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## **SOME CONCEPTUAL LEGAL ISSUES RELATED TO THE CONFLICT OF INTEREST**

### **Abstract**

In recent years, the conflict of interests and its forms is an especially important and current topic. Therefore, it is a subject to public debate in any contemporary and democratic society. It has aroused the interest of the public, media, politicians, businessmen and all others being part of the public and private life. It also leads to raised awareness, as well as importance of the consequences it causes as harmful social phenomenon. In the beginning, the focus was put on corruption which somewhat leads to underestimating the risks deriving from the conflict of interests. Of course, that is unjustified because the conflict of interest is the one that primarily leads to corruption which, by default, is being prosecuted and sanctioned. The conflict can be perceived as a natural phenomenon which could appear and be handled adequately by any society. The officials are obligated to serve the public interest, and very often these persons appear in many roles in the social, business and political domain. At the same time they play the role of government representatives and private persons, which

could lead to conflict of interests. The public and the citizens have a legit expectation for them to conduct in an honourable, just and impartial manner and not to get included or involved in any situation which would make them look like they are in conflict.

**Key words:** conflict of interest, sources of conflict of interest; forms and categories of conflict of interest, mechanism for prevention of conflict of interest

## INTRODUCTION

Corruption and conflict of interests are related, layered and negative social phenomena and fighting against such phenomena requires holistic approach, i.e. involvement of many social factors, which would contribute via coordinated, exact, feasible, effective and efficient activities. Corruption includes conflict of interests, even though not all cases of conflict of interest are deemed to be corruption. The conflict of interests creates a system for risk management, which are crucial challenge in the fight against and prevention of corruption.

Corruption and conflict of interests are especially important topic for scientific elaboration. All societies, without exception and with different intensity and forms, have issues with these two phenomena. What we want to emphasize in their mutual relation and the fact that there is no clear distinction between them, even though they are two different things. Globally, corruption is perceived as misuse of public function for personal benefit, while the conflict of interest is perceived as performance of public duties and authorizations which are in conflict with the personal interest i.e. its partiality to the detriment of the official position and duty.

The author Londa Esadze in her study “Guidelines for Prevention of Conflict of Interest”<sup>1</sup> says that it appears in form of “bribe, extortion, clientelism, kleptocracy, nepotism and corruptive networks” and is studied as criminological problem which entails with economic, legal, political and social consequences. The studies describe conflict of interest as “public administration, political and legal problem”.

The bond between corruption and conflict of interests is in the regard that corruption may, by itself include a conflict; however, not all cases of conflict of interests are deemed as corruption. In case when one official is in conflict of interests, it does not mean, by default, that such official is also corrupted. Therefore, it is quite justified when we perceive conflict of interests as one more comprehensive politics in the context of prevention of and fight against corruption. Conflict, by itself, is key instrument in building the integrity in the public sector, defence and promotion of the rule of law and democracy.

Integrity is a serious challenge for every official; hence its connection to the conflict of interests, which, as a condition, is regulated and standardized by means of using different mechanisms and instruments. Expectations of transparency and distinction between the private and public interest are quite justified in the contemporary societies and countries. The countries which recently became democratic and whose past is filled with corruption and abuse of power, official responsibilities and authorizations are the ones that face with such challenge.

Prevention, promotion of good rule and minimizing the risks of corruption are crucial in the fight against corruption and conflict of interests. When speaking of prevention, we refer to codes of conduct for officials, method of declaring their property status, personal interests, campaigns for education and raising the public awareness and the need of ethical conduct. On the other hand, the policy for prevention should be balanced with regards to penalties and measures for law enforcement, which should be conducted properly in order to eliminate the reasons for appearance of conflict of interests, as well as eliminate its risks

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1 Guidelines for Prevention of Conflict of Interest, Belgrade, 2013.

and effects. Unethical conduct can be different and inappropriate, and even violate national and international laws and standards by means of fraudulent activities. What is deemed unethical is hiding material information during negotiations with other persons, breaking given promises or violation of contracts concluded with clients or external partners. Unethical conduct ruins the reputation of institution, its position and role in the society and contributes to its exposure to incriminations, sanctions and appeals.

#### DEFINING THE NOTION AND TYPES OF CONFLICT OF INTEREST – SOURCES OF CONFLICT OF INTEREST

Recently, an especially popular topic for studying is the conflict of interests which directly refers to officials, especially the ones who are expected to work for the interest of the public. Such condition alarms us that they face on a daily basis with the challenge whether they could work in their personal interest by using the granted power. All of this makes us ponder and investigate about the thin line between personal and public interest. How the official behaves in their daily work, action and decision-making. Over time, such dilemmas indicate the gravity of the situation and the need of precise standardizing and putting thereof in a legal frame, and within a frame which does not entail any legal obligation, which is also needed and important when it comes to handling with such situation. The aforementioned is something that exists along with the existence of society itself, in different forms, shapes and different perception thereof. The evolution of societies entail evolution of the perception for the conditions undermining the rule of law, democracy and rule of state in terms of the awareness about them. The conflict of interests between political leaders and officials, in the way we perceive it today, exists since the time when public administration first appeared. In the past, the concept of conflict of interest was not even recognized by many societies. However, there were several societies, for example the Sasanian Empire (of the Sassanid people) in Iran, and the initial Tang dynasty in China, which required their official to work only in the interest of the state or their ruler. We cannot say for certain whether the administrative officials adhered to such principle. However, in many societies, regardless of whether we are speaking of England in the XVII century or Java Island in the XVIII century, it was naturally assumed that political leaders and officials would abuse their position for the benefit of their personal interests.<sup>2</sup>

Once the process of modern industrialization of the societies has begun, the political leaders and officials were expected to work strictly for the benefit of the interests of the country. Countries with great war ambitions, such as England in the XVIII century and Germany, when ruled by Bismarck and Hitler, were in need of efficient and relatively uncorrupted public administration in order to achieve their ambitions. The Soviet Union had the need of officials who were entirely devoted to social and economic transformation imposed by Lenin and Stalin. When the countries in Western Europe became democratized, their governments were responsible to the public, and the “sovereign” people started to insist via “ballot boxes” the politicians and officials to work in the interest of the public,

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2 ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19

despite their personal interests.<sup>3</sup>

The bonds between the private and public sector proved as bonds in many layers and shades, which resulted from the constantly predefined role of the state and the global economies. As the public and personal interest meet in ways which are constantly changing, the conflict of interests (or their perception) becomes a challenge for those who practice it and for those who create policies for it. Dealing with such challenge, in international frames, was difficult since mid-90.<sup>4</sup>

The condition of conflict of interests poses a serious problem about the integrity of all elected and appointed persons. Such problem, according to its nature, belongs to so-called anti-corruption law which is primarily based on international and regional standards and recommendations being part of the legal obligation, but also on what is known as soft law, which includes provisions for preventive measures i.e. standards or codes of ethics, guidelines and tools referring to the responsibility of officials, public sector and public interest.

In that regard, we distinguish the following sources of law<sup>5</sup>:

Inter-American Convention against Corruption (IACAC)<sup>6</sup> is one of the first international instruments in this regard. Article 3, paragraph 4 of this Convention, *inter alia*, requires from the member states to consider the relevance of measures in order to create, maintain and strengthen “systems for registration of revenues, assets and debts to persons appointed to perform public functions, particular places, as stipulated by law, and where possible (appropriate) such data to be publicly announced”.

