

# ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

## OVERVIEW OF CONFLICT OF INTEREST AND RELATED OFFENCES

### QUERY

Could you provide a comparative overview of sanctions imposed in cases of conflict of interest and related offences (abuse of power, trading in influence, fraud in office, etc.), as well as best practices in terms of legislation? What are the practical challenges of prosecuting public officials on the grounds of the conflict of interest laws?

### CONTENT

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### SUMMARY

Conflict of interest is addressed in the laws and regulations of international bodies and most EU Member States, as well as the US and Canada. Conflicts of interest in the public sector refer to situations in which decision makers are required to decide between a public interest and a personal one. International best practice on conflict of interest (a) requires decision makers to disclose any such conflict of interest, (b) includes mechanisms to manage conflicts of interest, and (c) specifies penalties for non-disclosure.

Conflict of interest is seen as an administrative offence in many countries. As such, rules put in place for conflict of interest generally require lower standards of proof and sanctions for non-compliance are likely to be less severe than penalties for related criminal offences. Nevertheless, oversight mechanisms for conflict of interest rules are frequently weak, undermining the effectiveness of conflict of interest provisions in identifying and preventing corrupt activities.

Related offences such as abuse of power, trade in influence and embezzlement tend to be more commonly found in criminal law regimes, have a higher burden of proof and are often subject to much stricter sanctions.

While a lack of studies makes it difficult to assess if these factors lead, in practice, to conflict of interest rules being applied in favour of related criminal offences, anecdotal evidence suggests that law enforcement often sees conflict of interest as an indicator of or precursor to more serious offences.

## 1. INTERNATIONAL STANDARDS ON CONFLICT OF INTEREST

Transparency International defines conflict of interest as situations where “an individual or the entity for which they work, whether a government, business, media outlet or civil society organisation, is confronted with choosing between the duties and demands of their position and their own private interests.”

Conflicts of interest are not of themselves evidence of wrongdoing and, given that officials inherently occupy multiple social roles, they are almost bound to occur. With the right measures in place, conflicts of interests are quickly detected and easily defused – usually voluntarily – before any impropriety can take place (Jenkins 2015: 1). Nonetheless, while a conflict of interest does not ipso facto imply corruption, where integrity management systems are weak and conflicts of interest are inadequately managed, there is a heightened risk of corruption.

The Organisation for Economic Cooperation and Development (OECD 2003: 4) highlights that where conflicts of interest are not regulated there is greater risk of low adherence by public officials to the ideals of legitimacy, impartiality, and fairness in public decision-making. An absence of conflict of interest provisions can therefore result in distortions to the rule of law, the development and application of policy, the functioning of markets and the allocation of public resources.

Typically, conflict of interest rules are put in place to achieve a number of policy aims related to corruption and good governance. These can include (Demmke & Henöld 2007: 35):

- increasing public confidence in the government;
- demonstrating the integrity of government officials;
- ensuring official activities are subject to public scrutiny;
- deterring persons whose personal finances would not bear up to public scrutiny from entering public service; and
- better enabling the public to judge the performance of public officials in the light of their outside financial interests.

Public confidence in institutional impartiality and resulting trust in government can also have wider societal benefits, as outlined by Rothstein and Teorell, who suggest that good governance – or as they call it “quality of governance” – and in particular the certainty that knowing government decisions will be made impartially, is vital for economic development, citizen satisfaction and democratic stability (Rothstein & Teorell 2008).

Conflict of interest rules should include three main areas to be effective (Jenkins 2015: 4-6):

### *Prohibition*

Activities and positions deemed to be incompatible with the proper performance of public duties should be clearly stipulated and prohibited. They should also be tailored to the role the public official performs (Reed 2008). This may include prohibition from:

- holding another post in a different branch of government
- private sector employment (including consultancy work)
- any ownership stake in a private legal entity conducting business with government
- accepting certain kinds of employment within a specified time-period after leaving office

### *Interest disclosure*

Certain officials and members of government should be obliged to regularly declare their past and present interests. A good disclosure regime should include both *financial assets* and other *interests*.

These are quite distinct. While *financial assets* and income entail concrete financial benefit, *interests* encompass a range of benefits which, at the time of declaration, may not bestow any particular advantage to the official (for example, membership of business associations or boards), but which could exert influence on an individual's decision making (OECD 2005).

Disclosure of interests should also include the interests, holdings and liabilities of officials' spouses and children, in addition to the officials' own interests. This is particularly the case where immediate family members have ownership stakes in private legal entities conducting business with government.

