

GUIDES TO GOOD GOVERN- ANCE

No. 02

Tackling conflicts of interest in the public sector



CENTRE FOR INTEGRITY
IN THE DEFENCE SECTOR

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The Centre for Integrity in the Defence Sector (CIDS) is promoting integrity, anti-corruption measures and good governance in the defence sector. Working with Norwegian and international partners, the centre seeks to build competence, raise awareness and provide practical means to reduce risks of corruption. CIDS was established by the Norwegian Ministry of Defence in 2012.

The views expressed in this booklet are those of the author and do not necessarily represent the views of, and should not be attributed to, the Norwegian Ministry of Defence.

ABOUT THE AUTHOR

Francisco Cardona is associate international expert at CIDS. Cardona is a renowned expert focused on designing and assessing civil service and public administration reforms, administrative law and justice, anticorruption policies and institution building. His experience stretches from his native Spain, where he developed a career within the civil service, to international organisations, such as the OECD, SIGMA Programme, where he spent 15 years as a senior policy analyst in public governance. At SIGMA he advised a host of some 25 transition and developing countries in Eastern Europe, Africa, Latin America and the Caribbean region. He is trained as a lawyer (Valencia University, 1976) and holds several master degrees in public administration.

FOREWORD

Guides to Good Governance

is a series of small booklets each of which discusses a particular topic of importance to good governance in the defence sector. The format is meant to be easy to read without oversimplifying issues that are, by their nature, multifaceted and sometimes technical. The guides are written for non-specialists and do not require a professional background in any particular field. They can be read by individuals with an interest in learning more about one or several topics of direct relevance to good governance in the defence sector – or the public sector more generally – and they can also be used for educational purposes.

Centre for Integrity in the Defence Sector (CIDS) is a competence centre under the Norwegian Ministry of Defence and plays an active role in NATO's Building Integrity Programme. Its mandate encompasses both national and international work, including projects, courses, and competence and capacity building. The main reason for promoting integrity in a systematic way is to reduce the risk of corruption and other unethical behaviours while improving transparency and accountabil-

ity. Thereby, conditions for good governance within a framework of democracy and rule of law will be established. For this undertaking, public servants with personal as well as professional integrity and high ethical standards are crucial.

The guide *Tackling conflicts of interest in the public sector* was written by Francisco Cardona, and edited by Ingrid Busterud. I would like to thank them for their inspiring work.

Comments and responses concerning the *Guides to Good Governance* are always welcome (cids@ifs.mil.no). More information about CIDS may be found at www.cids.no.



Bård Bredrup Knudsen
Director

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Introduction

Democracies are built in principle on a division between two spheres. On the one hand, there is the civil society and the market, where private interests and businesses prevail, compete and attempt to create benefits for themselves. On the other, there is the state, or the public sector, which represents the political and administrative governance and the general interest. The state rests upon a political class and a professional public administration, including the judiciary.

In European countries, the state shall define what the general interest is in a holistic way, regulate the market accordingly and enforce such regulation. The definition of the general interest shapes the basic schema of a liberal democracy in a market economy. The more solid a democracy and the rule of law are, the clearer the cleavage between the public interest and private interests. Interaction between the public sphere and the market is a major source of conflicts of interest, especially

through public procurements, public-private partnerships, lobbies, revolving doors, and similar situations. Managing conflicts of interest is about regulating and handling that interaction in such a manner that individual freedoms are respected and realised in an ethical way while preserving the public interest – often referred to as the “common good”.

This paper aims at presenting the conceptual and regulatory problems surrounding the handling of the interaction between the public and the private spheres of society. Those problems, encapsulated as conflicts of interest, are complex and extremely situational, and therefore very context-dependent, which may lead policy makers to approach and regulate them in too detailed ways. Indeed many countries have adopted a case-based reasoning in regulating conflict of interest situations. In fact, that was historically a method of regulating moral issues, but fell into intellectual disrepute a long time ago.