Another instrument is the African Union Convention Preventing and Combating Corruption<sup>7</sup> which emphasizes, as referred to in Article 7, that the member states are obligated, *inter alia*, to “demand from all or particular officials to report their assets as of the moment they start to perform public function and upon the expiry of their mandate”.

The Council of Europe was the first organization that accepted both international standards from the area on which the focus was put. The first generally known standard was

3 ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19

4 Ibid.

5 American Convention against Corruption (Article 3 – Preventive Measures)

Economic Community of West African States Protocol on the Fight against Corruption (Article 5 – Preventive Measures)

African Union Convention for Preventing and Combating Corruption (Article 7 Corruption and corruption offences in the public sector)

United Nations Convention against Corruption (Chapter II: Preventive Measures)

International Code of Conduct for Officials (Article II: Conflict of interests and disqualification)

Organization for Economic Cooperation and Development (OECD): Guidelines for managing conflict of interest in the public sector – Transparency and responsibility of the public sector

Council of Europe: Model of the Code of Conduct for Officials (Article 13- Conflict of interests)

6 Adopted on the 3rd Plenary Session held on March 29, 1996. This Convention was signed by 34 countries and ratified by 33 member states in both North America and South America. For more information go to: <http://www.oas.org/juridico/english/treaties/b-58.html>

7 Adopted on July 11, 2003. This Convention was signed by 45 of 53 member states of the African Union and ratified by 31 of them. For more information go to: [http://www.au.int/en/sites/default/files/AFRICAN\\_UNION\\_CONVENTION\\_PREVENTING\\_COMBATING\\_CORRUPTION.pdf](http://www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_PREVENTING_COMBATING_CORRUPTION.pdf)

Resolution (97) 24, referring to “Twenty leading principles for fight against corruption”.<sup>8</sup> This list of guiding principles (GP) is an important indicator, especially with regards to the following guiding principles:

- GP 1: “Take effective measures for prevention of corruption and, at the same time, raise the public awareness by promoting ethical conduct”;
- GP 3: “Ensure that the persons responsible for prevention, investigations, prosecution and making court decisions related to cases of corruption, will enjoy independence and autonomy, as necessary prerequisites for the performance of their functions, that they will be exempted from any negative influence, with effective measures for gathering evidence at their disposal, as well as provided protection of the persons assisting the competent bodies in the fight against corruption, by keeping the confidentiality of investigations in the process”;
- GP 7: “Promote qualification of the persons or institutions responsible in the fight against corruption and provide the necessary means and trainings for performing their tasks”;
- GP 10: “Ensure that the rules referring to the rights and obligations of the officials consider the necessary prerequisites for fight against corruption and provide adequate and effective disciplinary measures; promote further analysis of the manner of conduct expected from the officials via adequate measures, such as codes of conduct”;
- GP 20: “Develop more extensive international cooperation in all areas of fight against corruption”.<sup>9</sup>

The second instrument of the Council of Europe is Recommendation no. 10 (2000) of the Committee of Ministers to the member states, referring to the “codes of conduct for officials”<sup>10</sup>. This instrument sets the standards for integrity and conduct which should be accepted by the officials; however, it cannot apply to elected MPs, members of the government and judges.<sup>11</sup>

The Group of States against Corruption (GRECO) should not be left out when it comes to the dedication, activities and standards set by the Council of Europe GRECO was founded in 1999 and its task is to monitor how much the member states comply with the set anti-corruption standards.<sup>12</sup> The Second Evaluation Round, apart from many other topics, considered the topic related to administration and corruption. GRECO evaluated the member states by taking into consideration: conflict of interests, inconsistencies, additional activities, gifts and whistleblower protection.<sup>13</sup> GRECO, starting as of 2012, will initiate

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8 Adopted on November 6, 1997, on the 101<sup>st</sup> Session by the Committee of Ministers of the Council of Europe.

9 Rules and experience on integrity issues, RAI and Integrity Experts Network, Feb.2012 2012, p.24-33

10 Accepted by the Committee of Ministers of the Council of Europe on the 106<sup>th</sup> Session held on May 11, 2000.

11 The Model of the Code of Conduct for Officials contains provisions referring to: Article 13 (Conflict of interests); Article 14 (Assets Declaration); Article 15 (Improper external interests); Article 16 (Political or public activity); Article 17 (Protection of the privacy of officials); Article 18 (Gifts); Article 19 (Reaction to indecent proposals) and Article 26 (Leaving the public office).

12 At the moment, GRECO consists of 49 member states (48 European countries and USA).

13 This topic was evaluated by taking into consideration the leading principles 9 (Public administration) and 10 (Officials). The recommendations referring to conflict of interests, transition of public administration into private

Fourth Evaluation Round, which will be focused on: “Prevention of corruption with regards to MPs, judges and public prosecutors”.<sup>14</sup> <sup>15</sup> The Fifth Evaluation Round started in 2016 and the questionnaire referred to prevention of corruption and promotion of integrity in the central authority (highest executive functions) and law enforcement bodies.<sup>16</sup> Interesting fact that should be written down is that the first anti-corruption instrument focused on conflict of interests was the International Code of Conduct for Officials.<sup>17</sup> The Code of conduct is direct product from the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was held in 1990 in Havana, Cuba. The Code of Conduct thoroughly reviews the conflict of interests, emphasizing the most important parameters of the concept of conflict of interests by including several measures for managing thereof.<sup>18</sup> Important anti-corruption measures such as the Assets Declaration of public function holders and officials, prevention of conflict of interests, ban on receiving gifts, services, information, etc. are regulated in a different i.e. mixed manner, within one country and in separate countries. For example, in some countries some of these questions are included in the codes of ethical conduct for officials, which consider their informal nature, with emphasis on the effect on ethical standards, as it was done in most of the OECD countries (USA, Great Britain, the Netherlands, Norway, Finland, Australia, New Zealand, Portugal, Japan). In other countries these questions are regulated with special anti-corruption laws, which include the ethical component as well, with the difference that it is additionally strengthened with misdemeanour sanctions (Estonia, Poland, Russia, Ukraine, Romania, etc.); while in third countries, where no special anti-corruption legislation exists, similar and other questions are restrictively treated (or not treated at all) within the traditional criminal and legal solutions (Bulgaria, and until recently North Macedonia as well).<sup>19</sup>

The guidelines for managing conflict of interest in the public sector<sup>20</sup> of OECD<sup>21</sup> are another valuable tool in the area of softer standards which contains clear and precise technical guidelines, as well as definitions and concepts of the conflict of interests, policies and fundamental principles for managing conflict of interests, tools and procedures for

sector and whistleblower protection are just part of the many new comprehensions. For more information access to: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports\(round2\)\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/reports(round2)_en.asp)

<sup>14</sup> See the questionnaire to the following link:

[http://www.coe.int/t/dghl/monitoring/greco/source/Greco%20\(2011\)%209E%20Questionnaire.doc](http://www.coe.int/t/dghl/monitoring/greco/source/Greco%20(2011)%209E%20Questionnaire.doc)

<sup>15</sup> Rules and experience on integrity issues, RAI and Integrity Experts Network, Feb.2012 2012, p. 24-33

<sup>16</sup> For more information access to: [www.coe.int/greco](http://www.coe.int/greco)

<sup>17</sup> Resolution 51/59 of the United Nations General Assembly of December 12, 1996.

