded and considered in the minutes of a relevant meeting.

United Nations, International Code of Conduct for Public Officials (1996):

Article 5, sentence 2:

In situations of possible or perceived conflict of interest between the duties and private interests of public officials, they shall comply with the measures established to reduce or eliminate such conflict of interest.

Foreign examples

Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service 1997:

Article 11 Duty of self-exclusion

1. A person in the civil service shall be prohibited from participating in the preparation, consideration or passing of decisions or from otherwise influencing decisions, which may give rise to a conflict of interest situation.

2. A person in the civil service must notify, prior to the commencement of or during the procedure of the preparation, consideration or passing of the decision, his direct chief or the person authorised by the institution head, also persons who take part in the above procedure of preparation, consideration or passing of the decision, of the existing conflict of interest and must exclude himself from participation therein. The head of the institution or his authorised representative may refuse to accept the declared his self-exclusion and obligate the person to take part in the subsequent procedure.

3. A person in the civil service must fulfil written preliminary recommendations of the institution head or his authorised representative specifying the decisions from the preparation, consideration or passing whereof he must exclude himself. Said

recommendations are made for a specific situation on the basis of annual declarations or the person's request. The person in the civil service may make the preliminary recommendations public at his own discretion.

5. The institution head or his authorised representative may suspend a person who is in the civil service from participation in the preparation, consideration or passing of a specific decision if there are ample grounds to believe that his participation would result in conflict of interest.

Slovenia, Integrity and Prevention of Corruption Act 2010:

Article 38

(1) Unless otherwise provided by another Act, an official person who, upon taking up a post or office or during the performance of the duties of the post or office, finds that a conflict of interest has arisen or might arise must immediately inform his superior in writing, and if he has no superior, the Commission. In so doing, the official person shall immediately cease to perform any work with regard to the maeer in which the conflict of interest has arisen, unless the delay would pose a risk.

(2) The superior or the Commission shall decide on the conflict of interest within 15 days and shall communicate the decision to the official person.

Montenegro, Law on Prevention of Corruption 2014:

Article 7 paragraph 3 and 4

The Agency shall establish the existence of a conflict of interest and implement measures for prevention of conflict of interest. Opinions about the existence of conflict of interest in the exercise of public function and restrictions in the exercise of public functions and the decisions on the violation of the provisions of this Law relating to the prevention of conflicts of interest in the exercise of public functions, restrictions in the exercise of public functions, gifts, sponsorships and donations and reports on income and property by public officials, which are given or adopted by the Agency in accordance with this Law, shall be binding for a public official.

Article 11

International standards

Council of Europe Model code of conduct for public officials:[158]

Article 28, paragraph 4

The public official who supervises or manages other public officials has the responsibility to see that they observe this Code and to take or propose appropriate disciplinary action for breaches of it.

There are no international standards on which entity should manage the conflict of interest in coordination with the public official. This is probably due to the fact that there is such a large variety of systems, let alone for different branches and levels of State power. Only the "Western Balkan Recommendation on Disclosure of Finances and Interests by Public Officials Conflicts of Interest and Incompatibilities" (2014) addresses the issue of monitoring asset declarations:

[158] The wording is now slightly simpler, as the following track changes show: "Conflict of interest ~~arises from~~ is a situation [...]".

E.12 The supervision of conflicts of interest should be the obligation of a supervisor of the public official: conflicts of interest are relative to the job duties and a central oversight body cannot monitor conflicts arising in the course of daily work. The supervisor needs to have access to declarations in order to know about possible conflicts of interest. Any central body in charge with verifying income and asset declarations can complement the disciplinary supervisor by identifying incompatibilities which are not depending on the job duties but are visible from the declarations.

As for the responsibilities of public organisations for managing conflicts of interest, including its prevention, the OECD Guidelines contain the following instructions (abbreviated version):

2.2. Create a partnership with employees: awareness, anticipation and prevention
2.2.1. Ensure wide publication and understanding of the Conflict of Interest policy.
2.2.2. Review 'at-risk' areas for potential conflict of interest situations.
2.2.3 Identify preventive measures that deal with emergent conflict situations.
2.2.4. Develop an open organisational culture where dealing with conflict of interest matters can be freely raised and discussed.

Foreign examples

See above examples under Articles 9 and 10.

Article 12

International standards

Council of Europe Model code of conduct for public officials 2000:

Article 13 – Conflict of interest

4. Whenever required to do so, the public official should declare whether or not he or she has a conflict of interest.

5. Any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment.

Foreign examples

Lithuania, Law on the Adjustment of Public and Private Interests in the Public Service 1997 (as per amendment by Law No. XII-870 of 2014):

Article 4. Declaration of private interests

1. A person employed in the state service as well as a person who aspires to a position in the state service must declare private interests according to procedure set by this Law and other legislative acts by submitting a declaration of private interests (hereinafter – declaration).

Article 5. Filing of the declaration

2. Persons aspiring to work in the state service (except for the persons referred to in Section 4 paragraph 2 of this law [candidates to elected political posts such as the

parliament]) shall file a declaration with the head or a person authorized by the head of the state or municipal institution in which they are aspiring to work before their election, admission or appointment day unless other legislative acts provide otherwise.

Article 13

International standards

Council of Europe Model code of conduct for public officials:

> Article 14 – Declaration of interests
>
> The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests.

Council of Europe, Parliamentary Assembly Resolution 1214 (2000):

> In order successfully to fight corruption, parliaments – in their capacity as a country's supreme political authority and instance of control – should, where applicable: [...] introduce an annual system for the establishment of a declaration of financial interests by parliamentarians and their direct family.[159]

Western Balkan Recommendation on Disclosure of Finances and Interests by Public Officials (2014)[160]

Organisation of American States (OAS), "Model law on the declaration of interests, income, assets and liabilities of persons performing public functions" (2013),[161] with explanations provided in "Draft Legislative Guideline: Basic Elements on the Registration of Income, Assets, and Liabilities"[162]

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003):

> 1.2.1. Ensure that public officials know what is required of them in relation to identifying and declaring conflict of interest situations.
>
> a) Initial disclosure on appointment or taking up a new position -- Develop procedures that enable public officials, when they take up office, to identify and disclose relevant private interests that potentially conflict with their official duties. Such disclosure is usually formal, (by means of registration of information identifying the interest), and is required to be provided periodically, (generally on commencement in office and thereafter at regular intervals, usually annually), and in writing. Disclosure is not necessarily required to be a public process: internal or limited-access disclosure within the public organisation, together with appropriate resolution or management of any conflicts, may be sufficient to achieve the policy objective of the process -- encouraging public confidence in the integrity of the public official and their organisation. In general, the more senior the public official, the more likely it is that public disclosure will be appropriate; the more junior, the more likely it is that internal disclosure to the management of the official's organisation will be sufficient.

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[159] Parliamentary Assembly Resolution 1214 (2000), *Role of Parliaments in fighting corruption*, available at www.assembly.coe.int, accessed 10 October 2015.

[160] *Western Balkan Recommendations*, available at www.respaweb.eu, accessed 10 October 2015.

[161] Of 22 March 2013, *SG/MESICIC/doc.344/12* rev. 2, available at www.oas.org, accessed 10 October 2015.

[162] *Guidelines*, available at www.oas.org, accessed 10 October 2015.

b) In-service disclosure in office -- Make public officials aware that they must promptly disclose all relevant information about a conflict when circumstances change after their initial disclosure has been made, or when new situations arise, resulting in an emergent conflict of interest. As with formal registration, ad hoc disclosure itself is not necessarily required to be a public process: internal declaration may be sufficient to encourage public confidence that integrity is being managed appropriately.

c) Completeness of disclosure -- Determine whether disclosures of interests contain sufficient detail on the conflicting interest to enable an adequately-informed decision to be made about the appropriate resolution. The responsibility for the adequacy of a disclosure rests with the individual public official.

d) Effective disclosure process -- Ensure that the organisation's administrative process assists full disclosure, and that the information disclosed is properly assessed, and maintained in up-to-date form. It is appropriate that the responsibility for providing adequate disclosure of relevant information should rest with individual officials. Ensure that the responsibility for providing relevant information rests with individual officials and this requirement is explicitly communicated and reinforced in employment and appointment arrangements and contracts.