Conflicts of interest: In search of a general conceptual ground

Conflicts of interest may at a first glance seem a straightforward notion. According to the British economist Tim Lankester, it is not a new phenomenon:

- Conflict of interest amongst political leaders and public officials, as we understand it today, has existed as long as there has been public administration. In most pre-modern societies, the very concept of conflict of interest would not have been recognized. In most societies, it was automatically assumed that political leaders and officials would take advantage of public office to advance their own personal interests.
 - It is really only since the advent of the modern industrialising state that the notion has taken hold that public officials and their political masters should be expected to act exclusively in the interests of the state. States with large military ambitions, such as England and France in the eighteenth and nineteenth centuries and Bismarck's and Hitler's Germany, needed an efficient and relatively incorrupt civil service if their ambitions were to be fulfilled. The Soviet Union needed officials who were dedicated wholly to the social and economic trans-
- formation envisaged by Lenin and Stalin. When countries in Western Europe and elsewhere democratised and their governments became accountable to their publics, the people as 'sovereign' began to insist via the ballot box that politicians and officials should act in the public, as opposed to their own personal interests.
- In most countries, expectations as to the proper duties of politicians and officials have changed over time in the direction of greater transparency and clearer division between their public duties and private aims. But in countries that have yet to achieve any great measure of democratic control, expectations in this regard remain low; and the same applies to countries that have only recently democratised which have a previous history of corruption and abuse of power.
 - As seen at least through modern Western eyes, conflict of interest is at the root of the abuse of power by politicians and public officials for private ends. It arises when the personal interests of the politician or official are not fully aligned with the goals of the government or agency with which they

are associated. There will always be some (whom we may call the 'altruists') who will dedicate themselves automatically and unreservedly to these goals. There will be others (the 'self-interested') who, unless there are countervailing mechanisms in place, will allow their personal interests to interfere with their public duties and will use their public position for personal gain.¹

These points by Lankester, while useful, are in fact problematic. The world is a more complex place and the categories used to give 'meaning and representation' are not clear cut. These points, which are certainly shared by many, are based on accepted – if questionable – wisdom. Indeed, 'public interest', 'personal interest', 'bias', 'loyalty to the law vs. loyalty to the boss' are blurry concepts at best. The distinction between what is public interest and what is private gain is unclear. A German finance minister, Hans Eichel, was accused in 2001 of conflict of interest when he used a ministerial jet to attend a partisan rally in his constituency. He responded that he was a minister 24 hours a day seven days a week, so the distinction in his case between public and private activities was inapplicable.²

Regulating all possible situations by law is impractical and counterproductive. What would be the result if politicians amended laws simply to protect the interests of a particular officeholder (cf. Berlusconi in Italy)?³

Furthermore, laws are ambiguous and contestable, a quality that provides a livelihood for a

whole class of professional lawyers. The definition of 'public interest' and of who has the legitimacy to define it is vague and disputable. In fact, the conceptualisation of public interest at any given moment is the playing field on which democratic politics is disputed.

The public/private dualism is indeed at the basis of most definitions of corruption. It is at the core of any notion of conflict of interest. Public officials are expected to draw a sharp distinction between their personal interest and the public resources they administer. In conventional wisdom, it is the violation of this public/private distinction by individuals that fundamentally defines corrupt behaviour. Corruption scandals are viewed as a measure of how well a society distinguishes between public and private spheres. Haller and Shore, from the perspective of anthropology, consider that anthropologists have long recognised the arbitrary and inherently ambiguous nature of this public-private dichotomy as a cultural category.⁴ While public and private realms may be codified by rules in most Western democracies, there are always grey zones between these domains.

It is problematic to determine who defines the public interest. In democratic theory, it is the majoritarian representatives of the voters who do so. However, more and more evidence suggests that economic elites and organized groups representing business interests have substantial independent impacts on government policies, while mass-based interest groups and average citizens have little or no independent influence.⁵ Corporations and business interests are increasingly capable of

1 Lankester, Tim. 2007. "Conflict of interest: A historical and comparative perspective". Paper presented at the 5th Regional Seminar on making international anti-corruption standards operational, held in Jakarta, Indonesia on 6–7 August 2007. Available at: <http://www.oecd.org/site/adboecdanti-corruptioninitiative/40838870.pdf>

2 Haller, Dieter and Chris Shore (ed). 2005. *Corruption. Anthropological Perspectives*. London: Pluto Press.

3 See Stille, Alexander. 2007. *The Sack of Rome. Media + Money + Celebrity = Power = Silvio Berlusconi*. London: Penguin Books.

4 Haller, Dieter and Chris Shore (ed). 2005. *Corruption. Anthropological Perspectives*. London: Pluto Press.

5 See, for example, Gilens, Martin and Benjamin Page. 2014. "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens". *Perspectives on Politics* 12 (3): 564-581.

influencing what is and what is not taken to be the public interest and therefore to shape public policies, whereas the influence of the majority of the citizens may be less capable of doing so.