<sup>18</sup> ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19

<sup>19</sup> Miodrag Labovic, Authority Corrupts, De Gama 2006, p. 241-242.

<sup>20</sup> These guidelines are part of the annex of the significant recommendations introduced by the OECD Council in June, 2003 for its member states. Although only two IEN countries are OECD members, whose total number is 34 countries, it is a fact that almost all IEN countries were inspired by the OECD guidelines and other related bodies and practices in the reforms aimed at developing tools for preventing conflict of interests.

See the guidelines to the following link: <http://www.oecd.org/dataoecd/13/22/2957360>.

Based on such guidelines, a wide range of tools for managing conflict of interests in the public sector was established in 2005.

<sup>21</sup> Organization for Economic Cooperation and Development (OECD) is international economic organization founded in 1961 with headquarters in Paris. Its goal is to assist the economic prosperity and financial stability of the countries. It has 34 member states.

identification, management and solution of the condition of the conflict of interests.<sup>22</sup> There is no clear European reference or *acquis communautaire* (*accumulated legislation, legal acts and court decisions which form the European Union legal system*) for prevention of conflict of interests or assets declarations. Nevertheless, the candidate countries from SEE are being periodically monitored by the European Union when it comes to the anti-corruption agenda<sup>23</sup>. As a consequence, the prevention of conflict of interests and the system of assets declaration became, *de facto*, a standard for the EU candidate countries, as well as for the last two countries which became EU member states, after their accession.<sup>24</sup>

United Nations Convention against Corruption (UNCAC)<sup>25</sup> is the newest international standard in this area.<sup>26</sup> UNCAC most important provisions related to system for asset declarations and conflict of interests are contained in Articles: 7(4)<sup>27</sup>, 8(5)<sup>28</sup>, 52(5)<sup>29</sup>, 12(2)<sup>30</sup>, 9(1)<sup>31</sup>. With regards to the templates and registration of asset declarations and statements of interests, it is important to declare all types of income and properties owned by officials, in order to analyse the financial status of the officials, the procedures for announcement of property which will prevent its concealment, reliable system for control of income and property of persons related to the officials or legal entities connected therewith. This Convention indicates that when it comes to conflict of interests member states should pay attention to several questions, such as: what positions and activities are deemed inadequate

22 Rules and experience on integrity issues, RAI and Integrity Experts Network, Feb.2012 2012, p. 24-33

23 SIGMA conducts periodical evaluations of the SEE countries at the request of the European Union, thus encompassing the integrity issues as well.

24 Rules and experience on integrity issues, RAI and Integrity Experts Network, Feb.2012 2012, p. 24-33

25 Adopted by the General Assembly with Resolution 58/4 dated December 31, 2003 and entered into force on December 14, 2005. It consists of 154 member states and is ratified by all of them but one. For more information go to: <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

26 Rules and experience on integrity issues, RAI and Integrity Experts Network, Feb.2012 2012, p. 24-33

27 "Each member state, pursuant to the fundamental principles of the legislation applicable in that state, shall strive to adopt, maintain and strengthen the systems promoting transparency and prevention of the conflict of interests"

28 "Each member state should strive, where appropriate and pursuant to the fundamental principles of the national legislation, to put measures and systems in place which would obligate the officials to provide assets declaration in order to inform, inter alia, the competent bodies about: their external activities, job engagements, investments, property and more valuable gifts or benefits which could cause conflict of interests which appear due to their performance of public functions as officials."

29 "Each member state, pursuant to the national legislation, should take into consideration the establishment of effective systems for display of the financial status of the officials and determine relevant sanctions for violation of the legal obligations. Each member state should take into consideration the measures necessary to be taken in order to ensure that the competent persons share such information with other competent persons from other member states, when they are needed as an evidence during an investigation and as a mean for determining incurred costs, as established under this Convention."

30 "The measures taken by the member states may include prevention of the conflict of interests by imposing relevant restrictions, applicable within reasonable time period, on the professional activities of former officials or on the employment of officials in the private sector upon their resignation or retirement, where such activities or job engagements are directly related with the function the officials performed or through which they controlled such job engagements during their mandate."

31 "The systems [Public Procurement] should determine where it would be appropriate particular measures to regulate the jobs referring to personal responsibility with regards to procurement, such as the statement of interests, especially in terms of public procurement, as well as to determine procedures for monitoring and necessary trainings."

for particular public function, what interests and properties should be reported and what obligations and debts, what are the prerequisites to be fulfilled with regards to the conflict of interests, what information should be published, what is the asset declaration template, who verifies the reported information, who has access thereto, to what extent the indirect interest i.e. family should be monitored, who is responsible to report, what is the method of publishing asset declarations and provisioning the obligation for declaration. With regards to the limitations of work engagements after leaving the public position, the countries should consider the measures aimed at utilization of their function for services of potential employers, looking for employment during business negotiations, abuse of protected information, representation of private interests or private groups. The countries should also consider the following: Duration of the limitation, precise determination of the level or group of officials subjected to limitations, as well as definition of the areas where representation by former officials is prohibited.<sup>32</sup>

### CONCEPTUAL DETERMINATION OF CONFLICT OF INTEREST

The Council of Europe states the following: “Conflict of interests appears in situations where an official has personal interest which could affect, or seems to affect, the incomplete and one-sided implementation of the official responsibilities of the officials. The Organization for Economic Cooperation and Development (OECD) offers similar explanation, defining the conflict of interests as: “... conflicts of interests between the official duty and personal interest of the official, when the official has personal interest which could have negative effect on the implementation of (his/her) official responsibilities and obligations.”<sup>33</sup> From the aspect of the modern Western world, the conflict of interests is a fundamental element in the abuse of power by politicians and officials. The conflict of interests appears when the personal interests of the politicians or officials do not comply with the goals of the government or institutions where they perform their functions. There will always be persons (called “altruists”) who naturally and selflessly work hard in order to realize the institutional goals.<sup>34</sup> In fact, the conflict of interests is a situation, not an action, and it is clear that the official can find himself/herself in a situation of conflict of interests, without having to act in a corruptive manner. The general definition does not only include situations where the official or politician wants a financial benefit. It also includes conflict of interests which are not of financial nature, when officials or politicians work in order to realize their personal political interests which are contrary to the official politics. Contrary to the realization of personal interests for financial benefit, this not always has to be at the expense of the public interest - for example, if the official works for government whose policies are obviously unethical.<sup>35</sup> If the personal interests of politicians and officials are reviewed more thoroughly, one may say that they are specific, easily recognizable

32 Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005.

