

## Background Paper\*

### 12<sup>th</sup> IACC Special Training Session: *Preventing Conflicts of Interest in the Public Sector*

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**Day 3: Friday 17 November - 15:00 - 19:30**

### **Section I. Regulatory Framework**

This paper has the purpose to answer eight main questions related to the regulatory framework on conflict of interest.

#### **a) What are conflicts of interest? Why do they matter?**

The OECD's definition for **conflict of interest** is: "*A conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.*" (\*1)

The basic definition can also be applied in order to test situations in which there appears to be a conflict of interest, but this is not in fact the case. Having an **apparent** conflict of interest as a public official can be as serious as having an **actual** conflict, because of the potential for doubt about the official's integrity, and that of his/her organization. A **potential** conflict of interest may arise where official has private-capacity interests, which could cause a conflict of interest to arise in the future (\*2). The situations of **apparent conflict** can be also the situations that a benefit cannot be particularized, but there are reasonable doubts about the impartiality of the public official in a concrete decision. An **actual conflict** involves situations that can be identified in an objective way because there is a concrete benefit for the public official. (\*6). Nevertheless, the media highlight both apparent and actual conflicts of interest which can equally harm public confidence.

Conflict of interests matters because there are increasing expectations from ordinary citizens, business leaders and civil society that Governments will be responsible for delivering higher standards of integrity in the Civil Service, public institutions, the public services, government-controlled corporations and government itself. In this context, Conflict of Interest in its various forms should become a significant consideration in the day-to-day work of those who occupy any position of trust.

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\* This paper was elaborated based on and used integral or adapted texts from the references papers. In addition, it is proper for exclusive use in 12<sup>th</sup> IACC.

Conflict of interest in the public sector are particularly important because, if not recognized and controlled appropriately, they can undermine the fundamental integrity of officials, decisions, agencies, and governments. (\*3)

Conflict of interest matters a lot because it is the gate of entry for corruption.

#### **b) Is there a single approach / definition?**

There is not a single approach or definition. In the paper “*Managing Conflict of Interest in the Americas - Comparative Review*”, Eric Raile describes that there are “much variety in the specific ways in which countries categorize situations and actions as conflict of interests. For example in some countries only the potential for a conflict of interest exists until some malfeasance has actually occurred. Additionally, many situations that involve the potential for a conflict of interest may fall under the definition of incompatibilities. The term incompatibilities also refers to situations of holding more than one government position at once, a circumstance this paper will consider in its review due to the potential this situation poses for the conflict of multiple public interests and due to the way such an incompatibility could enhance opportunities for the occurrence of a conflict of interest as defined previously. Also, some countries make definitional distinctions between criminal and non-criminal matters concerning conflict of interest, and between corruption and conflict of interest. For example, some countries distinguish clearly between conflict of interest and illicit enrichment.” (\*5)

According to the International Code of Conduct for Public Officials, contained in the annex to General Assembly resolution 51/59 of the United Nations, of 12 December 1996, “Public officials shall not use their official authority for the improper advancement of their own or their family’s personal or financial interest. They shall not engage in any transactions, acquire any position or function or have any financial, commercial or other comparable interest that is incompatible with their office, functions and duties of the discharge thereof.”

According to Pablo García Mexía, there is a conflict of interest in that situation which, by action or omission, incurs a public official that, being obligated by a duty of service to watch to the general interest, assumes the risk of abusing its power, subordinating this general interest to its particular interest in form of profit pecuniary or in species (\*6).

#### **c) What is the role of international treaties against corruption?**

The main roles of international treaties and conventions are to promote international cooperation and technical assistance, as well as achieving equivalence among the measures to be taken by the countries.

In article III, about preventive measures, of the Inter-American Convention against Corruption, can be found the issue conflict of interest. There are several reports on the implementation of the Convention in the site [www.oas.org](http://www.oas.org).

The Convention of the United Nations against Corruption provides a significant progress on the subject of conflict of interests, being perhaps the most detailed international treaty dealing with conflict of interest. In articles 7 and 8 can be found the issue conflict of interest.

**d. What is the difference between conflict of interest and other regulations such as incompatibilities?**

The main difference between conflict of interest and incompatibility regulations is that CoI has target to preserve equity and impartiality of public functions and the incompatibility try to avoid an officer with multiple positions (public or private) and consequently without effectivity. The term incompatibility refers to situations of holding more than one government position or one public and one private employment.

**e. What are the key elements of a CoI regulatory framework?**

The key elements of a CoI regulatory framework are to establish the correspondent definitions, to indicate the characteristic situations and to establish the remedies for the detected situations.

The definition of the regulatory framework is a critical element for the effectiveness of the prevention of CoI strategy. The regulatory framework must be well written, without gaps, consistent, coherent, must include instruments for detection, instruments for investigation and instruments for sanction or penalization. (\*7)

When developing an adequate regulatory framework it is important to consider the following questions:

- be precise in the definition of conflict of interest
- the definition that establish the juridical framework must be understood as a juridical obligation
- the legal framework must admit the creation of specific legal framework for the areas that, considering their characteristics and functions, require specific framework
- the legal framework must distinguish, as intelligible as possible, the situations of conflict of interest from the situations of incompatibilities inabilities
- the legal framework must provide a general description of the situations reached by the adopted concept of conflict of interest
- the legal framework must establish an ample and coherent set of remedies for the situations of conflict of interest
- it can be established in the legal framework the evaluation of the candidates before the nomination, particularly for the senior level
- it can be established dispositions about conflict of interest considering the moment before and after the public function (\*6)

**f. What are the typical remedies?**

The typical remedies can be personal or related to the decision making process.