The financial crisis of 2007–08 is a case in point. A crisis of the market was transformed by free market ideologues and public officials into a crisis of public debt and deficits. Across Europe, the crisis was used to push through policies that in fact served certain private interests: the slashing of taxes on the rich and major corporations; the selling off of public services; and a reduction of workers' rights. The crisis brought the role and performance of public officials, including elected politicians, into a particular limelight and prompted the question: how to distinguish when politicians are striving for the general interest and when they are simply implementing policies pushed by private interests. The crisis put into question in many

countries the status of high officials and politicians as public servants and managers of public interests and the common good.

Under such circumstances societal cynicism may be on the rise and the regulatory effort to rein in conflict of interest situations may be ritual rather than substantive in many regards, with a tendency to confuse the instruments (e.g. asset declarations) with the substance (e.g. absence of conflict of interests). Perhaps this is the only way many governments can find to create an impression that conflicts of interest are being tackled by public institutions. However, good instruments do not by themselves make the challenges go away. Political resolve is always needed to address those challenges.

Conflicts of interest: Some definitions suggested in the international debate

Even if a number of countries have been addressing the issue for quite a long time, the conflict of interest debate is relatively recent on the international scene. It grew in the years after the end of the Cold War. It is interesting to note that the first anti-corruption instrument addressing conflicts of interest was the International Code of Conduct for Public Officials, adopted by the United Nations General Assembly Resolution 51/59 of 12 December 1996. This Code of Conduct was a direct product of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, in 1990. The Code of Conduct makes extensive reference to conflicts of interest, outlining the most crucial parameters of the concept and including several measures to deal with it.

The international debate stems from the realisation that trust in governments may be eroding in many democratic states, mainly as a result of cases of abuse of power. The mainstream international response is that more impartiality, transparency, openness and accountability through adequate control mechanisms could help regain confidence of the populations in their governing institutions.

This debate on regaining trust has been drawing the attention of international organisations, which have been proposing stringent requirements, or international standards, of public integrity. This phenomenon is observable in the EU, for example, where new member states tend to have stricter conflict of interest regulations than those of older member states.

International anti-corruption instruments of a legally binding nature, as well as of what is known as 'soft law', include provisions outlining preventive measures, e.g., standards (codes of conduct), guidelines, and tools targeting public sector accountability, with the aim to address conflict of interest issues:

- The Inter-American Convention against Corruption (article 3: Preventive Measures);
- The Economic Community of West African States Protocol on the Fight against Corruption (article 5: Preventive Measures);
- The African Union Convention on Preventing and Combating Corruption (article 7: Corruption and Related Offenses in Public Service);

- The 2003 United Nations Convention against Corruption – UNCAC (Chapter II: Preventive Measures);
- The UN International Code of Conduct for Public Officials (Article II: Conflict of Interest and Disqualification);
- The Organisation for Economic Co-operation and Development: Guidelines for Managing Conflict of Interest in the Public Service – Public Sector Transparency and Accountability;
- The Council of Europe: Model Code of Conduct for Public Officials (Article 13: Conflict of Interest).
- Trading in influence (Article 18);
- Abuse of function (Article 19);
- Illicit enrichment (Article 20);
- Embezzlement in the private sector (Article 22);
- Obstruction of justice (Article 25).

The UNCAC is an essential preventive tool with several specific provisions related to conflicts of interest. The UNCAC emphasizes the importance of transparency and standardization. Several provisions instruct signatories to establish standards to guide public sector officials' behaviour and codify systems to ensure legal procurement practices and management of public finances. The UNCAC also outlines guidelines for dealing with the private sector. When not prevented, conflicts of interest can lead to a range of criminal offenses, including abuse of power, influence peddling, obstruction of justice, criminal misappropriation and the capture of public assets for personal gain. The UNCAC addresses each possible criminal offense in various articles:

- Embezzlement, misappropriation or other diversion of property in the public sector (Article 17);

Despite the international conventions like UNCAC, conflict of interest remains a very difficult matter to define and regulate. It is a highly political issue, which tends to be reduced to its instrumental devices such as disclosure mechanisms. However, such mechanisms may easily become reductionist approaches. They allow many countries to showcase good conflicts of interest legal regimes – for example, because they have obliged everyone to declare their assets – while the public interest nevertheless remains entangled with that of vested interests that serve past or present public officials.

It is worthy looking around to see which definitions on conflicts of interest have been provided by national and international bodies. The French Central Service for the Prevention of Corruption (SCPC) suggests that a conflict of interest is a factual situation of a person in which he/she is confronted with two diverging interests, one general and the other personal or private, and he/she must decide to serve one of them.⁶

⁶ Service central de prévention de la corruption (SCPC). 2004: "Le conflit d'intérêts". Available at: http://www.justice.gouv.fr/art_pix/rapportscpc2005.pdf (pages 23–83).