### *Resolution of conflicts of interests*

Clear procedures for the resolution of conflicts of interest and disciplinary measures for dishonest activity should be laid out (Heggsted et al, 2010). As outlined by the OECD (2003), appropriate procedures to mitigate conflicts of interest could involve:

- recusal (the voluntary or enforced abstinence of officials from decision making or participation in discussions in which they have a personal stake)
- divestment or liquidation of a particular interest by the public official
- restriction of official's access to sensitive information
- transfer of public official to an alternative duty
- resignation of public official from the conflicting private-capacity function

Failure to manage conflicting interests appropriately should be dealt with by a competent agency and result in disciplinary action, up to and including dismissal. Criminal prosecution should be a credible sanction for those contravening conflict of interest rules (OECD 2007). Any decisions or contracts subsequently found to have been affected by an undeclared conflict of interest should be retroactively cancelled and the beneficiaries excluded from working with the public administration for a period of time (OECD 2004).

Conflict of interest rules generally seek to regulate to the following areas (Jenkins 2015: 5-6):

- secondary employment;
- procurement;
- movement of officials between the public and private sectors;
- sharing confidential information and insider trading;
- nepotism and cronyism;
- private financial interests; and
- fraud and bribery.

### **United Nations Convention Against Corruption**

The United Nations Convention Against Corruption is the fundamental instrument of

international anti-corruption law. While there is no single article on conflict of interest, conflicts of interest are addressed in rules on the public sector in Articles 7 and 8.

Article 7 (4) of the Convention requires that states 'endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.'

Article 8, addressing codes of conduct for public officials, states in paragraph 5 that: 'Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.'

The United Nations Office on Drugs and Crime has highlighted that in developing conflict of interest rules under Article 8 (6) of the UNCAC, a critical element is in ensuring that sanctions for a breach of these rules exists (UNODC 2010: 16).

### **International Organisations**

International organisations have implemented conflict of interest rules in similar ways, often following the OECD guidelines below as best practice. Key common features across them are that they rely on upwards reporting, sometimes with external oversight bodies, and include sanctions up to and including dismissal for failure to disclose conflict of interest. In some cases, policies include referral to national authorities for criminal investigation.

#### *OECD*

The 2003 OECD guidelines on conflict of interest are to a large extent the standard adhered to by other international organisations and national governments when establishing conflict of interest regimes (Zibold 2013: 2).

The guidelines define conflict of interest as "a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities" (OECD 2003: 4).

A number of core components of conflict of interest policies are highlighted in the guidelines, including:

- identifying situations where conflict of interest may occur;
- establishing procedures for identifying, managing and resolving conflicts of interest;
- demonstrating leadership commitment to the policy;
- ensuring employees are aware of policies, reviewing at risk areas, identifying preventative measures, instituting an open organisational culture for discussing conflict of interest, and a supporting management;
- enforcing conflict of interest policies; and
- instituting partnerships with the business and non-profit sectors to deal with conflict of interest in advance.

While highlighting that they may be effective, the guidelines stop short of recommending public asset declaration regimes.

In line with the guidelines, the OECD's personnel manual requires staff, "to disqualify themselves from advising or acting in the course of their duties with respect to a matter in which they or someone with whom they have a close relationship has a special personal interest". However, supervisors are able to waive this requirement when it is in the interests of the OECD, or where there has been competitive tendering.

Failure to comply with provisions of the staff manual can result in disciplinary measures being taken. These can range from a warning given by a manager, up to and including dismissal. There is no explicit statement however in the staff regulation confirming that misconduct could be referred to national authorities for criminal investigation (OECD 2017: 10, 172-173).

#### *United Nations (UN)*

The UN's Staff Rules and Regulations prohibit conflict of interest, defined as when "personal interests interfere with...official duties and responsibilities or with the integrity, independence and impartiality required." Actual

or potential conflicts of interest should be reported to heads of office, who should mitigate any conflict of interest that has arisen. Failure to report conflicts of interest are a breach of Staff Regulations and Rules and are subject to a disciplinary process (UN 2017: 11, 80-83). Sanctions under the disciplinary process can include fines, demotion, dismissal and, where warranted, referral to the relevant Member State for criminal investigation (United Nations 2011).

A number of senior UN officials are also required to submit financial disclosure forms to the UN Ethics Office annually. While there is no requirement to make these public, since 2007 the UN Secretary General and the Deputy Secretary General have done so (UN Ethics Office).

While the UN system generally restricts itself to a requirement to report conflicts of interest, when it comes to procurement processes, staff are prohibited from participating in a tender which involves a vendor with whom they have a financial or personal interest (UN 2013).

#### *International Monetary Fund*

The International Monetary Fund (IMF)'s Staff Regulations require in Article 24 that staff avoid conflict of interest – or the appearance of it – and requires disclosure to a supervisor or a Compliance Officer in situations where potential conflicts of interest arise. The supervisor or Compliance Office can then decide on whether or not the staff member should be recused. Disciplinary sanctions for breach of this rule can be applied, including termination of employment. All IMF staff are required annually to certify that they have read the conflict of interest policy and are in compliance with it. Staff above a certain grade are required to submit annual, confidential, financial disclosure forms to an external Compliance Officer (IMF 2003).