The personal remedies are measures such as:

- sale of assets – obligation of the public official to sell shares, inversions or assets that represent a situation of conflict of interest
- blind management – transference of the assets from the public official to a blind trust during the public function
- recusal – mechanism to remove someone from participation in a decision
- to excuse – obligation of a public official not to interfere in a decision
- reassignment of functions – transference of the public official to another function
- renunciation of the public official.

The decision making process remedies are measures such as:

- Public audiences
- Mechanisms of access to information (\*6)

Another important issue related to remedies is who is responsible for supervising and enforcing the implementation.

### **g. Should a CoI regulation contain sanctions?**

CoI regulation contains sanctions in several countries of OECD. Minor infractions result merely in a warning, while very serious infractions may be sanctioned with removal from the service or penal sanction. There are penal sanctions, disciplinary sanctions and administrative sanctions. Penal sanctions, in some cases as “search for illicit interest”, can result five years in prison and fine of 75.000 euros. Disciplinary and administrative sanctions vary according the gravity of the infraction, being dismissal the stiffest disciplinary penalty. Provisions on disciplinary measures are in the form of monetary and material disadvantage by a sole penalty payment or by restraining and reducing the salary and/ or complementary benefits (fine, withholding of salary, salary reduction, reduction of benefits, reduction of pension, deprivation of pension), impact on current or future career (denotion, slow down in promotion, deprivation of title or transfer with change of residence), suspension from office, temporary dismissal, dismissal, disqualification. The disciplinary sanctions can be warning either in verbal or written form, reprimand, admonishment, rebuke, and summons, counseling. Of all the disciplinary sanctions, reprimand and dismissal are the most frequent employed sanctions in OECD countries (\*7) (\*9).

The OAS website related to the IACC has information on the statutes in the Americas.

### **h. What should a conflict of interest regulation cover? Investments? Previous and current jobs? Gifts? Post employment? Income and expenses?**

The definition of conflict of interest traditionally covers financial interests as well as relationships (family and personal) and other benefits (eg. gifts, hospitality) but also emerging forms of conflict of interest such as business interests (eg. partnerships, share holdings, investments), secondary employment, public officials leaving the public sector to work for a private company and affiliations (\*10).

It is important to mention the discussion on local and universal information on conflict of interest. Some statutes fail to indicate that when reporting on CI disclosure should cover assets, for example, owned by the public official or his family anywhere in the world.

## **Conclusion:**

We can mention the three most important issues that one have to take into account when developing a CI regulation. The international treaties against corruption play a central role. The key elements of a CoI regulatory framework and the remedies must be observed. A CoI regulation must contain sanctions.

## **References papers:**

(\*1) Managing Conflict of Interests in the Public Service: OECD Guidelines and Country Experience, p. 24. This book was published by the OECD in February 2004. The OECD Code for the book is 422004021P1. The ISBN is 9264104895.

(\*2) OECD Toolkit for managing Conflict of Interest in the Public Service, p 6 - Forum on Implementing Conflict of Interest in the Public Service – OECD – IDB - 5 and 6 May – 2004 Rio de Janeiro - Brasil

(\*3) OECD Toolkit for managing Conflict of Interest in the Public Service, p4 - Forum on Implementing Conflict of Interest in the Public Service – OECD – IDB - 5 and 6 May – 2004 Rio de Janeiro – Brasil

(\*4) Managing Conflict of Interest in the Public Service – Background document – p 3 - Forum on Implementing Conflict of Interest in the Public Service – OECD – IDB - 5 and 6 May – 2004 Rio de Janeiro - Brazil

(\*5) Paper “Managing Conflicts of Interest in the Americas: A Comparative Review” – Eric Raile, p.2. Forum on Implementing Conflict of Interest in the Public Service – OECD – IDB 5 – 6 May – 2004 Rio de Janeiro – Brazil

(\*6) Los conflictos de interés en el sector público – Roberto de Michelle – p. 9, 14, 15 - Acción Ciudadana, Guatemala 2004.

(\*7) Conflict of interest – The experience of the European Union – Manuel Villoria – presentation in the VII Seminar Ethics in Management – Brasília – Brasil – June 2006.

(\*8) OECD Toolkit for managing Conflict of Interest in the Public Service, p 23, 26 and 27 - Forum on Implementing Conflict of Interest in the Public Service – OECD – IDB - 5 and 6 May – 2004 Rio de Janeiro – Brazil

(\*9) Trust in Government – Ethics Measures in OECD countries – p 58, OECD 2000.

(\*10) Managing Conflict of Interest in the Public Service – Background document – p 3 - Forum on Implementing Conflict of Interest in the Public Service – OECD – IDB - 5 and 6 May – 2004 Rio de Janeiro – Brazil