United Nations Convention against Corruption (UNCAC):

Article 8 paragraph 5 UNCAC

Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

United Nations, International Code of Conduct for Public Officials (1996):

5. Public officials, to the extent required by their position, shall, in accordance with laws or administrative policies, declare business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest.

8. Public officials shall, in accord with their position and as permitted or required by law and administrative policies, comply with requirements to declare or to disclose personal assets and liabilities, as well as, if possible, those of their spouses and/or dependants.

Foreign examples

Many transition countries require a large number of public officials to declare their personal and financial interests. Referencing any of the voluminous national regulations would go beyond the scope of this document.

Article 14

International standards

Council of Europe Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption:

> 14. to adopt appropriately transparent procedures for public procurement that promote fair competition and deter corruptors;

European Union Procurement Directive (2014), Article 59:[163]

> The ESPD [European Single Procurement Document] shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply [including conflict of interest, Article 24 and 57] and/or that the relevant selection criterion is fulfilled and shall provide the relevant information as required by the contracting authority.

International standards so far focus on obligations for **public officials**. They do not contain any provision related to contractors as Article 14 of this legislative toolkit suggests. This includes the UNCITRAL Model Law on Public Procurement (2011), which briefly addresses conflict of interest without any further detail. The European Anti-Fraud Office (OLAF) published "A practical guide for managers" on "Identifying conflicts of interests in public procurement procedures for structural actions". The Guide observes a "Need of declarations related to conflict of interests: it is recommended to require each person participating in a procurement procedure to fill in a declaration of absence of conflict of interests."[164] However, this obligation relates only to public officials, not bidders. The OECD "Principles for Integrity in Public Procurement" (2009) only focus on public officials; however, in one brief part they call for "ensuring that the contracting agency and the supplier are aware of policies in order to prevent conflict of interest and corruption (e.g. publication of the policies, reference in the contract) and that the supplier communicates this information to potential sub-contractors".[165]

Foreign examples

The United States Illinois Procurement Code contains in Section 50-35 a far-reaching provision on "Financial disclosure and potential conflicts of interest" by "bidders, offerors, vendors, or contractors with an annual value of more than $50,000".[166] The provision alone comprises of more than 1,600 words. In addition to their financial background, bidders must disclose:

> (1) State employment, currently or in the previous 3 years, including contractual employment of services.
>
> (2) State employment of spouse, father, mother, son, or daughter, including contractual employment for services in the previous 2 years.
>
> (3) Elective status; the holding of elective office of the State of Illinois, the government of the United States, any unit of local government authorized by the Constitution of the State of Illinois or the statutes of the State of Illinois currently or in the previous 3 years.

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[163] *Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement* and repealing Directive 2004/18/EC, available at http://eur-lex.europa.eu, accessed 10 October 2015.

[164] OLAF *Guide*, page 3, available at www.esfondi.lv, accessed 10 October 2015.

[165] OECD *Principles*, available at www.oecd.org, accessed 10 October 2015.

[166] Illinois *Procurement Code*, available at www.ilga.gov, accessed 10 October 2015.

(4) Relationship to anyone holding elective office currently or in the previous 2 years; spouse, father, mother, son, or daughter.

(5) Appointive office; the holding of any appointive government office of the State of Illinois, the United States of America, or any unit of local government authorized by the Constitution of the State of Illinois or the statutes of the State of Illinois, which office entitles the holder to compensation in excess of expenses incurred in the discharge of that office currently or in the previous 3 years.

(6) Relationship to anyone holding appointive office currently or in the previous 2 years; spouse, father, mother, son, or daughter.

(7) Employment, currently or in the previous 3 years, as or by any registered lobbyist of the State government.

(8) Relationship to anyone who is or was a registered lobbyist in the previous 2 years; spouse, father, mother, son, or daughter.

(9) Compensated employment, currently or in the previous 3 years, by any registered election or re-election committee registered with the Secretary of State or any county clerk in the State of Illinois, or any political action committee registered with either the Secretary of State or the Federal Board of Elections.

(10) Relationship to anyone; spouse, father, mother, son, or daughter; who is or was a compensated employee in the last 2 years of any registered election or re-election committee registered with the Secretary of State or any county clerk in the State of Illinois, or any political action committee registered with either the Secretary of State or the Federal Board of Elections. [...]

Article 15

International standards

The General Court of the European Court of Justice decided in 2011, that "if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process [...] and to have access to all relevant information."[167] There are several international standards for **freedom of information** one can refer to in general.[168]

Council of Europe Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption:

> 16. to ensure that the media have freedom to receive and impart information on corruption matters, subject only to limitations or restrictions which are necessary in a democratic society;

OECD Guidelines for Managing Conflict of Interest in the Public Service (2003):

> 1.2.2. e) **Transparency of decision-making** -- Registrations and declarations of private interests, as well as the arrangements for resolving conflicts, should be clearly recorded in formal documents, to enable the organisation concerned to demonstrate, if necessary, that a specific conflict has been appropriately identified

167 General Court of the European Court of Justice, *Case T-233/09* (Access Info Europe vs. Council of the European Union), Ruling of 22 March 2011, paragraph 69, available at http://eur-lex.europa.eu, accessed 10 October 2015.

168 See the overview at *article19.org* and *right2info*, available at www.article19.org; www.right2info.org, accessed 10 October 2015.

and managed. Further disclosure of information about a conflict of interest may also be appropriate in supporting the overall policy objective, for example by demonstrating how the disclosure of a specific conflict of interest was recorded and considered in the minutes of a relevant meeting.

Publishing **asset declarations** and **statistics** online as suggested by Paragraph 2, follows no. H.1 and H.2 of the Western Balkans Recommendation on Disclosure of Finances and Interests by Public Officials (2014):

> H.1 As monitoring by the public at large is one of the most effective tools, income and asset declarations should be available online. Ideally, declarations submitted online are published in real time. A useful public database of declarations requires in particular electronic and free access, and data in searchable, machine-readable format.
>
> H.2 The oversight body should also publish regular reports containing inter alia case statistics and an analysis of trends.

Charter of Fundamental Rights of the European Union (2000):

> Article 42 Right of access to documents
>
> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

United Nations Convention against Corruption (UNCAC):

> Article 10. Public reporting
>
> Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision making processes, where appropriate. Such measures may include, inter alia:
>
> (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
>
> (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
>
> (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.
>
> Article 13. Participation of society
>
> [...] This participation should be strengthened by such measures as:
>
> (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
>
> (b) Ensuring that the public has effective access to information;

Foreign examples

Canada, Conflict of Interest Act 2006:

> 25. (1) If a reporting public office holder has recused himself or herself to avoid a conflict of interest, the reporting public office holder shall, within 60 days after the day on which the recusal took place, make a public declaration of the recusal that provides sufficient detail to identify the conflict of interest that was avoided.

Article 16

International standards

Council of Europe Model code of conduct for public officials 2000:

> Article 12 – Reporting
>
> 1. The public official who believes he or she is being required to act in a way which is unlawful, improper or unethical, which involves maladministration, or which is otherwise inconsistent with this Code, should report the matter in accordance with the law.
>
> 2. The public official should, in accordance with the law, report to the competent authorities if he or she becomes aware of breaches of this Code by other public officials.
>
> 3. The public official who has reported any of the above in accordance with the law and believes that the response does not meet his or her concern may report the matter in writing to the relevant head of the public service.
>
> 4. Where a matter cannot be resolved by the procedures and appeals set out in the legislation on the public service on a basis acceptable to the public official concerned, the public official should carry out the lawful instructions he or she has been given.
>
> 5. The public official should report to the competent authorities any evidence, allegation or suspicion of unlawful or criminal activity relating to the public service coming to his or her knowledge in the course of, or arising from, his or her employment. The investigation of the reported facts shall be carried out by the competent authorities.
>
> 6. The public administration should ensure that no prejudice is caused to a public official who reports any of the above on reasonable grounds and in good faith.

Council of Europe Recommendation CM/Rec(2014)7 on the protection of whistleblowers, explanatory memorandum (at no. 43):

> The following is a non-exhaustive list of categories of (reported or disclosed) information for which it is typically considered that a whistleblower should be protected:
>
> - corruption and criminal activity;

- violations of the law and administrative regulations;
- abuse of authority/public position; [...].