Article 8 of the Recommendation (2000)10 of the Committee of Ministers of the Council of Europe of 11 May 2000 states that the public official should not allow his/her private interest to conflict with his/her public position. It is a personal responsibility to avoid such conflicts of interest, whether real, potential or apparent. The public official should never take undue advantage of his/her position in order to serve own private interests.⁷ This Recommendation (article 13) provides a definition whereby conflicts of interest arise 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/her official duties. This article includes an elaboration of the notion of private interest.

The OECD considers that a conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has personal interests which could improperly influence the performance of the official's duties and responsibilities.⁸

The French Commission for Reflecting on Preventing Conflicts of Interest in the Public Life submitted its report to the President of the Republic in January 2011.⁹ The Commission proposed defining conflict of interest as a situation where the private interest of a public official interferes with his/her public service mission if that private interest, because of its nature and intensity, can be reasonably regarded as capable of influencing or appearing to influence the independence, impartiality and objectivity of the public functions. A similar definition can be found in article 4 of the Spanish Law 5/2006 regulating the conflict of interests of members of the government and senior civil servants in the General State Administration.

The European Ombudsman uses the following definition: "Situations in which the private interests and affiliations of a public official appear to create, or to have the potential to create, conflict with the proper performance of his/her official duties."¹⁰ Even if this is a clear and meaningful definition, however, it does not tell us in which situations it may arise.

7 See Recommendation (2000)10 at: https://www.coe.int/t/dghl/monitoring/greco/documents/Rec%282000%2910_EN.pdf

8 OECD. 2003. "Managing Conflicts of Interests. OECD Guidelines and Country Experiences". Available at: <http://www.oecd.org/corruption/ethics/48994419.pdf>

9 Commission de réflexion pour la prévention des conflits d'intérêts dans la vie publique. 2011. "Pour une nouvelle déontologie de la vie publique". Available at: <http://www.conflits-interets.fr/pdf/rapport-commission-conflits-interets-vie-publique.pdf>

10 See Intervention of Mr. Ian Harden, Secretary General of the European Ombudsman, in the Workshop "Better Avoidance of Conflicts of Interest: EU Agencies and Other Bodies Moving Forward". Organised by the European Parliament, Brussels, on 21 February 2013. Briefing Paper available at: [http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/490675/IPOL-JOIN_AT\(2013\)490675_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/490675/IPOL-JOIN_AT(2013)490675_EN.pdf)

Policy issues: Creating a conflicts of interest legal regime

A conflict of interest is not necessarily corruption per se. In fact not all countries criminalise situations involving conflicts of interest. However, a conflict of interest situation is very harmful to the public trust in governmental institutions. A comparative study conducted some years ago in the European Union noted that, '[most] of the time, corruption appears where a prior private interest improperly influenced the performance of the public official ... thus conflict of interest prevention has to be part of a broader policy to prevent and combat corruption'.¹¹ The study also made clear that conflicts of interest can be real (factual), apparent or potential. All of them are equally destructive of the trust of citizens in public institutions.

Conflicts of interest appear not only in situations in which there is in fact an unacceptable conflict between a public official's interests as a private citizen and his/her duty as a public official, but also in situations in which there is an apparent or a potential conflict of interest. An apparent conflict of interest refers to a situation where there is a personal interest that might reasonably be considered by others to influence the public official's duties, even though

in fact there is no such undue influence or such influence might not materialize. The potential for doubt as to the official's integrity and/or the integrity of the official's organisation makes it obligatory to consider an apparent conflict of interest as a situation that should be avoided. The potential conflict of interest may exist where an official has private-capacity interests that could cause a conflict of interest to arise at some time in the future.

The definition of conflict of interest, however, assumes a broad notion of corruption. Corruption is not only the giving or taking of bribes. Corruption includes the corruption of politics, which means all kinds of actions where political actors (public officials included) breach the rules of the (democratic) political game and put their private interests before their public duties. The rules of the democratic political game stipulate that public officials should not abuse their power for direct or indirect private purposes. There is abuse of power not only when they breach the law, but also when they breach the rules of public ethics and duty to serve the public good for the purpose of increasing their personal power, standing or wealth.¹²

11 OECD SIGMA. 2005. "Conflict of Interest Policies and Practices in Nine EU Member States: A Comparative Review". Available at: <http://dx.doi.org/10.1787/5kml60r7g5zq-en>

12 Ibid.

In France, the *prise illégale d'intérêts* (or illegally taking a specific interest) is a crime under article 432-12 of the Penal Code. Such crime consists of an elected individual using his/her official position in a public body for personal benefit. It is punishable, if evidenced, with up to five years imprisonment and a fine of half a million Euros. However, the *prise illégale d'intérêts* is different from 'simple' conflict of interest, which is not a crime per se.¹³ Substantiating guilt in court has proven to be extremely difficult, even though verdicts of guilt have on occasion been issued.