IMF staff have access to an Ethics Office to make enquiries and report potential conflicts of interest. Up until the date of the last report of the Ethics Office of the IMF in 2014, the largest number of enquiries from staff each year, except 2009, pertained to conflict of interest, including questions over external activities, financial and personal conflicts of interest, gifts, obligations as an international civil servant and post-fund employment. Conversely though, allegations of

staff misconduct related to conflict of interest were not frequently reported (IMF 2014).

#### *World Bank*

World Bank staff guidelines prohibit World Bank employees and their immediate family members from participating in a financial transaction with the World Bank group. Persons who face a conflict of interest are required to inform managers and the Office of Ethics and Business Conduct (EBC). The staff member is then informed as to whether they can proceed with the action, should have different responsibilities or should abstain from the exercise of responsibility. Senior level staff are required to file an asset declaration to the EBC. Failure to comply with these provisions can lead to disciplinary measures, including dismissal and reporting of offences to national authorities (World Bank 2008).

#### *European Union*

The European Union has established conflict of interest provisions relating both to the conduct of its own staff in the European institutions, as well as for EU member states to comply with in certain policy areas, notably procurement.

Directive 2014/24/EU is the EU's main legal instrument regulating public procurement processes in Member States. Article 24 requires Member States to "ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures." It requires that conflict of interest rules cover, as a minimum, situations where persons involved in public procurement "have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence."

Internally, a number of different regulations cover EU staff, with European Institutions tending to be more stringently regulated than their national equivalents. The number of regulations differ per institution, with the European Commission and European Investment Bank being the most heavily regulated on conflict of interest, followed by the European Central Bank and the Court of Auditors (Zibold 2013: 4).

#### *European Commission*

Staff of the European Commission are forbidden from (a) accepting favours or gifts from third parties without obtaining prior permission and (b) having an interest in any businesses or organisations which have dealings with the EU institutions, if this has the potential to compromise their independence. Outside activities require approval and staff should inform employers of spousal employment. If a potential conflict of interest arises, staff are required to alert their supervisor (European Commission 2016). Supervisors can then decide that the person should withdraw from the procedure or put other measures in place to address the conflict of interest (European Commission 2014).

Commissioners have their own code of conduct, which includes provisions on conflict of interest and requires them to publish declarations of interests, including information on spousal employment (European Commission 2004). Meeting agendas of Commissioners and their staff are also available on the Commission's website.

All Commission staff and Commissioners are subject to varying degrees of post-employment restrictions and the Commission publishes an annual report on conflicts of interest (European Commission 2016).

Breaches of conflict of interest provisions are investigated by the Commission's Investigation and Disciplinary Office (IDOC), which conducts administrative enquiries and prepares disciplinary proceedings. The IDOC deals with all matters falling outside the remit of, or not already being investigated by, the European Anti-Fraud Office (OLAF). Ultimately, administrative enquiries under the IDOC may lead to the opening of disciplinary proceedings, which can result in financial or non-financial penalties including a delay in advancement to a higher salary step, removal from post, or reduction of pension (European Commission 2016).

OLAF investigates serious misconduct, including in relation to conflict of interest. Investigations are subject to several procedural safeguards, including the right to avoid self-incrimination and access to evidence. They can result in disciplinary measures, administrative measures (such as changes in contract terms), financial

measures (including recovery of disbursed funds) or referral to a national public prosecutor's office.

Monitoring of post-employment restrictions on former EU staff and Commissioners have been a subject of particular controversy in recent years, most notably the appointment of former Commission President Barroso to a position at Goldman Sachs in 2016. A 2017 Transparency International EU report identified that more than 50% of Commissioners from the previous College of Commissioners (2009-2014) now work for lobby organisations. The report expresses concern about the decision-making process for assessing if post-employment restrictions have been breached. The decision lies with sitting Commissioners, who are potentially long-term colleagues of former Commissioners and will themselves be assessed by the same system one day, potential encouraging lenient findings. The report is also critical of the lack of definition for conflict of interest within this process, leading to narrow interpretations in previous decisions. The report additionally found problems with the right of EU officials to take sabbaticals of up to 15 years, during which time some officials work in sectors closely related to later Commission duties (TI EU 2017: 19-20).

### *European Parliament*

Members of the European Parliament (MEPs) are required under their Code of Conduct to take steps to address conflicts of interest and, where this is not possible, to report these to the President of the Parliament. They are also required to state orally or in writing any conflict of interest to the chair before speaking or voting on an issue in Parliament. Each MEP should additionally submit an asset declaration within 30 days of taking office or of a change in circumstances. Declarations are published on the website of the Parliament. MEPs are forbidden from accepting gifts of a value of more than €150 (European Parliament 2012).