33 ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19

34 Ibid.

35 Tullock, Gordon. 1965. *The Politics of Bureaucracy*. Washington, D.C.: Public Relations; and Downs, Anthony, 1967.

conflicts of interests, for example: if they own shares in enterprise which participates in the public procurement where they make the decision on granting the job/contract. Or, if their personal interests are reviewed more comprehensively, it can be determined that they may have personal interest that prevents them to implement the goals of their government or institution, for example: if they decide to demand bribe in order to perform any service. The general definition is considered when we want to understand from where the abuse of power and corruption arise and how to solve the problems deriving therefrom.<sup>36</sup> Politicians fundamentally face with special conflict of interests related to their election or re-election. On one hand, this is a conflict of their obligations towards the public and the obligations towards the political parties on the other hand, should they want to be elected or re-elected. By principle, the abuse appears in two ways: when persons or groups having interest give money to politicians or their parties who, in return, perform services for them; and when politicians use money or the money embezzled from the state budget to fund their election campaigns or to buy votes from the citizens.<sup>37</sup>

## MANAGING WITH CONFLICT OF INTEREST

The good politics for managing conditions of the conflict of interests contributes to preservation and strengthening of the trust in state institutions. Some conditions of conflicts of interests cannot be avoided; however, the public institutions are obliged to define them and know precisely what is incompatible with the role or public function of the officials. Otherwise, the trust of the public will be lost when it comes to integrity, fairness and personal impartiality of officials performing their public functions. In order for a conflict of interest to exist, there must be a personal interest of the official and such interest can be: financial, economic, debt-related, property-related, related to profit and non-profit organizations, professional, social, ethical, family-related, religious, etc. The risky areas in terms of the existence of conflict of interests in any of its forms are also identified, and here we have the public and private sector, public procurements, regulatory and inspection functions, national contracts i.e. public and private partnership, sponsorships, non-governmental organizations, exchange of employees between the departments, etc. Partners in this fight are the media, supervision and the public pressure.<sup>38</sup>

In order to prevent conflict of interests, it is especially important the officials to be aware thereof and to be able to identify and report such conflict of interests. The country is obliged to adopt laws and codes, take particular steps in order to solve the conditions of conflict of interests. Procedures for recognizing, handling and solving conflicts of interests are necessary to be put in place as well.<sup>39</sup>

With regards to submitting a declaration, in line with the international standards, practices and guidelines, the officials must act in accordance with the declaration submission procedure immediately after being appointed or elected to a new function, by declaring their

36 ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19.

37 Ibid.

38 Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005.

39 Ibid.

personal information which identify their interest in definite time period, and as periodically conditioned by the possible changes or new conditions the official would find himself/herself into. Public, transparent and timely declaration by the official is for the purpose of gaining and increasing the public trust, his/her own and institutional integrity. Declaration can be submitted in the institution, as well as in the body responsible for record keeping and monitoring the interests of the officials. Officials are obliged to declare all relevant information while performing their function in their entirety, while the institution is obliged to properly review and regularly update thereof.<sup>40</sup>

The options for positive settlement or management of existing or recurring conflict of interests can include one or more adequate strategies, such as: separating or removing the interest from the official; exclusion of the public official from the affected decision-making process; limited access<sup>41</sup> of the official who is in conflict of interests with a particular information; transfer of the official to a position where the performance of his/her function will not cause conflict of interests; change of responsibilities and tasks of officials; allocation of tasks where conflict of interest exists upon the principle of “blind trust”; resignation<sup>42</sup> by officials from their function where conflict of interests exists and/or resignation of officials from the function in the institution where they are appointed.<sup>43</sup>

In the course of performing the public authorizations and responsibilities, the official is obliged to comply with the principles of legality, equality, efficiency, trust, independence, publicity, impartiality, integrity and professionalism and act conscientiously and professionally without discriminating or preferring anyone, and respect the human rights and freedoms and human dignity without having any private interest.

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40 Ibid.

41 In places where it is deemed that particular conflict of interest will not appear on regular basis, it could be appropriate for the official to keep his/her function; however, the official should not participate in the decision-making process for matters of personal interest, e.g.: when a decision, of personal interest for the official, is adopted by a third party or when the official is excluded from voting for particular decisions, or not to participate in discussion for suggestions and plans which could be of personal interest for the official, not to receive relevant documents and other information referring to personal interest of the official. The option for rearrangement of particular functions of officials having personal interests should be also taken into consideration, especially for the persons for whom it is believed that the conflict of interests will continue, but whose exemption from the decision-making process would be inappropriate. Special attention should be paid in order to make sure that all affected parties with the decision are aware what measures have been taken for protection of the integrity of the decision-making process where exclusion is allowed. *Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005.*

42 The officials are asked to remove their own personal interest which is causing conflict of interests, should they want to continue to be in the capacity of official, in cases when the conflict of interest cannot be solved otherwise (e.g. by using one or multiple of the aforementioned measures). In cases when the serious conflict of interests cannot be otherwise solved, the officials are obligated to resign from their public position. Under such circumstances, the conflict of interest policy (together with the provisions of the relevant labour law and/or employment contract) should allow the public position of the official to be suspended in accordance with the defined procedure. *Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005.*

43 Ibid. p. 28-34

## CATEGORIES OF CONFLICT OF INTEREST

The conflict of interests usually belongs to two categories: material and immaterial interests. Financial interests include real or potential financial profit. They may result from employees or family members of employees owning property, shares or being on a function in a company which is in competition for state work, or accepting gifts or services or receive additional income from additional work. It does not mean that funds must pass from one to another hands - the benefit can increase in property value due to making partial decision or partial selection in a procedure for particular tender.<sup>44</sup>

For example, if the person who applied before the council adopts a decision to donate in company wherein any of the committee members is a partner, in such case there is a potential conflict of interests, since such donation can affect the commission member when reviewing the applications in a tender procedure. There is a risk that the personal interest of the commission member for a particular company can cause conflict of interests with the performance of his/her public duties when evaluating the tender procedure applications.<sup>45</sup>

Immaterial interests do not have any financial component. They may derive from personal or family relations, or involvement in sports, social or cultural activities. The most obvious example for this is family interest – for example, the recruit official can have interest to affect the employment procedure in order to secure a job for his/her brother or cousin without having any financial benefit.<sup>46</sup> For example, a municipal city planner, with a child in a local pre-school institution voluntarily prepares plans for extensions of pre-school institutions, has personal interest to approve such plans for the institutions and thus affect his/her impartial assessment of the applications. Similar example to the aforementioned is when a national institution provisioning grants for sports organizations has a member whose daughter is the main player in one team in particular group which applies for donations of funds. The member has or it is believed that has personal interest when granting such funds.<sup>47</sup> In addition, there are many other interests which are not directly personal; however, they can be subject to conflict of interests. The elected function holders, having the idea of being re-elected, usually monitor the interests of their supporters and/or their party, thus trying to affect the relevant administrative process, which is usually contrary to the public interest.<sup>48</sup>

## SUPPOSED AND POTENTIAL CONFLICT OF INTEREST

Conflict of interests (COI) appears when officials should make a decision at work which may have an impact on their personal interests. The guidelines for managing conflict of interests in OECD public sector define the conflict of interest as “*conflict between official*

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44 Londa Esadze, Guidelines for Prevention of Conflict of Interest, Belgrade, 2013.