The first report of the Nolan Committee on the 'cash for questions' scandal in the UK Parliament stated that 'it is vital for the democratic process that MPs should maintain the highest standards of propriety in discharging their obligations to the public which elects them. It is also essential for public confidence that they should be seen to do so.'¹⁴ As a result, in 1996 a Code of Conduct was adopted for members of the UK House of Commons, showing that the British approach is based on the idea that conflicts of interest policies are one aspect of ethical standards in government.

The primary objective of a conflict of interest policy is the preservation and enhancement of trust in governments and in the political class. Any actual, apparent or potential conflict of interest situation carries the risk of corruption with devastating effects on principles and processes of democracy. Even if defining it in abstract seems quite simple, the unambiguous regulation of conflict of interest as a cor-

ruption prevention mechanism is much more complex, for several reasons.

The purpose of regulating conflict of interest is to underpin the impartiality or the independence of a decision-maker as well as securing his/her loyalty to the legal order of the country over and above any other loyalty. The risk to the value of impartiality depends not only on legal regulations, but also on the professional ethics and moral principles of the individual. These latter are markedly subjective and contingent to the personality of each individual. This subjective dimension hinders any attempt to provide a legal regulation able to secure unambiguously that public decision-making will be free of bias. That is why it is often said that the first judgement on a potential conflict of interest is done by the officeholder, who has to discern whether a private situation, in which he/she is immersed, is affecting or is likely to affect his/her decision or stance on a particular public matter. The officeholder's personal perception will always determine the outcome of that judgement. It is always subjective, even when there is no deliberate intent to defraud or deceive. That is why good public codes of conduct would always recommend an open discussion of the issue when in doubt, for example, with a superior.

Regulating conflicts of interest also means digging deeply into the ways in which institutions work, especially at the political level, in their decision-making processes and their priority setting. This is a complex exercise because it is necessary to determine the nature and intensity of the possible risks entailed by a conflict of interest situation. Only then will it be possible to decide on the most suitable response or remedy. The most frequently used regulatory instruments are statutory laws or codes

13 See Rebut, Didier. 2013. « Les conflits d'intérêts et le droit pénal ». *Pouvoirs, revue française d'études constitutionnelles et politiques* 147: 123-131.

14 The scandal began in October 1994 when *The Guardian* newspaper alleged that London's most successful parliamentary lobbyist had bribed two conservative MPs in exchange for asking parliamentary questions, and other tasks.

of ethics, depending on the cultural administrative tradition. In some countries, the law defines a general prohibition of public officials from being embroiled in conflicts of interest while bottom-up codes of ethics issued at the institutional level detail the forbidden behaviour and provide guidance on how to avoid conflicts of interest.

Responses to conflict of interest risks may be preventive or repressive. Few countries contain references to conflicts of interest in their penal codes, except in Eastern Europe. Most countries criminalise specific behaviours or acts originating in a conflict of interest, not the fact of being in a situation of actual, apparent or potential conflict of interest. Therefore, we may conclude, regulating conflicts of interest in Western democracies belongs principally on the preventive side of anti-corruption policies and mechanisms. Preventive measures, by definition, are meant to prevent a specific situation or event from happening. Gauging their actual effectiveness is problematic. The well-known 'attribution problem' expresses the difficulty of measuring the extent to which a given outcome may be attributed to a previous action, for example, by a government, institution or public official.

A clear legal framework is, however, vital in order to prevent conflict of interest situations in practice. The legal framework is a precondition to the legal certainty, which is necessary to the rule of law and to protect the public interest as well as to determine individual accountability and personal liabilities. One basic regulatory question has to do with determining which public or private outside activities or interests are to be considered illegal for a public official to combine with his or her regular work as a public official. Another one is

what measures are helpful in balancing public and private interests.

To reduce subjectivism in determining the existence of a conflict of interest, its regulation needs to be based on a typology of standard situations. The challenge though is to avoid unsound reasoning. For example, the situation of a politician in a public decision-making process is quite different from that of a civil servant. In turn, the position of a senior civil servant differs significantly from that of a rank-and-file civil servant. Within the group of politicians, the realities of parliamentarians are different from those of members of the executive when it comes to their capabilities to influence public decisions.