Post-employment restrictions are not in place for MEPs however. Transparency International EU has identified several potential conflict of interest violations that could have been addressed by effective post-employment restrictions, including:

- Sharon Bowles (UK, ALDE), who joined the London Stock Exchange months after leaving the European Parliament. As an MEP, Bowles was Chair of the

Parliament's economic and monetary affairs committee and had frequent meetings with the London Stock Exchange, as well as overseeing the drafting of new financial market regulations.

- Holger Kraemer (Germany, ALDE), who worked extensively on the regulation of the car industry as an MEP in the Parliament's environment committee and subsequently became director of European affairs, public policy and government relations at the Opel Group (TI EU 2017: 8).

## 2. OVERVIEW OF CONFLICT OF INTEREST IN NATIONAL LAWS AND POLICIES

Conflict of interest rules at the national level are more varied than those established by international organisations. While it is difficult to identify a standardised way that rules have been laid down, a number of similarities become apparent when looking at implementation in European countries, the US and Canada.

The first is that there is a tendency for conflict of interest rules to be set out in legislation (either criminal or non-criminal) rather than in internal regulations or administrative codes. Laws also tend to be general, rather than specific to conflict of interest (Zibold 2013: 2) and are both more common and more detailed in the "newer" EU member states compared to the older ones (Zibold 2013: 3; Nikolov 2013: 417).

Similarities also exist when it comes to the scope of the rules. General provisions on conflict of interest often apply to all levels of government at the national level; government ministers, parliamentarians and civil service staff. For each level of government however, the exact nature of the rules can differ.

Finally, in a number of countries a special oversight body is responsible for enforcement of conflict of interest rules in some or all cases, rather than the police or general prosecution. These bodies tend to have no criminal investigatory power.

A major difference between conflict of interest rules in different national jurisdictions lies in the

penalties for breaking conflict of interest rules. As Nikolov (2013: 408) points out, while some European countries recognise conflict of interest as a criminal offence, this is an exception and it is predominantly an administrative offence across much of the EU. There are also a number of instances, however, where national rules mix criminal and administrative penalties, depending on the type of official.

### Legal basis

The most common method for establishing conflict of interest rules is in national legislation, which is the case in a large majority of European countries, including France, Germany, Belgium, Finland and Romania, as well as in the US. This legislation tends to be separate from criminal laws and codes.

In Estonia, for example, the Anti-Corruption Act (1999, as amended) restricts all public officials from taking part in acts or decisions where there is a private or personal economic interest, while the Constitution prohibits Ministers and Members of Parliament from holding private sector advisory or management positions (EuroPAM). In Serbia, it is the Anti-Corruption Agency Act (2008, amended in 2010) that states that for all public officials, conflicts of interests must be avoided.

Three European countries only have administrative codes, rather than pieces of legislation, in place to deal with conflict of interest: Iceland, Norway and the UK. The British Ministerial Code (2010), for example, includes a general regulation for Members of Parliament to avoid conflicts of interest, as well as providing more detailed regulations for ministers, including on accepting gifts, company positions and post-employment restrictions. The UK's Civil Service Management Code (2013, as amended) applies similar provisions to the civil service. In Norway, the Ethical Guidelines for the Public Service (2005, last amended 2006) put in place restrictions for ministers and civil servants. These include accepting gifts, practicing second jobs that are compatible with the interests of the state, and participating in decisions which affect private interests.

Four European countries have a mix of law and administrative code; Bulgaria, Italy, Poland and Portugal. In all four cases, a law applies to ministers and parliamentarians, while a code is in

place for civil servants (EuroPAM). Canada similarly takes a mixed approach, with codes of conduct for parliamentarians and junior civil servants and legislation for ministers and senior civil servants (Asian Development Bank/OECD 2007: 50-53).

Denmark is an outlier here, having almost no rules governing conflict of interest. In Danish law, the only limitation is a requirement on civil servants not to hold a second position (EuroPAM).

### Scope

In the countries looked at, relative uniformity exists in terms of scope of rules. In most cases, whatever the legal basis, rules cover heads of state, ministers, parliamentarians and civil servants. One frequent exception to this is in cases where the head of state is a monarch. Portugal, for example, has a general provision in its Code of Administrative Procedure (2015) that prevents anyone holding a public function from participating in a decision-making process in which s/he holds a private interest. In addition to this it has legislation covering conflicts of interest for the head of state, ministers, parliamentarians and civil servants.

As notable exceptions, parliamentarians are only covered by a requirement 'to avoid conflict of interests' in the UK and are only subject to financial disclosure rules in Iceland. In Hungary, ministers are not covered by conflict of interest rules, while in the Netherlands ministers and parliamentarians are only covered by a constitutional principle forbidding them from fulfilling certain other government functions (EuroPAM).

### Oversight mechanisms

In contrast to the legal basis and scope, oversight and enforcement of conflict of interest rules vary greatly amongst the European and North American countries surveyed.