United Nations Convention against Corruption (UNCAC):

> Article 8 paragraph 4
>
> Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

Foreign examples

Bulgaria, Conflict of Interest Prevention and Ascertainment Act 2010:

> Article 32.
>
> (1) A conflict of interest whistle-blower may not be persecuted solely for this reason.
>
> (2) The persons who have been assigned to examine the alert shall be under an obligation:
> 1. not to disclose the identity of the whistle-blower;
> 2. not do make public any facts and data that have come to the knowledge thereof in connection with the examination of the alert;
> 3. to safeguard the written documents entrusted thereto from unauthorised access of third parties.
>
> (3) The persons referred to in Paragraph (2) shall propose to the competent heads the taking of concrete measures to preserve the dignity of the whistleblower, including measures to prevent any actions whereby the said whistleblower is subjected to mental or physical harassment.
>
> (4) A person, who has been discharged, persecuted or in respect of whom any actions leading to mental or physical harassment have been taken by reason of having submitted a request, shall have the right to compensation for the personal injury and damage to property according to a judicial procedure.

Serbia, Anti-Corruption Agency Act 2008:

> Article 37 Prohibition of Influence on an Official
>
> An official is obliged to promptly notify the Agency of any prohibited influence to which he has been subjected in the course of discharge of a public office. The Agency notifies the competent body of the official's allegations referred in paragraph 1 of this Article to institute disciplinary, misdemeanour and criminal proceedings, in accordance with law.

Albania, Law No. 9367 of 2005 "On the Prevention of Conflicts of Interest in the Exercise of Public Functions:

> Article 8 – Identification of Private Interests of an Official by Third Persons
>
> The offering of information on private interests of an official is:
> a) a duty of every other official who has knowledge, in particular of his superior;

b) a duty of every public institution that has knowledge;
c) the right of interested parties who are affected by the actions of the official;
ç) the right of every person who has knowledge and who has an interest in general and which complies with the purpose of this law.

Article 17

International standards

Council of Europe Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption:

> 11. to ensure that appropriate auditing procedures apply to the activities of public administration and the public sector;
>
> 12. to endorse the role that audit procedures can play in preventing and detecting corruption outside public administrations;

International Organization of Supreme Audit Institutions (INTOSAI), Guidelines for Internal Control Standards for the Public Sector (GOV 9100)[169]

> Every person involved in the organisation – among managers and employees – has to maintain and demonstrate personal and professional integrity and ethical values and has to comply with the applicable codes of conduct at all times. For example, this can include [...] reporting conflicts of interest.

United Nations Convention against Corruption (UNCAC):

> Article 6. Preventive anti-corruption body or bodies
>
> 1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
>
> (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

Foreign examples

New Zealand, Public Audit Act 2001:

> 16 Performance audit
>
> (1) The Auditor-General may at any time examine –
> [...]
> (b) a public entity's compliance with its statutory obligations
>
> [The Office of the Auditor-General regularly publishes findings on conflict of interest in public administration.][170]

[169] INTOSAI *Guidelines*, page 18, available at www.issai.org, accessed 10 October 2015.
[170] *Conflicts of interest reports*, available at www.oag.govt.nz, accessed 10 October 2015.

New Zealand, Local Authorities (Members' Interests) Act 1968

> 8. Auditor-General to institute proceedings
>
> The Auditor-General shall, either on investigation following receipt of a complaint or of his or her own motion, if he or she considers the circumstances warrant it, institute the necessary proceedings against any person for an offence against this Act, and no such proceedings shall be taken by any other person.

Australia, Ombudsman Act 1973:

> 5 Functions of Ombudsman
>
> (1) Subject to this Act, the Ombudsman:
> (a) shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman;
>
> [Based on this and similar provisions of the States, the various Ombudsmen regularly conduct investigations into conflict of interest cases, see for example "Investigation into allegations of improper conduct in the Office of Living Victoria": "Conflict of interest was also poorly handled, with many instances of previous work or personal associations with contract providers that were not declared, or any perceived conflict acknowledged."][171]

Macedonian Law on Prevention of Conflict of Interest

> Article 15 – Privileges or discrimination after elections
>
> (1) The National Commission shall consider and have insight into all contracts, public procurements, and other profit-making deals, made, that is, executed in the period of one year after the ending of the elections for President of the Republic, elections for delegates in the Assembly of the Republic of Macedonia, or the local elections, between state bodies, local self-government bodies, public enterprises, and other legal entities managing state capital and domestic or foreign juridical persons, as well as all permits, concessions, and other decisions recognising rights or privileges to legal entities as defined by law, or taking away or limiting such rights or privileges.
>
> (2) The National Commission is obliged to submit a report to the Assembly of the Republic of Macedonia for the insight carried out within 60 days. The report is announced in the media.

Article 18

International standards

There are no specific international standards on conflict of interest for top-level public officials.

[171] *Report of August 2014*, page 3, available at www.ombudsman.vic.gov.au, accessed 10 October 2015.

Foreign examples

Canada, Conflict of Interest Act 2006:

> Section 2
>
> 'private interest' does not include an interest in a decision or matter
> (a) that is of general application;
> (b) that affects a public office holder as one of a broad class of persons; or
> (c) that concerns the remuneration or benefits received by virtue of being a public office holder.
>
> Section 15 [incompatibilities and restrictions]
>
> (4) Nothing in this section prohibits or restricts the political activities of a reporting public office holder.
>
> Section 13
>
> Contracts with public sector entities
> (1) No minister of the Crown, minister of state or parliamentary secretary shall knowingly be a party to a contract with a public sector entity under which he or she receives a benefit, other than a contract under which he or she is entitled to pension benefits.
>
> Partnerships and private companies
> (2) No minister of the Crown, minister of state or parliamentary secretary shall have an interest in a partnership or private corporation that is a party to a contract with a public sector entity under which the partnership or corporation receives a benefit.
>
> Exception
> (3) Paragraphs (1) and (2) do not apply if the Commissioner is of the opinion that the contract or interest is unlikely to affect the exercise of the official powers, duties and functions of the minister of the Crown, minister of state or parliamentary secretary.

Article 19

International standards

Council of Europe, Parliamentary Assembly Resolution 1214 (2000):

> In order successfully to fight corruption, parliaments – in their capacity as a country's supreme political authority and instance of control – should, where applicable: [...]
> c. introduce an annual system for the establishment of a declaration of financial interests by parliamentarians and their direct family;
> d. [...] The proper declaration of sources of income and of potential conflicts of interest is particularly important;[172]

Council of Europe, Parliamentary Assembly Resolution 1903 (2012), Code of conduct of members of the Parliamentary Assembly: good practice or a core duty?:

[172] Parliamentary Assembly Resolution 1214 (2000), *Role of Parliaments in fighting corruption*, available at www.assembly.coe.int, accessed 10 October 2015.

The Assembly also invites the national parliaments of Council of Europe member States to: [...] draw on the provisions of the appended code of conduct in respect of all current ethical rules and rules of conduct concerning their members or in respect of any rules they may need to develop. [...]

5. While performing their mandate as members of the Parliamentary Assembly, members shall:
5.2. take decisions solely in the public interest, without being bound by any instructions that would jeopardise members' ability to respect the present code;
5.4. use the resources available to them responsibly;
5.5. not use their public office for their, or anyone else's, private gain;
5.6. declare any relevant interests relating to their public functions and take steps to resolve any conflicts arising in a way that protects the public interest;
[...]
2. Members shall avoid conflicts between any actual or potential economic, commercial, financial or other interests on a professional, personal or family level on the one hand, and the public interest in the work of the Assembly on the other, by resolving any conflict in favour of public interest; if the member is unable to avoid such a conflict of interests, it shall be disclosed.

3. Members shall draw attention to any relevant interest by an oral declaration in any proceedings of the Assembly or its committees, or in any relevant communications.

4. No member shall act as a paid advocate in any work of the Assembly.

5. Members shall not request or accept any fee, compensation or reward intended to affect their conduct as members, particularly in their decision to support or oppose any motion, report, amendment, written declaration, recommendation, resolution or opinion. Members shall avoid any situation that could appear to be a conflict of interests or accept an inappropriate payment or gift.

6. Members shall not use their position as a member of the Parliamentary Assembly to further their own or another person's or entity's interests in a manner incompatible with this code of conduct.

7. Members shall use information with discretion, and in particular shall not make personal use of information acquired confidentially in the course of their duties.

8. Members shall register with the Secretariat of the Assembly any gifts or similar benefits (such as travel expenses, accommodation, subsistence, meals or entertainment expenses) of a value in excess of €200 that they accept in the performance of their duties as Assembly members.