The higher the position of the officeholder in the administrative hierarchy, the likelier he/she will be using discretionary powers in decision-making. The more an officeholder is free to use his/her own personal judgement in decision-making, the likelier it is that he/she may become entangled in a conflict of interest situation. Therefore, it is at this level of public responsibility where the regulation of conflict of interest and incompatibilities needs to be rigorous. This is one reason why ministers and high public officials are (or should be) subjected to more stringent conflict of interest regulations.

A number of situations affecting high public officials (politicians and high civil servants as well as some other civil servants holding public authority functions) should be devoted closer attention in regulatory terms because their decision-making may be very harmful if decisions are biased or dishonest. Possible regulatory measures may be phrased as questions:

- Should professional or remunerated activities outside the public office be allowed?
- Should political party activities be allowed for public officials needing reinforced protection of their impartiality (e.g. judges, prosecutors, members of the state audit institution or courts of accounts, central bank staffers, high ranking military officers, and members of the police forces)?
- Should public officials be permitted to receive gifts, donations or other kinds of gratuities?
- Should post-public employment activities be restricted for those leaving the public office in order to prevent 'revolving-doors' effect? If so, how long should such a cooling-off period last? Should former public officials or university professors be obliged to declare their professional interests and connections when they introduce themselves as experts in public debates or publications?
- How should the use of inside information be regulated?
- How should the conditions for officials to withdraw from decision-making processes be regulated?
- Should the propriety of assets be disclosed? Should the disclosure be publicised? Should an officeholder be obliged to sell off certain assets or put them in a blind trust? Which verification mechanism should be put in place?
- Should a declaration of personal economic interests and those of close relatives be registered? Should such information be made public?
- To what extent should public officials be permitted to hold honorary positions or membership in charities or other non-profit organisations?
- How should these regulations be implemented and what kind of public authority should be entrusted with overseeing compliance?

Comparisons across countries

Most countries have passed legislation on conflicts of interest. Conflict of interest control has moved to the forefront in the fight against corruption. Managing conflicts of interest is recognized as fundamental for integrity and as an important anti-corruption instrument. A better understanding and awareness of conflicts of interest aims to strengthen institutional frameworks, enlighten international practices, introduce a culture based on ethics in public life and improve the existing tools and instruments to reduce vulnerability to corruption.

The regulation of conflicts of interest differs significantly across countries.¹⁵ Dissimilarities depend on a number of variables such as the degree of clarity in the separation between the public and the private sectors, the effectiveness of the checks and balances system, and 'regulatory density', i.e. the scope, level of detail and extent of the regulations.¹⁶ In the EU, new member states, especially Latvia and Bulgaria, have the most 'dense' conflict of interest regulations.

¹⁵ Demke, C. et al. 2008. "Regulating Conflicts of Interest for Holders of Public Offices in the European Union: A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions". Available at: http://ec.europa.eu/dgs/policy_advisers/publications/docs/hpo_professional_ethics_en.pdf

¹⁶ See Vukadinovic, Jelena and Mirjana Glintic. 2013. "Conflict of Interest". In *Legal Mechanisms for Prevention of Corruption in Southeast Europe. With Special Focus on the Defence Sector*, edited by Aleksandra Rabrenovic, 95-130. Belgrade: Institute of Comparative Law.

In older member states, conflict of interest regimes are based on law, but not only. Supervising compliance and penalising wrongdoing are deemed indispensable, but they are not the only or most used tools in enforcing conflict of interest policies. In well-established democracies most of these policies are management driven and oriented at preventing conflicts of interest from happening and towards encouraging integrity and proper ethical behaviour through training, orientation and counselling.

In some countries, the constitution establishes certain requirements or ethical principles such as impartiality or objectivity or other administrative law principles such as openness and transparency. In others, constitutions are silent on issues of good governance and administration or on public service standards.

Statutory law is the usual regulatory instrument for conflicts of interest in most countries. Most EU member states have separate and different rules for different institutions rather than comprehensive across-the-board regulations applicable to all institutions and public officials. Only in a few countries do these regulations apply to the whole public administration and

all governmental institutions.¹⁷

In countries without specific rules on conflict of interests there are laws defining incompatibilities of certain public functions with other occupations, especially for election to parliament of members of the civil service, or other (elective) offices with executive power or in local government. The accumulation of various public jobs may also be considered unacceptable. The abolition of the *cumul des mandats* (accumulation of mandates, whereby politicians may hold more than one elective office at a time) in France has been in the public debate for years, but legislation is still permitting it. Two pieces of legislation (one organic law and an ordinary law) were promulgated on 14 February 2014, which partially address the issue. They are scheduled to enter into force on 31 March 2017, subsequent to the next due elections.