45 Ibid.

46 Ibid.

47 Londa Esadze, Guidelines for Prevention of Conflict of Interest, Belgrade, 2013.

48 Ibid.

*duties and personal interests of the official, when the official has personal interests which can improperly affect the performance of their official duties and responsibilities*". The conditions of conflict of interests are "real" when the officials find themselves in situation when their personal interests can affect the way of performing their work in an impartial manner. The situations of conflict of interests can also be "potential" or "supposed":

- potential conflict of interests exists when officials can have such personal interests which may cause conditions of conflicts of interests in the future. For example, the official owns large number of shares in a forest company, which may decide to compete in the future for a contract for cutting trees with the institution where the official is employed on a position which allows the official to be responsible for all public procurement contracts.
- the supposed conflict of interests exists where it seems that the official has conflict of interests, but in fact that is not the case. For example, if official on a high position owning shares in a corporation, in order to deal with the conflict of interests, kept himself/herself aside from all decision-making processes ("was excluded from the decision-making process") with regards to the contract for which this company decided to compete. Although the activities taken by this person are not at all familiar to the public, they are satisfactory for his/her institution.<sup>49</sup> Therefore, it can be said that the conflict of interests can be actual or existed in some time in the past. On the contrary, it can be said that the possible conflict of interests exists where the private interest of the official can improperly affect the quality of his/her work, but in fact this does not refer to this case. The potential conflict of interests appears if the official is included in the performance of (so-called conflict) official duties in the future.<sup>50</sup> The obvious and potential conflict of interests can be as harmful as the actual or real conflict of interests. Although there is no universal definition of "managing conflict of interests", majority of countries and competent institutions have common opinion that the conflict of interests appears when the public interests or properties are affected by personal interests.<sup>51</sup> When left unchecked, the conflict of interests is identified as indicator, predecessor and result of corruption. The consensus that prevention of conflict of interests is of crucial importance in the fight against corruption continuously increases. In a comparative case study<sup>52</sup> conducted in the European Union, it was established that "In most of the cases, corruption appears if there is a personal interest that has negative effect on the work of the official..., still the prevention of conflict of interests must be part of more comprehensive politics for prevention and fight against corruption".<sup>53</sup>

49 ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 83-91

50 Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005, p. 28-34

51 ADB/OECD Anti-Corruption Initiative for Asia and the Pacific p. 3-19.

52 Conflict of interests and practices in nine EU member states: Comparative review. Text written for OECD and EU SIGMA Programme, 2005.

53 ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19.

Evident conflict of interests	Perceived conflict of interests	Potential conflict of interests
The official is in position to be led by his/her own personal interests in the course of performing his/her work	The official is in position where the official seems to be led by his/her own personal interests in the course of performing his/her work	The official is in position where the official could be led in the future by his/her own personal interests in the course of performing his/her work

Overall, the potential<sup>54</sup> conflicts of interest refer to various issues such as: relations (for example, obligations to a professional, ethnic, family or religious group in a personal or professional relation or people living in the same household); possession of important information; advocacy and action for foreign countries; abuse of one's own position for private benefit; misuse of state property; other professional activities; post-employment; future employments; financial interests; different responsibilities to different actors; honorary positions; invitations for holidays, dinners, speeches, participation in events. There is an agreement that the risk areas where there is potential for the occurrence of situations of conflicts of interest are: additional work engagement, "internal" information, contracts, gifts and other forms of benefits, family and community expectations, appointment to a management or supervisory board and activity after leaving public office. For the additional work engagement, it is important for the preconditions, as well as the procedures for its approval, to be precisely defined. The internal information is considered to be privileged information that is received or owned by the public authorities and institutions and it is the responsibility of both the holder and the official to protect them from inappropriate use, publication or abuse. An adequate policy is needed for detecting the conflict of interest in terms of gifts and other forms of benefits, as well as for recognizing the conflict of interest in terms of recognizing the expectations of the family and the community. The appointment to a management and supervisory board should be in accordance with the necessary procedures for election and appointment. This also applies to the activities after leaving office in terms of negotiating an election or employment in another institution which was affected or could have been affected by the previous office, but which also has an effect after the termination of office.<sup>55</sup>

## FORMS AND CATEGORIES OF CONFLICT OF INTEREST

In addition to defining, delineation, the categories and forms in which we encounter the conflict of interest are equally important for it. In continuance we will present you the most commonly noticeable forms and categories of conflicts of interest. There will always be other „*self-interested*“ people who, if they do not encounter any restrictive mechanisms, will allow their personal interests to hinder them in the performance of their public duties

<sup>54</sup> See Annex 1 which contains examples of potential conflicts of interest.

<sup>55</sup> Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005.

and will abuse their public office for personal gain. This can happen in a variety of forms, such as: soliciting a bribe for the services they offer, using the “internal information” for personal financial gain, giving advice and making decisions in a manner that will provide them with personal benefit, showing affection for co-workers or family members when appointing, promoting or awarding contracts. In a similar manner, politicians may take actions that are designed to secure the benefit of the party they belong to, and at the expense of the public. Where there is abuse of power for personal or party interests, we can confirm that the public office holder has allowed the conflict of interest, that is, the personal or party interest, to affect the performance of his public duties.<sup>56</sup> Like in chess, leaving the king in a “chess position” is a dangerous move. However, the “chess position” by itself is not fatal if there is a solution to the conflict of interests. Similarly, the situations of conflicts of interest in the public and private sector do not always represent corruption, but are potentially harmful or politically dangerous and must be timely identified and prevented. If the conflict of interest situations are not identified, prevented and adequately solved, they can lead to corruption.<sup>57</sup>

Sources of the conflicts of interest are all forms of personal bias based on: personal relations (with the social, ethnic or religious community), material interests, business interests and professional or political affiliation. Every interest is relevant if it is considered to be improperly affecting the official when performing his official duties in certain situations or circumstances.<sup>58</sup>

Some scientists identified eight categories of conflicts of interest:

1. Independent operation that refers to a situation in which an action is undertaken with an official capacity, which implies a personal benefit and interest;
2. The acceptance of benefits describes that public officials should not solicit, nor accept economic benefits from persons with whom they have contact at the official level. These benefits can be in the form of gifts or range to significant “transfers” that are prohibited under the Criminal Code;
3. The impact on trade is a “practice of soliciting some form of benefit in exchange for the performance of the official duty or power”;
4. The use of government property, including the use of government phones for personal use, or said in an archetypal manner “taking pencils home” from the office. When there are more serious repetitions, it implies a significant use of government vehicles, airplanes, computers and other for private purposes;
5. The use of confidential information means that the public official discloses this information to others or uses it for his personal interest, and this is confidential information acquired during the performance of the official duties. A special example of this is “insider information”, which means use of information that is acquired during the performance of work tasks by the public official and that is not available to the general public, but is used for private purposes;
6. Employment outside the state institution, whereby the official can engage in negotiation or can accept employment in the private sector for which he will offer services for the realization of someone’s private interests or businesses, and which will directly impact the arising of conflicts of interest in the course of his official duties;
7. Post-employment is one of the newest areas of conflicts of interest. It implies that the officials cannot act after

<sup>56</sup> ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19.

<sup>57</sup> Ibid. p. 83-91.

<sup>58</sup> ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 83-91.

leaving office in a manner in which they will provide themselves with personal benefit. This is an example of the problems of the so-called “capturing” of the government officials after leaving office in the field of regulation. When there is such a situation, it undermines the public confidence in the already adopted administrative decisions; 8. Personal behaviour is a question of whether the officials have the same right to privacy as other citizens. There are two key circumstances where personal behaviour can create a conflict of interest:

- a. when the behaviour of the public official makes him vulnerable to pressure for improper use of his office (such as drug addiction);
- b. when the behaviour of the public official brings significant discredit to the government or the department and thus undermines the confidence in the public officials. Every case of suspicious or improper personal behaviour of officials should be carefully reviewed in terms of their merits.