In several countries, a dedicated body or bodies covers cases of conflict of interest for ministers and Members of Parliament, while departmental bodies exist for civil servants. In Ireland, for example, the Standards in Public Office Commission monitors conflict of interest for parliamentarians and ministers, while each department monitors its own civil servants. In

Bulgaria, the Commission for Prevention and Ascertainment of Conflict of Interest monitors and enforces conflict of interest rules for the head of state and ministers, while the Anti-Corruption, Conflicts of Interest and Parliamentary Ethics Committee does the same for MPs and the Civil Service Appointing Authority oversees civil servants.

In a number of other countries, however, dedicated bodies are responsible for enforcement against some public officials, while no enforcement body exists for others. In Norway, for instance, the Hiring Respective Authority oversees civil servants' conflicts of interest, but there is no corresponding body for ministers or parliamentarians. In Finland, there is an enforcement body for parliamentarians, but none for ministers or civil servants. In the UK, there is an enforcement body for parliamentarians, but no specific body for other public officials.

A few countries, including Slovenia, Croatia and Latvia have a dedicated body overseeing conflict of interest at all levels of government. In Slovenia, for example, the Commission for the Prevention of Corruption acts as the enforcement body for all public officials.

In addition to these, a smaller but not insignificant number of countries have no specific enforcement mechanism for conflict of interest, including Luxembourg, Portugal and Spain (EuroPAM). This may imply that the public prosecutor is the responsible body or that internal management are responsible, but it could also mean that no enforcement body provides oversight. The US, for example, does not designate a specific body, but as it combines conflict of interest rules at the federal level with other anti-corruption rules in the US Criminal Code (18USC), the Federal Bureau for Investigation and federal prosecutors with enforcement are mandated with enforcement.

### Sanctions

Sanctions for violations of conflict of interest laws can include criminal penalties, administrative sanctions, no penalties at all or a mix of all three.

In countries with criminal penalties for breaching conflict of interest laws, possible maximum sentences can be high. In Romania, for example,

penalties include a maximum 15-year prison sentence for violating conflict of interest laws. In France, the maximum sentence is three-years' incarceration or a €200,000 fine.

France's High Authority for Transparency in Public Life (HATVP), for example, has been particularly active in referring cases for prosecution under conflict of interest rules. High profile examples include (TI EU 2017: 27-29):

- a senator who was given a six months suspended prison sentence and fined €60,000 for omitting a Swiss bank account from his asset declaration;
- a former minister who was convicted to a two-month suspended prison and a €5,000 fine for an omission in her asset declaration;
- a member of the National Assembly who was sentenced to a €45,000 fine; and
- a Secretary of State, who had to step down nine days after his nomination, when the review of his declaration by the HATVP showed he had not correctly filed his tax returns.

In the Czech Republic, Germany and Portugal, along with a number of other countries, sanctions for violating conflict of interest laws range from fines to loss of mandate, but do not include prison sentences. In the Czech Republic for example, civil servants can be fined up to CZK 10,000 (€370), while Members of Parliament can lose their mandate for violating conflict of interest laws. In Hungary, the head of state and Members of Parliament can lose their mandate in cases of conflict of interest, while civil servants can face a public warning or a reprimand.

At the other extreme, in Estonia, Spain and Sweden amongst others, no sanction is provided in the law or regulations for breaching conflict of interest rules.

A fourth group of countries have a mix of administrative, criminal and no sanctions depending on the level of official. In Austria for example there are no sanctions for breach of rules by the head of state, ministers or parliamentarians, but civil servants can face fines and removal from office. In Bulgaria, ministers and parliamentarians can face fines, while civil

servants face only disciplinary sanctions (EuroPAM).

### Burden of proof

Burden of proof in conflict of interest violations varies depending on the type of offence in the national law or regulation. However, while there is not a great deal of literature on the subject, it seems that often, where criminal law is not involved, the burden of proof for conflict of interest regulations is low and that in many cases, the investigating body has the power to make a determination that a conflict has occurred without recourse to a judicial process or to prove guilt beyond a reasonable doubt.

In France's Law on Transparency in Public Life (2013), for example, the HATVP can both make determinations on conflict of interest violations and refer them to appropriate bodies for action, including forwarding cases to the public prosecutor for criminal investigation.

Similarly, under the Canadian Conflict of Interest Act (2006), the Conflict of Interest and Ethics Commissioner can impose a fine of up to C\$500 when the Commissioner believes on reasonable grounds that the public officer has failed to submit an asset declaration on appointment, failed to declare gifts or offers received in office, not issued reports on why they have recused themselves from a certain issue, and not divested or put their assets in a blind trust within the time limit set after appointment.