In general, however, the incompatibilities affecting the parliamentary function appear to be under-regulated in many European countries, perhaps because parliamentarians regulate themselves.¹⁸ It is quite common in many countries that parliamentarians are allowed to pursue an outside profession whereas members of the government or high civil servants are not.

On the other hand, while some countries have highly regulated systems (e.g. Latvia, Lithuania, Hungary, Bulgaria, Poland, Portugal, Romania, Spain and the United States, as well as most South Eastern European countries), others regulate only some specific topics.¹⁹ Scandinavian countries have the less 'dense' regulation

of conflict of interest, where mainly principles are stated in legal instruments. It is well known that the proliferation and detail of rules are no guarantee of rule effectiveness. The most regulated topics in EU member states are the obligation of impartiality and incompatibilities while in office, whereas the topics of gifts and gratuities and post-employment cooling-off periods are the least regulated.²⁰

Most conflict of interest situations, however, escape regulation and sanction. This is particularly serious when it comes to the defence sector where issues of peace and war, i.e. life and death, may be at stake. A recent study by Public Accountability Initiative, a non-profit organisation in the United States, highlighted the private interests in the defence industries of prominent, self-styled defence experts. Nevertheless, these experts were presented by the media as representing the public interest in the debate on whether or not the United States needed to intervene militarily in Syria.²¹

A similar situation has been repeatedly denounced at the European Food Safety Authority (EFSA). A Corporate Europe Observatory report ('Unhappy Meal'), published in October 2013, revealed that some 59 per cent of EFSA's scientific panel members had direct or indirect links to companies whose activities fell under EFSA's responsibility. In other words, almost two-thirds of EFSA's panel scientists had conflicts of interest and could not be considered independent from the sector they were regulating.²²

²⁰ Demke et al. 2008. 57.

²¹ Public Accountability Initiative. 2013. "Conflicts of Interest in the Syria Debate: An analysis of the defense industry ties of experts and think tanks who commented on military intervention". Available at: <http://public-accountability.org/2013/10/conflicts-of-interest-in-the-syria-debate/>

²² Corporate Europe Observatory, "The European Parliament demands stricter regulation of conflicts of interest at EU's food safety authority." Available at: <http://corporateeurope.org/pressreleases/2014/04/european-parliament-demands-stricter-regulation-conflicts-interest-eus-food>

¹⁷ E.g. "The Seven Principles of Public Life" of the UK apply to all public officials and civil servants.

¹⁸ Demke et al. 2008: 29-35.

¹⁹ Vukadinovic and Glinčić 2013.

A report by the German newspaper *Der Spiegel* on 10 September 2013 highlighted that senior European Commission officials have a penchant for changing sides when they join the private sector. They take up positions with Chinese companies, cigarette manufacturers or PR firms – and potential conflicts of interest are often ignored by their former colleagues working in EU institutions.²³

The US Food and Drug Administration (FDA) Safety and Innovation Act has recently relaxed conflict of interest rules for FDA advisory committee members, but concerns remain about the influence of members' financial relationships on the FDA's drug approval process.

Using a large, newly available, data set, a study by the Milbank Memorial Fund carefully examined the relationship between the financial interests of FDA Centre for Drug Evaluation and Research (CDER) advisory committee members and whether members voted in a way favourable to these interests.²⁴ Medical practice and prescribed treatments depend on the professional judgements of the medical profession, which can be strongly influenced by the lobby of pharmaceutical companies.²⁵ The independence and impartiality of such medical judgements are often put into question.

23 Schult, Christoph and Christoph Pauly. 2013. "Conflicts of Interest: Brussels' Revolving Door for Top EU Officials." *Der Spiegel On Line*, 9 October 2013. Available at: <http://www.spiegel.de/international/europe/european-commission-officials-and-potential-conflict-of-interests-a-926792.html>

24 Pham-Kanter, Genevieve. 2014. "Revisiting Financial Conflicts of Interest in FDA Advisory Committees." *The Milbank Quarterly* 92 (3): 446–470; DeAngelis, Catherine D. 2014. "Conflicts of Interest in Medical Practice and their Costs to the Nation's Health and Health Care System." *The Milbank Quarterly* 92 (2): 195–198.