10. Former members of the Parliamentary Assembly involved in representing and fostering another person's or entity's interests in the Parliamentary Assembly shall not, throughout the period of such activity, benefit from the prerogatives of the honorary associates or the Honorary President of the Parliamentary Assembly as far as the distribution of documents and the access to the buildings and meeting rooms are concerned.

Observance of the code of conduct

1. If a member is believed to have acted in breach of the code of conduct, the President of the Assembly may seek clarification and further information from the member concerned, the chairperson of the member's national delegation, the

chairperson of the member's political group or the chairperson of the member's committee.

2. If necessary, the President of the Assembly may seize the Committee on Rules of Procedure, Immunities and Institutional Affairs to examine the circumstances of the alleged breach and make a recommendation as to a possible decision to be taken by the President.

3. Should the President of the Assembly decide that the member failed to comply with the code of conduct, he or she may prepare a reasoned statement to be read out in the Assembly if need be.

4. Members shall co-operate, at all stages, with any investigation into their conduct by or under the authority of the Assembly.

Council of Europe Recommendation 60(1999)1 on a European Code of Conduct on political integrity of local and regional elected officials:[173]

Article 15

In performing their functions, elected representatives shall not take any measure such as to grant themselves a future personal professional advantage once they have relinquished their functions:

- in public or private bodies over which they exercised supervision while performing those functions;
- in public or private bodies with which they established a contractual relationship while performing those functions;
- in public or private bodies which were set up during their term of office and by virtue of the powers entrusted to them.

None of the other international organisations, notably the Inter-Parliamentary Union (IPU),[174] has issued any standard or recommendation for parliamentarians on conflict of interest. There are four major publications though which contain some comparative overview on conflict of interest in parliament:

- Global Organization of Parliamentarians Against Corruption (GOPAC), Handbook on parliamentary ethics and conduct, A guide for parliamentarians, 31 pages, 2009[175]
- Inter-Parliamentary Union (IPU), The Parliamentary Mandate – A Global Comparative Study, 162 pages, 2000[176]
- Office for Promotion of Parliamentary Democracy (OPPD)/European Parliament, Parliamentary Ethics – A Question of Trust, 100 pages, 2011[177]
- Organization for Security and Co-operation in Europe (OSCE)/Office for Democratic Institutions and Human Rights (ODIHR), Background Study: Professional and Ethical Standards for Parliamentarians, 88 pages, 2012[178]

Foreign examples

[173] *European Code of Conduct on political integrity of local and regional elected officials*, available at https://wcd.coe.int, accessed 10 October 2015.

[174] *IPU webpage*, available at www.ipu.org, accessed 10 October 2015.

[175] *GOPAC Guide*, available at www.gopacnetwork.org, accessed 10 October 2015.

[176] *The Parliamentary Mandate, available at www*.ipu.org, accessed 10 October 2015.

[177] *Parliamentary Ethics*, available at www.europarl.europa.eu, accessed 10 October 2015.

[178] *Standards for Parliamentarians, available at www*.osce.org, accessed 10 October 2015.

Germany, Members of the Bundestag Act 1977:

Section 44a Exercise of the mandate

(1) The exercise of the mandate of a Member of the Bundestag shall be central to his or her activity. Without prejudice to this obligation, activities of a professional or other nature alongside the exercise of the mandate are permissible in principle.

(2) For the exercise of his or her mandate, a Member of the Bundestag may not accept any allowance or other pecuniary benefit besides those for which the law provides. In particular, it is inadmissible to accept money or allowances with monetary value which are only granted in the expectation that the interests of the payer will be represented and asserted in the Bundestag. It is also inadmissible for a Member of the Bundestag to accept money or allowances with monetary value if he or she does not render an appropriate service in return. The foregoing provisions shall be without prejudice to the receipt of donations.

(3) Allowances or pecuniary benefits which are inadmissible under paragraph 2 above or their monetary equivalent shall be payable to the federal budget. The President shall assert this entitlement by means of an administrative act, provided that a period of three years has not elapsed since the receipt of the allowance or pecuniary benefit. Loss of membership of the Bundestag shall not affect this entitlement. Details shall be regulated in the Code of Conduct pursuant to section 44b of this Act.

(4) Activities predating the acceptance of the mandate and activities concurrent with the exercise of the mandate which may indicate combinations of interests with implications for the exercise of the said mandate shall be disclosed and published in accordance with the Code of Conduct (section 44b). If disclosable activities or income are not reported, the Presidium may impose an administrative penalty of up to half of the annual Member's remuneration. The President shall affirm the penalty by means of an administrative act. The foregoing provisions shall be without prejudice to section 31 of the present Act. Details shall be regulated in the Code of Conduct pursuant to section 44b of this Act.

(5) In the case of a non-minor breach of order or failure to respect the dignity of the Bundestag during its sittings, the President may impose a fine of 1,000 euros on a Member of the Bundestag. Any repetition shall result in an increase in the fine to 2,000 euros. In the case of a serious breach of order or failure to respect the dignity of the Bundestag, a Member may be ordered to leave the Chamber for the remainder of the sitting and suspended from taking part in sittings of the Bundestag and meetings of its bodies for up to 30 sitting days. Details shall be regulated in the Rules of Procedure of the Bundestag.

[Paragraph 2 would normally constitute bribery of parliamentarians. However, Germany did not have a bribery offence in line with Council of Europe and UNCAC provisions. Therefore, paragraph 2 was an attempt to provide some indirect protection against bribes.]

Section 44b Code of Conduct

The Bundestag shall lay down its own Code of Conduct, which must include provisions relating to

1. cases in which there is an obligation to disclose activities pursued prior to membership of the Bundestag and activities pursued concurrently with the exercise of the mandate;

2. cases where there is a duty to disclose the type and amount of income where a specified minimum amount is exceeded;

3. the duty to keep separate account and disclose donations where specified minimum amounts are exceeded;

4. the publication of particulars in the Official Handbook and on the Internet;

5. procedure, as well as the rights and duties of the Presidium and President, in respect of decisions under section 44a(3) and (4) of this Act.

Norway:

"Representatives are considered disqualified to participate in the consideration of matters relating to their own powers after a parliamentary election and when dealing with questions about the constitutional responsibility of their own person. In these rare cases, it is the representative's own relationship which is subject to parliamentary processing. It may happen that a representative or one of the representative's relations has a particularly strong personal interest in a matter to be considered in parliament. In such cases, the representative should consider refraining from participation in proceedings. The representative can also consult with the presidency about how he/she should act.

If the representative wishes to suspend him/herself, it may be appropriate to apply for a leave pursuant to the Parliament's Rules of Procedure § 5, so that a deputy may be called."[179] The solution available to Norwegian MPs uses the feature of the Norwegian parliament where members have elected deputies who may replace them in certain situations. Alternatively the member may suspend him\herself and opposing parties may suspend one of their own members to maintain the balance of votes under an arrangement used in the Norwegian parliament.

United States, Code of Laws ("United States Code"):

18 U.S.C. § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

(e) RESTRICTIONS ON MEMBERS OF CONGRESS AND OFFICERS AND EMPLOYEES OF THE LEGISLATIVE BRANCH.—

(1) MEMBERS OF CONGRESS AND ELECTED OFFICERS.—

(A) Senators.—Any person who is a Senator and who, within 2 years after that person leaves office, knowingly makes, with the intent to influence, any communication to or appearance before any Member, officer, or employee of either House of Congress or any employee of any other legislative office of the Congress, on behalf of any other person (except the United States) in connection with any matter on which such former Senator seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(B) Members and officers of the House of Representatives.—

(i) Any person who is a Member of the House of Representatives or an elected officer of the House of Representatives and who, within 1 year after that person leaves office, knowingly makes, with the intent to influence, any communication to or

[179] *Norwegian Parliament website on ethics*, available at www.stortinget.no, accessed 10 October 2015.

appearance before any of the persons described in clause (ii) or (iii), on behalf of any other person (except the United States) in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall be punished as provided in section 216 of this title.

(ii) The persons referred to in clause (i) with respect to appearances or communications by a former Member of the House of Representatives are any Member, officer, or employee of either House of Congress and any employee of any other legislative office of the Congress.

(iii) The persons referred to in clause (i) with respect to appearances or communications by a former elected officer are any Member, officer, or employee of the House of Representatives.