Under the UK Parliament's House of Commons Code of Conduct (2015), the Parliamentary Commissioner for Standards has an obligation to invite the person investigated to respond to the complaint, but has no other duty to respect procedural rights. The Commissioner has the power to decide if there has been a violation, which is then confirmed or not by the Committee on Standards, which can impose sanctions. In the most serious cases, the whole House must vote on expulsion of a MP.

In Germany, violations of conflicts of interest rules by parliamentarians are referred to the President, who has the power to issue an admonishment for a minor offense after making a determination that conflict of interest rules have been breached. For more serious offences,

cases are referred to the Presidium, which can issue fines (German Bundestag 2014: Rule 8).

### 3. KEY DIFFERENCES BETWEEN CONFLICT OF INTEREST AND ABUSE OF POWER, TRADE IN INFLUENCE AND EMBEZZLEMENT

Abuse of power, trade in influence and embezzlement, as well as public sector fraud and bribery, are all closely related to conflict of interest. In fact, in many cases a conflict of interest that has not been reported or adequately mitigated can be an indicator of or precursor to other criminal offences.

While the terminology used to cover these offences differs according to the jurisdiction, some commonly accepted definitions of the related offences include:

- Abuse of Power, often also referred to as misconduct in public office, is when an office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office (UK Crown Prosecution Service).
- Trade in influence, or influence peddling, is when a person misuses her/his influence over the decision-making process for a third party in return for loyalty, money or any other material or immaterial undue advantage (Slingerland 2010: 2).
- Embezzlement is "when a person holding office in an institution, organisation or company dishonestly and illegally appropriates, uses or traffics the funds and goods they have been entrusted with for personal enrichment or other activities" (Transparency International).
- Fraud is "the offence of intentionally deceiving someone in order to gain an unfair or illegal advantage (financial, political or otherwise)" (Transparency International).
- Bribery is the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust (Transparency International).

As highlighted above, while conflict of interest rules and these related offences differ in a

number of ways, the most crucial of these is that the latter are often criminal offences as part of criminal legal infrastructure, while conflict of interest is more often an administrative rule at the national level.

A consequence of this is that related offences tend to have a much broader scope and more serious sanctions than conflict of interest regulations and are generally overseen by law enforcement and prosecuting authorities. On the other hand, the burden of proof for these offences tends to be much more onerous on the prosecuting body and in some cases immunity issues arise, making conviction more challenging.

### Legal basis for offences

Unlike conflict of interest rules, which are normally laid out in specific laws or in legislation related to the operation of the public administration, offences like abuse of power, embezzlement and trade in influence are usually covered in general criminal codes.

In Canada, for example, offering and accepting a bribe in order to influence a public office holder (S.119-120), influence peddling (S.121 & S.123), and fraud and breach of trust (S.122) are all included as part of Canada's Criminal Code (Nicholls et al: 620).

A similar situation exists in France, where trafficking in influence, embezzlement and misappropriation are included in the Criminal Code, under Articles 332, 432 and 433 (Nicholls et al: 662-665).

The US is an exception to this. US federal criminal law covers acts included elsewhere as conflict of interest, as well as a number of related activities, such as bribery, influence peddling and fraud, in one heading of the Federal Criminal Code (Tillipman 2014: 10-13).

### Scope

In contrast to conflict of interest rules, which often identify the exact office holders to which they apply, or specify different rules for different types of office holder, the related crimes examined are more likely to be comprehensive in scope.

In New Zealand, for example, the Crimes Act 1961 (as amended) defines 'official' as "any person in the service of Her Majesty in right of

New Zealand," giving a wide definition of the public officials to whom it applies.

A number of jurisdictions also include persons working for, but not employed by the state, allowing authorities to prosecute private sector employees performing a public function under public sector corruption provisions.

The Irish Prevent of Corruption (Amendments) Act of 2010, for example, applies to any person employed by or *acting on behalf of* the state. Similarly, in France, the Criminal Code for public sector corruption includes persons "holding public authority or discharging a public service mission", going beyond those only employed in the public sector.

Potentially going further to include voluntary workers, Brazil's Criminal Code defines a public official as "any person who holds a public position, employment or exercising a public function, even if temporarily or without pay" (Nicholls et al: 630-633, 638-639, 652-655).

An important limitation when prosecuting criminal offences, which tends not to exist with conflict of interest rules, is that in several jurisdictions, parliamentarians enjoy full or partial immunity from criminal prosecution without the consent of parliament (European Parliament 1999).

In Italy, for example, the Chamber of Deputies has decided in a number of cash-for-votes allegations involving parliamentarians that the offence falls within the limited immunity Italian parliamentarians enjoy and, as such, cannot be prosecuted (Cerese 2015: 9). Theoretically at least, such instances could be subject to administrative sanctions under conflict of interest provisions.

### Body responsible for enforcement

Compared to conflict of interest rules, there exists a much greater degree of uniformity across different jurisdictions in enforcement of abuse of power, trade in influence, embezzlement and similar offences. In most cases, such offences are overseen and laws are enforced by the police and prosecution authorities.