25 See, for example Caroll, Aaron E. 2014. "Doctors' Magical Thinking About Conflicts of Interest". *The New York Times*, 8 September 2014. Available at: http://www.nytimes.com/2014/09/09/upshot/doctors-magical-thinking-about-conflicts-of-interest.html?_r=1&abt=0002&abg=1%20-

The Achilles' Heel of enforcement

The most difficult question in managing conflicts of interest is, perhaps, the implementation of the policy and ensuring compliance with the goals, wording and spirit of the regulations. Demke et al. find that:

- the more rules exist, the more management capacity is required to implement these rules and standards. While individual requirements in fulfilling new obligations (mainly in the field of disclosure policies) are increasing, in many cases, control and monitoring bodies (e.g. ethics committees) are weak and lack resources.²⁶

This finding challenges the adoption of comprehensive approaches to regulating conflicts of interest: Enforcement requires that specific features of high officials and politicians be taken into account, that is, the ethics regimes of civil servants should not be directly used as benchmarks for high public officials and politicians. Quick responses of monitoring bodies to conflict of interest-based political scandals are required to protect the credibility of the public bodies concerned and to preserve the trust of the citizens. However, quick responses may be at odds with the often lengthy and

cumbersome methods that are in place in order to guarantee fairness in administrative procedures and criminal investigations.

Weak implementation of conflict of interest regimes involving high public officials tends to be less and less tolerated by civil society and a free public opinion. Manifest discrepancies between the proliferation of rules and their low enforcement tend to breed public cynicism, causing systems of self-regulation in the public sector to fall into disrepute. Therefore, strong conflict of interest enforcement bodies are necessary, and increasingly so. They should have the legal powers to investigate, enforce the relevant legislation, and sanction improper behaviour.

The experience of some countries, such as the United States, highlights the complexity of conflicts of interest and suggests that informal monitoring by civil society watchdog groups may be just as important as official monitoring of compliance with regulations and statutes in ensuring adequate enforcement. As pointed out by the Asian Development Bank (ADB) and OECD Anti-corruption Initiative (2007):

²⁶ Demke et al 2008: 8.

- In managing conflicts of interest, prevention is more cost-effective than enforcement; however, they are equally important in promoting good governance and fighting corruption. Universal codes of conduct, asset and interest disclosure, and public education and awareness campaigns to outline fundamental concepts and expectations for ethical behaviour must be balanced by clear sanctions and enforcement measures to ensure that both the causes of conflicts of interest and its effects are adequately addressed.²⁷

²⁷ ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. "Managing conflicts of interest. Frameworks, tools, and instruments for preventing, detecting, and managing conflict of interest". Available at: <http://www.adb.org/sites/default/files/publication/27975/managing-conflict-interest.pdf>

CONCLUSIONS

1. Conflicts of interest, for all their elusiveness, are real. Illegitimate interests may influence decisions at all levels and in all aspects of public life, including the private economy. The implications include numerous grave consequences like, for example, medical treatments, issues of war and peace, justice and injustice. Eliminating conflicts of interest completely in decision-making is probably impossible, but the informed public discussion about conflicts of interest could minimise their impact.
2. While a good regulatory system is necessary, it is insufficient on its own. Although many national regulations and codes of conduct are good, they are often not taken seriously. If they were born in an atmosphere of general public mistrust in public officials and government institutions, trust is not likely to increase simply as a result of some legislative changes. Populations do not feel reassured merely by knowing that in their country there is robust regulation of conflicts of interest. More is needed to create confidence, especially a visible, sustained, coherent and efficient implementation.
3. Research and experience show that effective political leadership, a strong legal framework, and an independent press are necessary to detect, prevent, and manage conflicts of interest. Establishing a public discourse that supports and reinforces high ethical standards in public life, as well as in private relationships, will clearly benefit from a determined leadership at the top. Transparency and fairness are also necessary components. Finally, a professional and adequately paid civil service, clear rules concerning the duties of politicians and public officials, and an emphasis on accountability at both national and local levels, are imperative.

Guides to Good Governance series



The guide *Tackling conflicts of interest in the public sector* considers how democracies are built on a division between two spheres: the civil society and the market (the private sector), and the state (the public sector), which represents the political and administrative governance and should embody the general interest. The notion of conflict of interest encapsulates the complexity of the ethical and regulatory problems surrounding the interaction between the public and the private spheres of society. Conflicts of interest are very context-dependent, which may lead policy makers to approach and regulate them ineffectively.

Guides to Good Governance is a series of small booklets each of which discusses a particular topic of importance to good governance in the defence sector. The guides can be read by individuals with an interest in learning more about one or several topics of direct relevance to good governance in the defence sector – or the public sector more generally – and they can be used for educational purposes.

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