#### DELINEATION OF CONFLICT OF INTEREST FROM ABUSE OF OFFICIAL POSITION

Where the personal interest has basically endangered the proper performance of the duties of the officials, the specific situation is more known as a case of abuse of office, or even as a case of corruption, rather than a case of a “conflict of interest”. In this definition, “personal interests” are not limited solely to financial or monetary interests, or interests that generate direct personal benefit to the official. The conflict of interest may also include other cases that would otherwise appear as legitimate activities of personal/family interest and personal connection, if those interests are actually deemed to be able to affect the officials to perform their public duties in an improper manner. A specific case is the one that refers to the topic of the work engagement of the official after leaving public office<sup>59</sup>: the negotiations for the future work engagement before leaving office are considered to be a conflict of interest situation. The modern policy on conflicts of interest should find a balance through the identification of the risks that may affect the integrity of the public institutions and the officials, thus: prohibiting unacceptable forms of conflict of interest, proper management of conflict of interest situations, informing the public institutions and certain officials about the incidents arising from such conflicts of interest, providing effective procedures to be used for identification, reporting, management and promotion of adequate solutions to conflict of interest situations.<sup>60</sup> In order to better manage conflicts of interest, the OECD has adopted “Guidelines for Managing Conflict of Interest in the Public Sector”<sup>61</sup> that help central level governments implement a constant policy and practice that applies to officials, including administrative officials, office holders. These guidelines help

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59 Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005 p. 28-34.

60 Ibid.

61 *Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005*. This publication provides a set of practical solutions for the development and implementation of solutions for managing conflicts of interest. The toolkit was created in cooperation between the OECD member countries, as well as the countries that are not members of this organization. It is a result of several international forums in different regions, and: Southeast Europe, the Asia-Pacific Region and Latin America.

in the creation of an effective policy on conflicts of interest, a framework for verification of the existing solutions and modernization of the mechanisms in relation to good practices, a culture of public administration behaviour and proper reporting, management and resolution of conflicts of interest in a transparent manner, clear and public standards for stakeholder responsibility towards integrity. In order to maintain the public confidence, and with the purpose of promoting integrity, OECD experts have defined some basic principles for managing conflicts of interest. They are: service for the benefit of the public interest<sup>62</sup>, support of transparency and monitoring<sup>63</sup> and promotion of individual responsibility and personal experiences.<sup>64</sup>

Some of the institutional mechanisms for preventing a conflict of interest in the case of appointed officials (public/state officials) may be applied to the elected officials, but

62 - Officials should make decisions and provide advice based on a relevant law or policy and the merits of each case, regardless of their personal benefit (that is, not to be affected by it). The integrity in making decisions by officials, especially making decisions on the application of policies in certain cases, should not be affected by the religious, professional, ethnic, family or other personal preferences or beliefs of the decision-maker.

- Officials should be free of or limit the impact of the personal interests that may impede the making of decisions in which they participate. Whenever possible, officials should be excluded from their involvement in the making of public decisions that may be affected by their personal interests.

- Officials should avoid activities related to their personal interests arising from the irregularly acquired benefit from the “internal information” that they acquired in the course of their public duties, whereby the information they acquired is not always available to the general public, and therefore the officials are required not to abuse their office and the state resources in order to obtain personal benefits.

- Officials should not solicit or acquire any unlawful benefit arising from their impact on the performance or non-performance of the official duties and functions.

- Officials are obliged not to abuse the institution or the public office to which they were previously appointed, including information they acquired while being in office, especially when seeking a work engagement or appointment to another office after the termination of their public office.

63 - Officials and public institutions are obliged to act in a manner that is in accordance with the needs of the public. This obligation is not considered fulfilled only through the work within the framework of the law, but it is also subject to the respect of the values of the public services for the general public through: interest, impartiality and integrity.

- Officials should adequately report all their personal interests and connections that may impact the inadequate performance of their public duties in order for their proper control to be enabled and an adequate solution to be found.

- Public institutions and officials should ensure the consistency and adequate level of openness in the process of resolution or management of the conflict of interest situation.

- Officials and public institutions should promote control in managing conflict of interest situations within the applicable legal framework.

64 - Officials are obliged to act at all times in such a manner in which their integrity serves as an example to their officials and the public.

- Officials should accept the responsibility to adjust their personal interests as reasonably as possible in order to prevent a conflict of interest that would arise if they are appointed to a public office.

- Every time a conflict of interest arises, officials should accept the responsibility to identify and resolve the conflict of interest in favour of the public interest.

- Officials and public institutions are obliged to demonstrate their commitment to integrity and professionalism through the application of effective conflict-of-interest policies and practices.

not all of them. There are some differences between the appointed and elected officials. State officials operate “permanently, professionally and full-time”, elected officials operate “temporarily, unprofessionally and part-time”. State officials are “responsible solely for the institution for which they work and its rules”, elected officials are directly responsible to the public through elections and other means and ways of legislative control. Given that state officials can only participate in a specific discussion related to their office or duty, elected officials are by definition part of various public debates or decision-making processes. It is therefore necessary to make a clear distinction between public officials who perform functions within the framework of the public administration or a public sector entity, on the one hand, and elected representatives who are political figures responsible before parliament, and finally the voters on the other hand. In addition, the judicial office holders (that is, judges and prosecutors) are likewise excluded from the scope of the conflict of interest regulation applicable to public administration officials. In the past period, there has been an increase in the perception that the ethical standards in the state system bodies are decreasing, even in the very advanced and developed democracies, especially in the part of the ethical framework for elected officials. There are many examples where the conflict of interest concept is not properly and clearly understood, and there is a tendency of its underestimation and difficulties are encountered in the process of its implementation. Therefore, we emphasize that the conflict of interest is a condition or situation in which any elected or appointed person can be found, in a manner in which that condition can impact his impartial and objective performance of the public and official duties and authorizations. The conflict of interest is a natural phenomenon, and not a pathology, as well as an inevitable consequence for people who have more than one social role or function. Here we see the challenge of regulating the public and political sphere in a manner that will prevent corruption and abuse of office because the conflict of interest situation does not by itself imply that. As a result, the task of the regulation designed for conflicts of interest should help people counter offenses in a manner that would point out the risks of corrupted and unethical behaviour or abuse of office. Therefore, the conflict of interest is not the real crime, the real crime is the potential for an offense to occur and the conflict of interest is by itself different from the offense of abusing the official position and authority.