For example, in the UK the Serious Fraud Office is responsible for investigating acts falling under the Bribery Act, while the Public Prosecutor, Director of the Serious Fraud Office or Director of Customs and Revenue have responsibility for

prosecutions (Nicholls et al: 102-107). Similarly, in France, the public prosecutor is responsible for prosecuting offences falling under the French criminal code (Nicholls et al: 662-665). In the Netherlands a special branch of the national police is responsible for investigating civil servants and elected/appointed officials suspected of criminal offences in cases where the integrity of justice and/or that of the public administration is at issue.

In some jurisdictions, however, other oversight bodies play a role in public sector criminal prosecutions, although it still falls to the police and prosecution to decide to take cases to court.

In Ireland, for example, the Standards in Public Office Commission has power of investigation either on its own initiative or following a complaint, though prosecution falls to the public prosecutor. In Luxembourg, a number of bodies have the power to investigate, including the Internal Audit and Investigations Department, the National Audit Office and the Permanent Commission against Corruption, but only the Commissioner of Police has the power to prosecute (Demmke & Moilanen 2011: 66).

### Penalties and sanctions applicable

In line with the greater focus on criminal law, sanctions for related offences tend to be substantially higher than those for conflict of interest violations.

In France for example, persons can be sentenced for up to 10 years' imprisonment for misappropriation or embezzlement, in contrast to a maximum of three years for conflict of interest violations. Interestingly though, the maximum fine for these offences is €150,000, €50,000 less than for conflict of interest violations. Trading in influence similarly carries a sentence of up to 10 years' imprisonment, while fraud has a maximum of seven years (Nicholls et al: 662-665).

Ireland also has legislation allowing for up to 10 years' imprisonment for public sector corruption, including trading in influence and bribery, while Canada has sentences of up to 14 years for active and passive public sector bribery, and five years for influence peddling, fraud and breach of trust (Nicholls et al: 620, 630-633).

The UK has maximum 10-year sentence for bribery, but an older, common law offence of misconduct in public office also exists, which has a maximum sentence of life imprisonment (Nicholls et al: 153-171).

### Burden of proof

As opposed to conflict of interest rules, the burden of proof for related offences is, in most cases, on the prosecution to prove guilt through a criminal trial to a standard similar to 'beyond a reasonable doubt' (European Commission 2007).

Public prosecutors have highlighted the particular difficulties they have encountered in meeting this standard for corruption in particular. This is in part due to its secretive nature, partly as a result of corrupt activities often involving just two parties (one of whom frequently needs to testify against the other), and also due to the resource intensive nature of investigations and prosecutions (Kwok Man-wa, no date; Rashid and Kamaluddin, no date).

In order to address some of these difficulties, Ireland has introduced a reverse burden of proof in some cases. It applies when a gift is given to a person with whom there is an interest in performing an official function and requires the defendant must prove that the gift was not given corruptly (McCann Fitzgerlad 2016: 1-2). It should be noted though that this is not a common provision in other jurisdictions.

## 4. ENFORCING CONFLICT OF INTEREST RULES: PRACTICAL CHALLENGES

When implemented correctly, conflict of interest rules can be an effective part of a country's anti-corruption infrastructure. In a number of jurisdictions, conflict of interest rules have played an important role in ensuring that public officials are held to account. This has been particularly the case where oversight and enforcement bodies have been given sufficient resources to perform their function.

France's HATVP, for example, has an annual budget of €6 million and 40 full-time staff to oversee the asset declarations of 14,000 French public officials, monitor post-employment restrictions and to promote transparency and integrity. To date it has examined over 5,000 asset declarations and has found a number of

violations leading to high-profile cases that have resulted in convictions under conflict of interest rules (TI EU 2017: 27-29).

In Canada, the Commissioner of Lobbying covers post-employment restrictions in the lobbying sector and has an annual €3 million budget and a staff of 28. In parallel, the Conflict of Interests and Ethics Commissioner oversees potential conflicts of interest in 2,200 senior public office holders, including ministers, parliamentary secretaries, ministerial staff and, to some degree, members of parliament, and has a budget of €5 million and a staff of 47. Up until June 2015, the Conflict of Interests and Ethics Commissioner had opened more than 200 investigations and since 2013 had issued 55 penalties (TI EU 2017: 27).

Australia's conflict of interest bodies have also been active in overseeing public sector integrity. In 2005-2006, for instance, 1,800 public sector employees were investigated (Asian Development Bank 2007: 154-155). Of these:

- 930 cases involved allegations of employees not behaving honestly and with integrity—upon investigation, 76% were found to have breached the Code;
- 777 cases were investigated for not declaring conflicts of interest (real or perceived), and of these 80% were found to have breached the Code;
- 99 cases were investigated for having made improper use of inside information or their position, and of these 36% were found to have breached the Code.