Article 20

International standards

Council of Europe Recommendation CM/Rec(2010)12, No. 12:

> "Judges may engage in activities outside their official functions. To avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence."

Bangalore Principles of Judicial Conduct (2002):[180]

> "2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where
>
> 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or
>
> 2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:
>
> Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

European Charter on the Statute for Judges (1998):[181]

> "Judges freely carry out activities outside their judicial mandate including those which are the embodiment of their rights as citizens. This freedom may not be limited except in so far as such outside activities are incompatible with confidence in, or the impartiality or the independence of a judge, or his or her required availability to deal attentively and within a reasonable period with the matters put before him or her. The exercise of an outside activity, other than literary or artistic, giving rise to remuneration, must be the object of a prior authorization on conditions laid down by the statute."

[180] *Bangalore Principles*, available at www.judicialintegritygroup.org, accessed 10 October 2015.

[181] *European Charter*, available at www.coe.int, accessed 10 October 2015.

Foreign examples

Ad-hoc conflict of interest:

German Civil Procedure Code:

Title 4 Disqualification and recusal of court personnel

Section 41 Disqualification from the exercise of judicial office

A judge is disqualified by law from exercising judicial office:

1. In all matters in which he himself is a party, or in which his relationship to one of the parties in the proceedings is that of a co-obligee, co-obligor, or a party liable to recourse;

2. In all matters concerning his spouse or former spouse;

2a. In all matters concerning his partner or former partner under a civil union;

3. In all matters concerning persons who are or were directly related to him, either by blood or by marriage, or who are or were related as third-degree relatives in the collateral line, or who are or were second-degree relatives by marriage in the collateral line;

4. In all matters in which he was appointed as attorney of record or as a person providing assistance to a party, or in which he is or was authorised to make an appearance as a legal representative of a party;

5. In all matters in which he is examined as a witness or expert;

6. In all matters in which he assisted, at a prior level of jurisdiction or in arbitration proceedings, in entering the contested decision, unless this concerns activities of a judge correspondingly delegated or requested.

7. In all matters concerning court procedures of excessive duration, if he assisted in the impugned proceedings at the level of jurisdiction, the duration of which is the basis for the claim to compensation.

8. In all matters in which he assisted in mediation proceedings or in any other alternative conflict resolution procedures.

Section 42 Recusal of a judge from a case

(1) A judge may be recused from a case both in those cases in which he is disqualified by law from exercising a judicial office, and in those cases in which there is a fear of bias.

(2) A judge will be recused for fear of bias if sound reasons justify a lack of confidence in his impartiality.

(3) In all cases, both parties shall have the right to recuse a judge.

Section 43 Loss of the right to recuse a judge

A party may no longer recuse a judge for fear of bias if that party has made an appearance before said judge at a hearing, or filed petitions, without asserting the reasons for recusal of which it is aware.

Section 44 Motion to recuse a judge

(1) The motion to recuse a judge is to be filed with the court of which the judge concerned is a member; it may be recorded with the registry for the files of the court.

(2) The grounds for such recusal are to be demonstrated to the satisfaction of the court; the party may not be permitted to make a statutory declaration in lieu of an oath. By way of demonstrating the grounds for recusal, the testimony of the judge being recused may be referred to.

(3) The judge regarding whom a motion for recusal has been filed shall make his statements regarding the grounds therefor in his judicial capacity.

(4) If a judge is recused for fear of bias before whom a party has made an appearance at a hearing, or with whom a party has filed petitions, it shall be demonstrated to the satisfaction of the court that the grounds for filing a motion for recusal arose only at a later date, or became known to the party at a later date.

Section 45 Decision on a motion to recuse a judge

(1) That court of which the judge is a member shall rule on a motion to recuse him, without that judge being involved in the decision.

(2) If a judge at a local court (Amtsgericht, AG) is to be recused, a different judge of the local court shall rule on the motion. No decision need be handed down where the judge regarding whom a motion for recusal has been filed believes this motion to be justified.

(3) Should the court competent to take the decision become unable to enter a judgment as a result of its member having been recused, the court of the next higher level of jurisdiction shall rule on the matter.

Section 46 Decision and appellate remedies

(1) The decision on a motion to recuse a judge shall be issued by a court order.

(2) No appellate remedies may be lodged against the court order declaring the motion to be justified, while a complaint subject to a time limit may be filed against any order declaring the motion to be without justification.

Section 47 Official acts that cannot be delayed

(1) Prior to the motion to recuse him having been dealt with, a judge regarding whom such a motion for recusal has been filed may take only such measures that cannot be delayed.

(2) Should a motion for recusal be filed regarding a judge during a hearing, and should the decision regarding the recusal require the hearing to be postponed, the hearing may be continued with the involvement of the judge regarding whom a motion for recusal has been filed. If the motion for recusal is declared justified, the part of the hearing that took place after the motion was filed is to be repeated.

Section 48 Self-recusal; recusal ex officio

> The court competent for conclusively dealing with the motion to recuse a judge is to decide on the matter also in those cases in which such a motion is not appropriate, but in which the judge notifies the court that a relationship exists that might justify his recusal, or in which other reasons give rise to concerns that the judge might be disqualified by law.
>
> Section 49 Records clerks
>
> The stipulations of the present Title shall apply mutatis mutandis also to the records clerk of the court registry; the decision shall be handed down by the court at which that records clerk is employed.

As for **incompatibilities**, there are different models internationally, for example:

- **Germany**: In accordance with section 4(1) German Judiciary Act, judges may not take on judicial and legislative or executive duties simultaneously. However, in practice a number of judges are elected to bodies of local or regional self-government such as municipal councils. The Council of Europe's "Group of States against Corruption" (GRECO) recently pointed out that this practice "raises questions with respect to the separation of powers, the risk of conflicts of interest and the necessary independence and impartiality of the judiciary".[182]
- In **Spain**, judges are subject to a very strict regime of incompatibilities, much stricter than any other public servant. Judges cannot hold any paid jobs or professions (except teaching and legal research, literary, scientific, artistic and technical papers), nor any position of popular election or political appointment or within the public administration (Article 389, Organic Law 6/1985 of the Judiciary).
- **Sweden**: judges "may not appear as attorneys or public defence counsels, unless the Government (or the authority it designates) grants permission. Furthermore, judges are not allowed to be chief guardians or trustees. [...] [I]n practice, some judges engage in accessory activities such as writing, lecturing at university or during social gatherings for judges and lawyers, undertaking assignments as arbitrators, serving as members of Government commissions, etc. According to the established practice of the Judges Proposals Board, judges must not operate in profit-making companies or enterprises, except for family run businesses."[183]
- **Switzerland**: According to Section 19 of the Regulation for the Swiss Federal Court

  > "1) The following extra activities may be authorized:
  >
  > a. participation in arbitration, judicial bodies and expert commissions and mandates for mediation and expert opinions, as far as this is in the public interest.
  >
  > b. selective lectureships, editing of commentaries, publication series and law journals;
  >
  > c. Participation in organs of associations, foundations or other not-for-profit organizations.
  >
  > (2) No permit requires who writes books or articles, gives lectures or wants to participate in congresses and symposia."[184]

[182] GRECO, Fourth Evaluation Round, *Evaluation Report on Germany*, January 2015, at no. 152, available at www.coe.int, accessed 10 October 2015.

[183] GRECO, Fourth Evaluation Round, *Evaluation Report on Sweden*, November 2013, at no. 115, available at www.coe.int, accessed 10 October 2015.

[184] Swiss *regulation* of 20 November 2006 (as of 17 March 2014), available at www.admin.ch, accessed 10 October 2015 (German; translation by author).

The overly liberal application of the above provision has been subject to criticism in the Swiss national press.[185]

Article 21

International standards

Consultative Council of European Prosecutors (CCPE), Opinion No. 9 (2014) on European norms and principles concerning prosecutors:[186]

> 3.4.2 Incompatibilities and conflicts of interest
>
> 77. Prosecutors should at all times adhere to the highest ethical and professional standards. In particular, they should not act in cases where their personal interests or their relations with the persons interested in the case could hamper their full impartiality. Prosecutors should not engage in any activity or transaction or acquire any position or function, whether paid or unpaid, that is incompatible with or detracts from the proper performance of his/her duties.
>
> 78. States should guarantee that a person cannot at the same time perform duties as a prosecutor and as a court judge. However, States may take measures in order to make it possible for the same person to perform successively the functions of prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.
>
> 79. Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions.
>
> 80. Prosecutors should, at all times, conduct themselves in a professional manner and strive to be and be seen as independent and impartial.
>
> 81. Prosecutors should abstain from political activities incompatible with the principle of impartiality.
>
> 82. Prosecutors should exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial and prosecutorial independence or impartiality. While they are free to participate in public debate on matters pertaining to legal subjects, the judiciary or the administration of justice, they must not comment on pending cases and must avoid expressing views which may undermine the standing and integrity of the court.
>
> 83. In accordance with the law, for an appropriate period of time, the prosecutor should not act for any person or body in respect of any matter on which he/she acted for, or advised, the public service and which would result in a particular benefit to that person or body.