#### MECHANISMS FOR PREVENTION OF CONFLICT OF INTEREST

It is a challenge for governments and society to ensure the existence of adequate institutional mechanisms that will encourage “altruism” and prevent “selfish persons” from realizing their personal interests at the expense of the public. If the political leaders are elected and the adequate mechanisms for verification and prevention are not implemented, corruption will remain at the same level or it will rise to an even higher level. This is especially the case in democratic societies rich in resources. In cases involving officials these mechanisms may include:

- Appointment and promotion of well-being, including the integrity of the person being appointed;
- Adequate compensation;
- Clear rules for dealing with specific forms of

conflicts of interest (for example, “reporting of interests” when the official faces situations in which he has a personal interest) and for securing ethical behaviour (for example, the behaviour of the competitors when participating in tenders for concluding contracts);

- Good leadership for ensuring compliance with the rules; -“Altruistic” leadership;
- Legal framework that can serve as a defence mechanism and a means for punishment for committed violations; -Supervision by the legislature; -Supervision by the civil society organizations;
- Protection of whistleblowers; -Law on free access to information that will provide the public with access to the internal state documentation; -Independent media that will conduct investigations of abuse of power.<sup>65</sup> In addition to these instruments for prevention and avoidance of conflicts of interest, the following are likewise recognized in science: 1. Restrictions on auxiliary employment; 2. Personal Income Statement; 3. Family Income Statement; Personal Financial Statement; 4. Family Financial Statement; 5. Declaration of Gift; 6. Security and control of the access to internal information; 7. Statement of private interests relevant for contract management; 8. Statement of private interests relevant for decision making; 9. Statement of private interests relevant for participation in the preparation or giving of policy advice; 10. Publication of income and asset declarations; 11. Restrictions and control of post-employment activities or NGO activities; 12. Restrictions and control of gifts and other forms of benefits; 13. Restrictions and control of external concurrent appointments (for example, with an NGO, a state-owned political organization or corporation); 14. Refusal and routine withdrawal of public officials from public office when the participation in the meeting or the adoption of a certain decision will place them in a position of conflict); 15. Personal and family restrictions on the ownership of private companies; 16. Revocation, either by selling business interests or investments or by establishing a trust or blind management agreement.

Failure to comply with the institutional policy on conflicts of interest should be considered as a subject to disciplinary procedure, while more serious offenses that include an actual state of conflict of interest may result in penalties for abuse of office or criminal prosecution for a committed corrupted offense. Different penalties may be imposed on officials depending on the seriousness of the offense, for example the simple failure to report a relevant interest compared to a more serious refusal of an official to leave a conflict of interest state of which he is aware. Positive management can provide efficient additional forms of solutions for non-compliance with the policy on conflicts of interest and can efficiently deter those who want to directly or indirectly exploit such offences to their advantage. Such measures may include retroactive annulment of the affected decisions and unlawful agreements, as well as exclusion of the users, regardless of whether they are corporations, individuals or associations, etc., from future processes. Such exclusion measures may function for a certain period of time, within the framework of the specified monetary restrictions or for certain types of activities.<sup>66</sup>

65 ADB/OECD Anti-Corruption Initiative for Asia and The Pacific p. 3-19.

66 Managing Conflict of Interest in the Public Sector, A Toolkit OECD, 2005 p. 28-34.

## SUBMISSION OF FORMS FOR REPORTING THE PROPERTY STATUS (ASSETS) AND PROMOTION OF OBLIGATIONS FOR FULFILMENT OF LEGAL OBLIGATIONS

The primary goal of the institution in charge of publishing the forms for declaring property is to assist honest officials, who are obliged to report their property, to do so in a proper manner. The activities that agencies can undertake to encourage voluntary compliance with the obligation for declaring property include: seminars for the persons obliged to submit a property declaration form, to provide assistance in completing the forms, as well as to provide advice and opinions in parts of the law regarding which there are certain ambiguities. Opinions should be widespread because they then become a legal basis that directs the interpretation in future cases. Once the state has taken the necessary steps to promote voluntary compliance with the legal obligations, it is easier for it to implement its policies on compliance with the legal provisions through penalties. These penalties should be strict enough to match the severity of the offense. In other words, the failure to submit or the false filing of property declaration forms should not be treated less seriously than the soliciting or accepting a bribe. For example, in Trinidad, in addition to prison sentences for failure to declare property, the state may request the confiscation of the property of the defendant that has not been declared. When establishing a system, start slowly and build capacities. A common mistake when establishing a new institution is for it to be established on the first day, and on the second day to request thousands of state officials to submit forms to the institution. The institution is not able to significantly review so many forms, so early in its existence. The news about this effect will rapidly spread and make people not to take the institution or its mandate seriously. In the first round of the establishment of the system, ask only a few senior officials to submit property declaration forms. In addition to asking officials to report personal and business property, it is good practice for officials to report: sources of income, positions in profit and non-profit organizations, debts, gifts, travel expenses, advances, allowances and income and property of spouses or children who live with or are supported by the official.<sup>67</sup> Another important question is how to develop a good regulation for the conflict of interest? The answer to this question is in the direction of prohibiting activities, declarations of interest and exemption from the decision-making processes. The primary objective of the regulation of conflicts of interest is to prevent conflict of interest situations to the extent possible and practical, then to establish rules relating to cases of conflicts of interest, when they arise, as well as to provide guidelines to officials and enable them to protect themselves in an easier manner.

## PRINCIPLES FOR EFFECTIVE REVISION OF CONFLICT OF INTEREST

Violations of the Law on Prevention of Corruption and Conflict of Interest and examples thereof.<sup>68</sup>

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<sup>67</sup> ADB/OECD Anti-Corruption Initiative for Asia and the Pacific p. 37-46.

<sup>68</sup> Accumulation of offices

The simultaneous performance of multiple offices by one person is contrary to the positive legal regulations in this field that envision the performance of one, and not of several public offices. This leads to the accumulation of offices, which creates preconditions for the public interest to subordinate the private interest of the official.

Example:

1. A person performs the following offices: Director of Finance in a state institution and member of a Board of Directors in a joint stock company with a 100% state capital.
2. Performance of three offices: Member of a Board of Directors in a Public Enterprise, Member of a Municipal Council and member of a Supervisory Board in a Public Health Institution.

Simultaneous performance of public authorizations and duties determined by law and as owner manages a trade company or institution.

Example:

1. Member of a Municipal Council and manager of a private trade company.
2. Minister and manager of a private trade company.
3. Member of Parliament and manager of a private trade company.

Performance of public offices and receipt of compensation for activities in citizens associations, foundations and organizations (with the exception of travel expenses related to their activity).

Example:

1. Organizational Director in a Public Health Institution and Founder and Director of a Foundation, as well as a Founder and President of a sports association. Receives compensation both in the foundation and the association.
2. Member of a Board of Directors of a Public Enterprise and a member of the Board of a Foundation, thus receiving monetary compensation per session.

Nepotism

The official giving an advantage, benefit or other convenience in the course of his official duty to a particular individual or group of persons with whom the official has family or friendly connections.

Example:

1. The Director of a kindergarten employs a close person (daughter) in the same institution, by signing a Decision for election of a candidate and an Employment Contract.
2. After 6 months of taking office, the Director of a Public Enterprise announces a call for temporary employment, whereby he employs his daughter.
3. The Director of a clinic employs his son through a transfer from primary to tertiary healthcare. For this purpose, he annulled a call for employment of two doctors without any legal basis.
4. The Director of a primary school employs two close relatives, his sister and his wife.

Officials must not act in a case in which they have a personal interest. When they learn about circumstances that indicate a conflict of interest, they are obliged to immediately request to be exempted and stop their actions. The decision on the exemption is made by the body where the official is elected or appointed, that is, the employed person, and at the request of the interested person.

Restriction after termination of office

This risky area is related to a potential conflict of interest among officials who, after termination of office, are employed in the private sector. It implies that the official created benefits and privileges for himself while performing his office.