### Practical challenges

Despite these successes, it is also clear that in trying to enforce conflict of interest rules, a number of practical challenges currently exist, even where oversight bodies are operational and sanctions are in place for breaches of conflict of interest rules.

### Weak penalties

In many cases, penalties for breaches of conflict of interest rules are either non-existent or only allow authorities to issue administrative penalties for non-declared potential or actual conflicts of interest. Only in a few cases are criminal sanctions available. Nevertheless, even where appropriate sanctions do exist, it is possible that authorities are opting for lesser penalties.

In Canada for example, the main penalties issued by the Conflict of Interests and Ethics Commissioner after its investigations has been the use of negative publicity, or government or party discipline, rather than more serious sanctions (TI EU 2017: 27).

In Australia, of more than 1,000 persons found to have breached conflict of interest rules, the majority were only given reprimands. Only around 200 had their salary reduced as a consequence of the violation, with 52 receiving demotions and 92 having their employment terminated (Asian Development Bank 2007: 154-155).

### Weak oversight bodies

A second challenge is that, where oversight bodies do exist for conflict of interest rules, they tend to be weak. A particular problem in this area is the use of internal mechanisms to oversee rules, such as parliamentary committees or departmental oversight bodies in the civil service. Demmke & Moilanen (2011: 63, 66) highlight these as not only less likely to be able to effectively monitor standards than external bodies, but also less likely to receive complaints, citing a study which found that legislators “rarely report improprieties of their colleagues or even of the members of their colleagues’ staffs”.

The UK's Parliamentary Commissioner and Committee for Standards have also both faced criticism for not conducting full investigations due to their status as internal bodies. In particular, criticism has related to the proximity between the investigators and persons being investigated and the potential for this to result in a less thorough investigation. This was particularly highlighted during the ‘cash-for-access’ scandal in 2015, where senior politicians were accused of offering to accept bribes in return for influence over legislation (Newell et al 2015).

### Lack of implementation

Even where strong conflict of interest rules exist, implementation of these has been a challenge. In the US, for example, despite strong post-employment restrictions, in the period 2001-2011 alone 5,400 congressional staffers and 400 former lawmakers left Congress to become federal lobbyists, raising large conflict of interest

problems in terms of undue influence (Jenkins 2015: 7).

Adequate implementation or enforcement requires political will and strong organisational leadership committed to probity in public office, both of which are often lacking. A survey of the Directors General responsible for Public Services of EU Member States undertaken by Demmke & Moilanen (2011: 46) found that the main obstacle to an effective ethics policy (in which they include conflict of interest rules) is that they are not taken seriously by senior management.

### A sliding scale of conflict of interest rules to related offences?

In light of the challenges faced when enforcing conflict of interest rules, but also the difficulties encountered when prosecuting other related offences, an interesting question is which channel is more commonly pursued by relevant oversight bodies and law enforcement.

Unfortunately, the lack of data and empirical studies makes it difficult to identify whether oversight bodies more commonly tackle conflicts of interest through the use of specific conflict of interest rules, or whether enforcement is favoured through criminal prosecution of related offences.

From examples that do exist though, it appears that rather than seeing the two enforcement options as a binary choice, some oversight bodies view conflict of interest at the lower end of a sliding scale of misconduct which culminates in outright bribery, fraud or abuse of office.

The UK government's advice to civil servants regarding potential corruption states, for example, that if civil servants become aware of actions that could be a conflict of interest, they are required to report this up the management chain. If they believe the conflict amounts to criminal or unlawful activity, however, they are advised to contact the police or other regulatory authorities directly (UK Government. 2015).

Similarly, officials in the US Department of Justice's Public Integrity Division have placed conflict of interest on a sliding scale, identifying that conflict of interest is seen by law enforcement in the US as "less egregious than bribery" (Asian Development Bank 2007: 121-122).

This approach can be seen in use by the Hong Kong police in the case of Donald Tsang, the former Chief Executive of Hong Kong. Mr Tsang failed to disclose the conflict of interest he had in negotiating rent for an apartment with a landlord who was applying for a broadcasting licence for the city. After evaluating the situation, the police decided to prosecute under criminal legislation and he was found guilty of misconduct in public office, based on non-declaration of a conflict of interest, and given a 20-month prison sentence in February 2017 (Tse & Tweed 2017).

Such actions are in line with the OECD guidelines (2004: 4), which state that where internal, administrative measures fail to identify or contain a conflict of interest, resulting offences should be regarded as public sector misconduct, abuse of office, "or even an instance of corruption," paving the way for a criminal investigation.

Ultimately, striking the right balance on this sliding scale of offences could help oversight bodies and law enforcement prevent *potential* conflicts of interest from developing into full blown wrongdoing in public office, while ensuring their response remains proportionate.

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