[185] Tagesanzeiger (15 January 2014), *The additional source of income of the highest judges - Constitution and law prohibit secondary jobs for federal judges. Their own rules allow them, though - thanks to a legal finesse.* [translation from German by author], available at www.tagesanzeiger.ch, accessed 10 October 2015.

[186] CCCPE, *Opinion No. 9(2014)*, available at https://wcd.coe.int, accessed 10 October 2015.

> 84. A prosecutor, like a judge, may not act in a matter where he/she has a personal interest, and may be subject to certain restrictions aiming to safeguard his/her impartiality and integrity.

European Guidelines on Ethics and Conduct for public prosecutors (2005):[187]

> "Prosecutors should at all times [...] not allow the public prosecutor's personal or financial interests or the public prosecutor's the family, social or other relationships improperly to influence the public prosecutor's conduct as a public prosecutor. In particular, they should not act as public prosecutors in cases in which they, their family or business associates have a personal, private or financial interest or association." (Principle II o)

Outside Europe, the lack of international guidance on conflict of interest of prosecutors is noteworthy; the following international standards do not contain any recommendation on conflict of interest:

- The UN Guidelines on the Role of Prosecutors (1990)[188]

- International Association of Prosecutors, Standards of professional responsibility and statement of the essential duties and rights of prosecutors (1999); as the UNODC noted in 2011: "However, it was noted that the Standards did not address the question of incompatibilities or conflicts of interest, which were likely to have adverse impact on the independence and impartiality of the public prosecutor."[189]

  However, the UNODC Guide on the Status and Role of Prosecutors noted in this context Principle 3 (b): Prosecutors shall "remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest". In this context, the Guide gives the following explanation: "The independence that is so important to prosecutors in effectively performing their duties places some limits on activities that may compromise or give the appearance of compromising the independence of their office: activities such as outside employment that could lead to a conflict of interest, running for political office while still employed as a prosecutor, consorting with known criminals or frequenting venues where criminals may be found or engaging in activities that may bring the office of the prosecutor into disrepute are considerations that prosecution services may need to address with their staff. [...] In addition, prosecutors should not allow their personal or financial interests or family, social or other relationships to improperly influence their conduct. A prosecutor should not play any part in a case in which the prosecutor or the prosecutor's family or business associates have a personal, private or financial interest or association. It is unacceptable behaviour for a prosecutor to accept any gifts, prizes, benefits, inducements or hospitality from third parties or carry out any task that may be seen to compromise the prosecutor's integrity, fairness and impartiality, as is using the official capacity of the prosecutor's office to obtain a personal advantage. In some States prosecutors are required to declare their assets and all sources of income to their employer as a method of preventing corruption. This can be a valuable safeguard against corruption as well as tending to draw the individual prosecutor's attention to any potential conflict of interest. Management should ensure that procedures are in place to guide prosecutors who seek advice concerning possible conflicts of interest."

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[187] *European Guidelines*, adopted by the Conference of Prosecutors General in Europe on 31 May 2005, available at www.coe.int, accessed 10 October 2015.

[188] *UN Guidelines*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at www.ohchr.org, accessed 10 October 2015.

[189] UNODC (2011), *Addendum to the Standards of Professional Responsibilities and Statement of the Essential Duties and Rights of Prosecutors: Compilation of comments received from Member States*, page 3, available at www.unodc.org, accessed 10 October 2015.

Foreign examples

Ireland, Code of Ethics for Prosecutors:[190]

> Integrity – 1.7 Prosecutors shall:
>
> [...]
>
> (d) avoid impropriety and the appearance of impropriety and avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality;
>
> (e) not, through their behaviour and conduct, compromise the actual, or the reasonably perceived, integrity, fairness or independence of the Office of the Director of Public Prosecutions and in particular must not accept any gift, prize, loan, favour, inducement, hospitality or other benefit in relation to anything done or to be done or omitted to be done in connection with the performance of their duties or which may be seen to compromise their integrity, fairness or independence. A prosecutor may, subject to law and to any legal requirements of public disclosure, receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit could not reasonably be perceived as intended to influence the prosecutor in the performance of his or her duties or otherwise give rise to an appearance of partiality;
>
> [...]
>
> (g) not allow the prosecutor's family, social or other relationships improperly to influence the prosecutor's conduct as a prosecutor;
>
> (h) not use or lend the prestige of their position as prosecutors to advance their private interests or those of a member of their family or of anyone else, nor shall prosecutors convey or permit others to convey the impression that anyone is in a special position improperly to influence them in the performance of their duties;
>
> (i) not knowingly permit any person subject to the prosecutor's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions;
>
> (j) not use or disclose confidential information acquired in their capacity as a prosecutor for any purpose unconnected with the performance of their duty or the needs of justice;
>
> [...]
>
> (n) disqualify themselves from participating in any prosecution in which they are unable to act impartially or in which it may appear to a reasonable observer that such is the case. Such proceedings include, but are not limited to, instances where:
>
> > i) the prosecutor has actual bias or prejudice concerning an accused, complainant or witness;
> >
> > ii) the prosecutor previously served as a lawyer for another party, or was a material witness, in the prosecution;
> >
> > iii) the prosecutor, or a member of the prosecutor's family, has an interest in the outcome of a prosecution;
> >
> > iv) a person who is connected with the prosecutor in the sense of section 2(2) of the Ethics in Public Office Act, 1995 has an interest in the outcome of the prosecution of which the prosecutor has actual knowledge;

[190] Ireland, *Code of Ethics for Prosecutors*, available at www.dppireland.lie, accessed 10 October 2015.

(o) bring to the attention of the Director any circumstances which might reasonably lead a member of the public or party having an interest in a case to perceive any conflict of interest or lack of impartiality on the part of the prosecutor.

During its Fourth Round Evaluation, GRECO noted "that the prosecutors in Ireland are guided by detailed legislation and codes of conduct which apply throughout the civil service. In addition, they are guided by complementary guidelines specifically targeting their functions in the prosecution service. The GET found this framework to be exemplarily clear and precise".[191]

Latvian Criminal Procedure Code:[192]

Section 55. Submission of Recusation

(1) A person who performs defence, a victim, or a person authorised to perform proceedings [this includes prosecutors], if such person has certain conditions that prohibit an official from performance of the concrete criminal proceedings, shall submit the recusation of such person to the persons referred to in Section 54, Paragraph one of this Law who have the right to decide on the recusation. If a recusation for a maintainer of a State prosecution is submitted during the sitting of a court, it shall be decided by the composition of the court.

Norway, Criminal Procedure Act:[193]

§ 60. An official serving the prosecuting authority or acting on its behalf is disqualified when he has such a relationship to the case as is specified in section 106, items 1 to 5, of the Courts of Justice Act. He is also disqualified when other special circumstances exist that are likely to weaken confidence in his impartiality. This is especially the case when the issue of disqualification is raised by one of the parties.

If an official is disqualified, his subordinates in the same office are also deemed to be disqualified, unless his immediate superior decides otherwise.

§ 61. The official himself shall decide whether he is disqualified. When one of the parties so requests and it can be done without considerable loss of time, or the official himself otherwise has reasons to do so, he shall as soon as possible submit the question to his immediate superior for decision. If it is alleged that the Director of Public Prosecutions is disqualified, the Ministry may decide that he is not disqualified.

An official who deems himself to be disqualified shall as soon as possible notify his immediate superior thereof.

When an official is disqualified, his immediate superior shall decide how the case shall be proceeded with.

Even though an official is disqualified, he may take such steps as cannot be postponed without detriment and cannot be left to another.

Article 22

[191] GRECO, Fourth Evaluation Round, *Evaluation Report on Ireland*, 10 October 2014, at no. 152, available at www.coe.int, accessed 10 October 2015.