Example:

A Council Member, after the termination of this office, is employed in a private company within a shorter period of time than the legally prescribed one, where he conducted supervision as a member of the aforementioned Council.

Determining a conflict of interest in a public procurement procedure

The official must not impact the making of a public procurement decision or in any other way to use his position to make a decision aimed at obtaining a private interest or benefit for him or his close relatives.

Example:

The Director of an Agency is found in a conflict of interest situation because his close relatives are employed in

Within the ReSPA,<sup>69</sup> a Methodology for oversight bodies and other stakeholders was made with which hidden conflicts of interest in the public sector are detected.<sup>70</sup> The purpose of this methodology is to provide an overall image of what should be done for proactive detection of conflicts of interest. There are various schemes of how public officials try to hide their private interests, and all these schemes should be target of oversight. At the same time, conflicts of interest leave traces and various stakeholders are in a position to use these traces for detecting hidden conflicts of interest.<sup>71</sup>

Incompatibilities do not constitute a conflict of interest by themselves, but rather restrictions created to prevent a conflict of interest before it can arise. In other words, incompatibilities try to minimize the risk of a conflict of interest. For example, in some countries (certain categories of) officials are not allowed to engage in additional activity or own their business as there is a high risk that the interests of the activity or the business will come into conflict with the public duties of the official. The main permanent restrictions that exist at the international level and the adequate hiding strategies are as follows:

- Additional activity (failure to report the additional activity in the property declaration form/the declaration of interest; failure to report the activity in the tax return; failure to report the social security activity (if applicable).
- Businesses (failure to report the business in the property declaration form/the declaration of interest; registration of the business under a different name or under a legal structure as owner).
- Contracts with the public sector (failure to report the contract in the property declaration form/the declaration of interest or use of legal structures as intermediaries).
- Membership (failure to report the membership in the property declaration form/the declaration of interest).
- Opposing public positions (failure to report the position in the property declaration form/the declaration of interest.)
- After leaving office (failure to report the benefits after leaving office in the property declaration form/the declaration of interest; failure to disclose the information to the previous employer; failure to report the tax return; failure to report in social security (if applicable).
- Political affiliation (failure to report the membership in the property declaration form/the declaration of interest; avoidance of participation in (semi-) public events of the political party).<sup>72</sup> Ad hoc conflicts of interest depend on the situation – the official may temporarily be in a position where he/she can support his/her private

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trade companies that act as economic operators, public procurement holders, published by the Agency and the Director himself acts as signatory.

69 The Regional School of Public Administration is a joint initiative of the European Union and the Western Balkan countries, which works to encourage and strengthen regional cooperation in the field of public administration through its member countries. Its headquarters is in Danilovgrad in Montenegro.

70 Tilman Hoppe, *Detecting hidden conflicts of interest*, ReSPA, 2017.

71 Hidden conflicts of interest: non-disclosure of incompatibilities: additional activity, businesses, opposing positions, after leaving office (which are in conflict or at risk of conflict); visible; official – official duties; non-disclosure of conflicts of interest; private interests related to: family, other close relatives, businesses, policies that are conflicting.

72 Tilman Hoppe, *Detecting hidden conflicts of interest*, ReSPA, 2017.

interests. For example, a tax inspector performs a tax audit of a family member.<sup>73</sup>

Categories of private interest:

- Family relations (non-disclosure of ad hoc family relationship, non-reporting of family members in the property declaration form/the declaration of interest as required; non-reporting of a family business in the property declaration form/the declaration of interest; hiding family relations behind a different name or legal entity.)
- Other close relations (non-disclosure of an ad hoc personal relationship).
- Business relations (non-disclosure of ad hoc business relations; non-disclosure of the business in the property declaration form/the declaration of interest; non-registration of the business or its specific interests; registration of the business under a different name.)
- Political affiliation (non-disclosure of the political affiliation; non-registration of the membership in the property declaration form/the declaration of interest.)
- Gifts (non-reporting of received gifts above the legal limitation; the gift is shown to be from private sources; hiding gifts from public supervision (no “sponsored” travel is published on the social networks).)<sup>74</sup>

The foreign judicial systems, in addition to being an attractive option for the public officials who want to hide their money originating from corrupt sources, are also attractive for hiding conflicts of interest. For example, a minister who does business with his ministry will be easily be detected. Hiding his business under the ownership of another (domestic) company is an option, but it can easily be detected by any interested stakeholder by checking the domestic trade register. The hiding of such a business under one or more layers of foreign legal structures is a more effective alternative. The domestic oversight body may not have the authority to inspect the foreign databases and they may not be publicly available, due to language barriers or due to the fact that the database is located in a non-transparent country (so-called offshore destination). In general, there are two types of schemes involving foreign countries:

- Incompatibilities: The official owns a foreign business or generates income from a position abroad and does not disclose it.
- Ad hoc conflicts: The official (or his/her family/other close relationships) owns a home business, which he/she hides under the cover of a foreign legal structure and becomes part of a situation where a conflict of interest arises, such as business services for his/her employer.<sup>75</sup>

The search strategy for detecting incompatibilities largely overlaps with the financial audit of the property declarations. The oversight body compares the data contained in the annual statement of the official with the data contained in the public and private databases, such as the databases of companies, associations, tax offices, registries (family members). In general, the oversight body may detect unreported membership by searching the Internet

<sup>73</sup> Ibid.

<sup>74</sup> Tilman Hoppe, *Detecting hidden conflicts of interest*, ReSPA, 2017.

<sup>75</sup> Ibid.

or the membership lists or through secondary information (for example, a press release or a report from an event of an association where the membership of the official is mentioned).

There are basically two types of schemes involving foreign countries:

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- Random selection (“lottery”) of a certain percentage of officials every year (for example, 4%);
- Media reports about suspicions;
- Supported reports on violations of the provisions of conflicts of interest (open and anonymous).

## CONCLUSION

Conflicts of interest and incompatibilities constitute one of the most important challenges to the establishment of rule of law in South East Europe. Successfully tackling these phenomena is a key issue in the relationship between the countries in the region and the European Union. The conflict of interest implies a conflict between the public duty and the private interest of the official, where the interest in the private capacity of the official may improperly impact the performance of the official duties and responsibilities. Officials have the obligation when performing their duties to always act in favour of the public interest, excluding the personal or private interest, while respecting the positive regulations, the efficiency, confidentiality, independence, individuality, honesty and professionalism. The inability to identify, publicize or manage the conflict of interest is the basis where serious corruption begins. Due to this precisely, the management of conflicts of interest is a particularly important strategy for preventing corruption as a social phenomenon. The management of the system for preventing a conflict of interest, both at the institutional level and at the level of the state system, requires continuous improvement and upgrade. No state can have full insight into the interests, especially of the elected and appointed persons, if it does not have a sufficient number of monitoring instruments. However, the State Commission for Prevention of Corruption in the Republic of North Macedonia as an institution is not and will never be “everybody’s darling”. In fact, it has and will have powerful enemies, also among certain segments of the political elites, who will try to limit the scope of the competencies and actions of these institutions. Therefore, a strong civil society that insists on transparency and accountability, that supports respective institution, is essential in ensuring the durable success of efforts to prevent conflicts of interests and incompatibilities.

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<sup>76</sup> Tilman Hoppe, Detecting hidden conflicts of interest, ReSPA, 2017.

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