[192] Latvian *Criminal Procedure Code*, available at www.knab.gov.lv, accessed 10 October 2015.

[193] Norway, *Criminal Procedure Act*, available at www.coe.int, accessed 10 October 2015.

International standards

There are no international standards on conflicts of interests of independent public officials in general. However, there are some standards for various categories of such public officials, such as for example the International Ombudsman Association Standards of Practice:[194]

> "2.4 The Ombudsman serves in no additional role within the organization which would compromise the Ombudsman' neutrality. The Ombudsman should not be aligned with any formal or informal associations within the organization in a way that might create actual or perceived conflicts of interest for the Ombudsman. The Ombudsman should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue."

Foreign/European example

Code of Conduct for the Members of the Court (European Court of Auditors), Article 2 paragraph 1:[195]

> "Members shall avoid any situation liable to give rise to a conflict of interest. They shall not deal with matters in which they have any personal interest, in particular a family or financial interest, which could impair their impartiality. If Members are confronted with a situation that may give rise to a conflict of interest, they shall inform the President of the Court. The matter shall be submitted to the Court, which shall take any measure it considers appropriate."

Article 23

International standards

European Code of Conduct on political integrity of local and regional elected officials (1999):[196]

> Article 10 – Conflict of interests
>
> When elected representatives have a direct or indirect personal interest in matters being examined by local or regional councils or by executive bodies, they shall undertake to make those interests known before deliberations are held and a vote is taken.
>
> Elected representatives shall abstain from any deliberation or vote on a question in which they have a direct or indirect personal interest.
>
> Article 15 – Ban on securing certain appointments
>
> In performing their functions, elected representatives shall not take any measure such as to grant themselves a future personal professional advantage once they have relinquished their functions:
>
> - in public or private bodies over which they exercised supervision while performing those functions;
> - in public or private bodies with which they established a contractual relationship while performing those functions;

[194] *Ombudsman Standards*, available at www.ombudsassociation.org, accessed 10 October 2015.

[195] *European Guidelines*, available at www.eca.europa.eu, accessed 10 October 2015.

[196] *European Code of Conduct on political integrity of local and regional elected officials*, available at https://wcd.coe.int, accessed 10 October 2015.

- in public or private bodies which were set up during their term of office and by virtue of the powers entrusted to them.

Foreign examples

Australian Queensland Local Government Act 2009, section 173:

> Councillor's conflict of interest at a meeting
>
> (1) This section applies if—
>
> (a) a matter is to be discussed at a meeting of a local government, or any of its committees; and
>
> (b) a councillor has a conflict of interest, or could reasonably be taken to have a conflict of interest, in the matter.
>
> (2) The councillor must inform the meeting about the councillor's interest in the matter.
>
> Maximum penalty—100 penalty units.
>
> (3) A conflict of interest is a conflict between—
>
> (a) a councillor's personal interests (including personal interests arising from the councillor's relationships or club memberships, for example); and
>
> (b) the public interest; that might lead to a decision that is contrary to the public interest.
>
> (4) If the other persons who are entitled to vote at the meeting are informed about a councillor's interest in a matter, by the councillor or someone else, the other persons must--
>
> (a) decide whether the councillor has a conflict of interest, or could reasonably be taken to have a conflict of interest, in the matter; and
>
> (b) if the other persons decide that is the case--direct the councillor to leave the meeting room (including any area set aside for the public), and stay out of the meeting room while the matter is being discussed and voted on.

New Zealand Local Authorities (Members' Interests) Act 1968, section 3 (3):[197]

> "no person shall be disqualified under this section by virtue of his being concerned or interested in any contract made in any special case with the prior approval of the Auditor-General on the application of the local authority. In any such special case the Auditor-General may authorise the payment and receipt of such amount as it thinks fit [...]."

[197] New Zealand, *Local Authorities (Members' Interests) Act* 1968, Section 3 (1): "[N]o person shall be capable of being elected as or appointed to be or of being a member of a local authority or of any committee of a local authority, if the total of all payments made or to be made by or on behalf of the local authority in respect of all contracts made by it in which that person is concerned or interested exceeds $25,000 in any financial year."; available at www.legislation.govt.nz, accessed 10 October 2015.

Local Government Act of Sweden (1991):[198]

Disqualification

Section 24 : An elected representative or an employee disqualified in a matter coming before a committee may not take part in or attend the transaction of the matter. He may, however, take measures which no other person can take without inconvenient delay.

A person aware of a circumstance presumably entailing his disqualification shall of his own volition make this known.

If a question of disqualification has arisen against any person and no other person has entered into his stead, the committee shall decide the question of disqualification without delay. The disqualified person may not take part in the adjudication of the disqualification question unless the committee is not quorate without him and no other person can be summoned without inconvenient delay.

A decision in a matter of disqualification may be appealed against only in connection with appeal against the decision whereby the committee resolves the matter.

Section 25 : An elected representative or an employee of the municipality or county council is disqualified if

1. the matter concerns him personally or his spouse, cohabitant, parent, child or sibling or some other person with whom he is closely connected, or if the outcome of the matter can be expected to entail signal benefit or detriment to him personally or to some person with whom he is closely connected,
2. he or any person with whom he is closely connected is proxy for the person whom the matter concerns or for some other person who can expect signal benefit or detriment from the outcome of the matter,
3. the matter concerns the management of any local government activity with which he himself is associated,
4. he has pleaded as a legal representative or, in return for payment, represented a person in the matter, or
5. there is any other special circumstance calculated to impair confidence in his impartiality in the matter.

Section 26 : Disqualification is disregarded when the question of impartiality is manifestly of no importance.

Section 27 : If a matter coming before a committee concerns a limited company in which the municipality or county council owns at least half the shares or a foundation in which the municipality or county council appoints at least half the members of the governing body, disqualification under Section 25 (2) or (5) shall not be deemed to exist solely on account of the person handling the matter being a proxy for the company or foundation or associated with it in some other way. The aforesaid shall not apply when a committee is handling matters relating to the exercise of official authority in relation to individual persons.

Nor shall disqualification under Section 25 (5) be deemed to exist solely on account of the person handling a matter in a committee having previously taken part in the handling of the matter by another committee.

[198] Sweden, *Local Government Act*, Chapter 5 Section 20, available at www.government.se, accessed 10 October 2015.

Article 24

International standards

There are international standards for many professions of this world containing also guidance on conflict of interest. Listing them all would go beyond the limits of this toolkit.

Foreign examples

The following two examples are indicative of the wide variety of regulations:

United States, Code of Laws ("United States Code"):

> 5 U.S. Code § 7323 - Political activity authorized; prohibitions:
>
> (b)(1) An employee of the Federal Election Commission (except one appointed by the President, by and with the advice and consent of the Senate), may not request or receive from, or give to, an employee, a Member of Congress, or an officer of a uniformed service a political contribution.
> (2) (A) No employee described under subparagraph (B) (except one appointed by the President, by and with the advice and consent of the Senate), may take an active part in political management or political campaigns.
> (B) The provisions of subparagraph (A) shall apply to—
> (i) an employee of—
> (I) the Federal Election Commission or the Election Assistance Commission;
> (II) the Federal Bureau of Investigation;
> (III) the Secret Service;
> (IV) the Central Intelligence Agency; [...]

United States, Temple University School of Medicine Policy:[199]

> A. Faculty may not give compensated presentations or accept honorarium, food, lodging or transportation for participation in non-CME events directed at physicians or other health care professionals, such as restaurant talks. It is acknowledged that consultation for industry may require presentations.
>
> B. Faculty may not accept compensation for membership on a speakers list (speakers' bureau), nor accept any compensation from industry for attending any industry-sponsored event at which he/she is not a speaker. This includes industry support to defray costs of attending such meetings, e.g., travel, hotel, and meals.

Article 25

International standards

Aside from the above mentioned criminal offences, there are no international standards on sanctioning conflict of interest violations. However, one should note the following provisions from Article 28 of the Council of Europe Model code of conduct for public officials:

> 2. Subject to Article 2, paragraph 2, the provisions of this Code form part of the terms of employment of the public official. Breach of them may result in disciplinary action.

[199] Temple University School of Medicine, *Financial Conflicts of Interest Related to Research (Policy Statement I)*, available at www.temple.edu, accessed 10 October 2015.

3. The public official who negotiates terms of employment should include in them a provision to the effect that this Code is to be observed and forms part of such terms.

4. The public official who supervises or manages other public officials has the responsibility to see that they observe this Code and to take or propose appropriate disciplinary action for breaches of it.

Foreign examples

United States, Code of Laws ("United States Code"):

18 U.S.C. § 216. Penalties and injunctions

(a) The punishment for an offense under section 203, 204, 205, 207, 208, or 209 of this title is the following:

(1) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in this title, or both.

(2) Whoever willfully engages in the conduct constituting the offense shall be imprisoned for not more than five years or fined in the amount set forth in this title, or both.

(b) The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title and, upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,0004 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is greater. The imposition of a civil penalty under this paragraph does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

18 U.S.C. § 203. Compensation to Members of Congress, officers, and others in matters affecting the Government

18 U.S.C. § 204. Practice in United States Court of Federal Claims or the United States Court of Appeals for the Federal Circuit by Members of Congress

18 U.S.C. § 205. Activities of officers and employees in claims against and other matters affecting the Government

18 U.S.C. § 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches

18 U.S.C. § 208. Acts affecting a personal financial interest

18 U.S.C. § 209. Salary of Government officials and employees payable only by United States

18 U.S.C. § 798. Disclosure of classified information

(d)(1) Any person convicted of a violation of this section shall forfeit to the United States irrespective of any provision of State law—

(A) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and

(B) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.

Slovenia, Integrity and Prevention of Corruption Act:[200]

Article 78 (Offences by legal persons)

A fine of between EUR 400 and EUR 100,000 shall be imposed on a holder of public authority or other legal person governed by public or private law which commits a minor offence referred to in paragraphs [...] of this Act, with the exception of the Republic of Slovenia and local communities.

Article 26

International standards

Council of Europe Model code of conduct for public officials:[201]

Article 28,

2. Subject to Article 2, paragraph 2, the provisions of this Code form part of the terms of employment of the public official. Breach of them may result in disciplinary action.

4. The public official who supervises or manages other public officials has the responsibility to see that they observe this Code and to take or propose appropriate disciplinary action for breaches of it.

Council of Europe Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption:

10. to ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; [...]

Foreign examples

Albania, Law No. 9367 of 2005 “On the Prevention of Conflicts of Interest in the Exercise of Public Functions:

Article 45 Disciplinary Measures

1. Every violation of the obligations defined in this law by the officials constitutes a disciplinary violation, regardless of criminal or administrative responsibility. The disciplinary measures are applied in conformity with the laws that regulate labour relations and/or the status of the officials. The High Inspectorate is informed, case by case, on the disciplinary measures taken by the respective institutions.

[200] Slovenia, *Integrity and Prevention of Corruption Act*, available at www.kpk-rs.si, accessed 10 October 2015.

[201] The wording is now slightly simpler, as the following track changes show: “Conflict of interest ~~arises from~~ is a situation [...]”.

Article 27

International standards

Council of Europe Civil Law Convention on Corruption:

> Article 3 – Compensation for damage
>
> 1 Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.
>
> 2 Such compensation may cover material damage, loss of profits and non-pecuniary loss.

Foreign examples

Montenegro, Law on Prevention of Corruption 2014:

> Article 43 - Compensation of Damage
>
> If a violation of this Law caused damage to a legal or natural person, this person shall be entitled to compensation of the damage by filing a lawsuit in civil proceedings before the competent court, through the application of the general rule of compensation of damages.

United States, Code of Laws ("United States Code"):

> 18 U.S.C. § 216. Penalties and injunctions
>
> (c) If the Attorney General has reason to believe that a person is engaging in conduct constituting an offense under section 203, 204, 205, 207, 208, or 209 of this title, the Attorney General may petition an appropriate United States district court for an order prohibiting that person from engaging in such conduct. The court may issue an order prohibiting that person from engaging in such conduct if the court finds that the conduct constitutes such an offense. The filing of a petition under this section does not preclude any other remedy which is available by law to the United States or any other person.

Regulations on procurement blacklists or debarment registers are more complex than can be presented in this toolkit. For country examples, please see the explanations.

Article 28

International standards

Council of Europe Civil Law Convention on Corruption:

> Article 8 – Validity of contracts
>
> 1 Each Party shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void.
>
> 2 Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to

apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.

Foreign examples

United States, Michigan, Law on Conflict of Interest:

> "Sec. 5. (1) This act, following the evident intent of section 10 of article 4 of the constitution, is aimed to prevent legislators and state officers from engaging in certain activities under circumstances creating a substantial conflict of interest and is not intended to penalise innocent persons. Therefore, no contract shall be absolutely void by reason of this act or the constitutional provision which it implements. Contracts involving a prohibited conflict of interest under this act and said constitutional provision shall be voidable only by decree of a court of proper jurisdiction in an action by the state or a political subdivision which is a party thereto, as to any person, firm, corporation or trust that entered into said contract or took any assignment thereof, with actual knowledge of such prohibited conflict."[202]

United States, Maine, Title 5: Administrative procedures and services, Part 1: State departments, Chapter 1: State officers and employees generally, Subchapter 1: General provisions, §18-A. Conflict of interest; contract with the State:

> "3. Violative contract void. Any contract made in violation of this section is void.
>
> 4. Exemptions. This section does not apply:
>
> A. To purchases by the Governor under authority of Title 1, section 814; [real estate[203]]
>
> B. To contracts made with a corporation that has issued shares to the public for the general benefit of that corporation; or
>
> C. If an exemption is approved by the Director of the Bureau of General Services within the Department of Administrative and Financial Services or the director's designee based upon one of the following and if the director gives notice of the granting of this exemption to all parties bidding on the contract in question with a statement of the reason for the exemption and if an opportunity is provided for any party to appeal the granting of the exemption:
>
> (1) When the private entity or party that proposes to contract with the State and that employs the executive employee, based upon all relevant facts, is the only reasonably available source to provide the service or product to the State, as determined by the director; or
>
> (2) When the director determines that the amount of compensation to be paid to the private entity or party providing the service or product to the State is de minimis."[204]

[202] Michigan, *Conflict of Interest Act* 318 of 1968, available at www.legislature.mi.gov, accessed 10 October 2015.

[203] Maine Statutes *section 814*, available at www.mainelegislature.org, accessed 10 October 2015.

[204] Maine Statutes *section 18-A*, available at www.mainelegislature.org, accessed 10 October 2015.

Article 29

International standards

United Nations Convention against Corruption (UNCAC):

> Article 30
>
> 7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:
>
> (a) Holding public office; and
>
> (b) Holding office in an enterprise owned in whole or in part by the State.
>
> 8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

Foreign examples

Lithuania, Law on the Adjustment of Public and Private Interests in the Civil Service 1997:

> Article 15. Other restrictions and prohibitions
>
> Persons in the civil service who are recognised in accordance with the procedure laid down by legal acts as violators of the requirements of this Law may not be given incentives, promoted for a year following the day the violation has come to light, and in case of expiration of official duties on any grounds may not be accepted to the civil service for three years following the day the violation has come to light.

United Kingdom, Localism Act 2011:

> Section 34 (4)
>
> A court dealing with a person for an offence under this section [failure of disclosure of pecuniary interests on taking or in office] may (in addition to any other power exercisable in the person's case) by order disqualify the person, for a period not exceeding five years, for being or becoming (by election or otherwise) a member or co-opted member of the relevant authority in question or any other relevant authority.

Serbia, Law on the Anti-corruption Agency:

> Measures. Article 51.
>
> Measures which may be pronounced against an official due to a violation of this Law are caution and public announcement of recommendation for dismissal.
>
> The measure of caution and the measure of public announcement of the decision on the violation of this Law may be pronounced against an official who has been directly elected by the citizens, an official whose public office has terminated or an associated person.
>
> If the person referred to in paragraphs 1 and 2 of this Article fails to comply with the measure of caution within the time period specified in the decision, the measure of

public announcement of recommendation for dismissal or public announcement of the decision on the violation of this Law shall be pronounced against him/her.

In case of pronouncing the measure of public announcement of recommendation for dismissal against the official, the Agency shall file an initiative for dismissal to the body which elected, appointed or nominated the official. The competent body shall notify the Agency of the measures it has taken in view of the pronounced measure of public announcement of recommendation for dismissal, i.e. initiative, within 60 days of pronouncing the measure.