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Conflicts of interest in public administration

SUMMARY *With the financial crisis, "conflict of interest" has become a buzzword. Not a day passes without the press uncovering another case of unethical behaviour from holders of public office. The introduction of new ethical rules and standards has become a political topic.*

But what is exactly a conflict of interest? Its definition is not simple and different possibilities have been proposed.

There are different approaches to tackling conflicts of interest. International organisations provide general guidance which is applied by many international and national bodies as the basis for their own specific codes. However, regimes differ amongst EU Member States. And in most Member States individual institutions have their own rules and standards. The types of measures applied also differ amongst EU Member States and in comparison with other parts of the world.

It is strongly disputed that more rules and higher standards lead to a reduction in unethical behaviour and to greater public trust.

Most EU institutions are regulated more strictly than equivalent institutions at national level. However, each institution has its own codes and the level of regulation and enforcement varies amongst them.

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In this briefing:

Definition

General definition

A conflict of interest is not easily defined because standards of morality may differ and have also evolved over time. A widely used general definition is *a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest.*

Conflict of interest is considered an indicator, a precursor and a result of corruption. It is referred to in the United Nations Convention Against Corruption (UNCAC), in particular in Articles 7, 8 and 9.

Conflict of interest in the public service

With reference to the public service, the Guidelines of the Organisation for Economic Cooperation and Development (OECD) define a conflict of interest as involving *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.*

Transparency International (TI) understands a conflict of interest as *a situation where an individual or the entity for which they work, whether a government, business, media outlet or civil society organisation, is confronted with*

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choosing between the duties and demands of their position and their own private interests.

The Commission proposal on a Directive on public procurement (Art. 21) states that t*he notion of conflict of interests shall at least cover any situation where* [staff members of the contracting authority or other service providers involved in the procedure] *have, directly or indirectly, a private interest in the outcome of the procurement procedure, which may be perceived to impair the impartial and objective performance of their duties.*

Many regimes distinguish private interests further between:

- pecuniary interests (which involve an actual or potential financial gain), and
- non-pecuniary interests (which are non-financial but arise from personal or family relationships, or other activities).

The OECD Guidelines distinguish between:

Actual conflict of interest: a direct conflict between a public official's current duties and responsibilities and his or her private interests

Apparent conflict of interest: where it appears that a public official's private interests could improperly influence the performance of their duties but this is not in fact the case.

Potential conflict of interest: where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in the relevant official responsibilities in the future.

All kinds of behaviour can be qualified as causing a conflict of interest. Transparency International identifies three main sources of conflicts of interest in OECD countries: [1]

- secondary employment in the private sector,
- private-public partnerships, and
- shareholdings in entities with a contractual or regulatory relationship with the government.

Guidelines and toolkits of international organisations

The OECD Guidelines aim primarily to help member countries at central government level, but also to provide general guidance reflecting policies and practices that have proved effective in OECD countries. It appears that they are used by many international and national organisations as a basis for their regimes, together with the practical explanations from the OECD toolkit.

Transparency International offers its own toolkits and links to all kinds of specific toolkits, including from other organisations. These toolkits aim to provide a step-by-step self-assessment and further practical guidance (e.g. a self-assessment toolkit for parliaments to raise awareness and steer policy dialogue, and a handbook for NGOs to monitor election campaign finance).

Member State regimes

A 2007 study for the Commission's Bureau of European Policy Advisers (BEPA) concluded that the predominant form of regulation is the use of law. However, only a few EU Member States have specific "conflict of interest" laws, and fewer still apply them to all their institutions. More Member States have separate rules concerning specific institutions. Moreover, banks and governments are more often subject to regulation than are parliaments.

Classification of regimes

The BEPA study classifies the different national regimes into three categories – "strict", "moderate" and "soft" – distinguishing between those countries and institutions

- which regulate, prohibit and restrict a number of issues, require a detailed number of reporting obligations and have independent control and monitoring mechanisms in place (a restrictive approach)
- which regulate, prohibit and restrict a number of issues but leave room for some exceptions and have less strict

control mechanisms in place (moderate approach), and those
- which are mostly based on voluntary approaches and rely on different forms of self-regulation and self-enforcement (soft approach)

The study observed that Member States which joined the EU more recently (e.g. Latvia) tend to have more extensive regulation than other Member States (e.g. Sweden)[2].

Public procurement

A recent paper by Transparency International on public procurement in EU Member States outlines that "conflict of interest" and the means to deal with it throughout the procurement cycle need to be clearly defined in legislation, including with clear guidelines on implementation, monitoring and sanctions. It concludes that current proposals are detailed but that there is scope to tighten these rules in order to strengthen citizens' trust.

Disclosure policies and ethics bodies

It has been observed that there is a recent trend towards more disclosure policies and the establishment of ethics bodies.

There is also a tendency to greater transparency with regard to the lives of public officials (e.g. obligations to register additional jobs, private income, share ownership or their partner's occupation).

Protection of whistleblowers

Most Member States neither currently have nor plan to introduce specific legislation on the protection of whistleblowers in the field of conflicts of interest. In contrast to Europe, numerous acts on whistleblowing have been enacted in the US. Where whistle-blowing programmes have been established in EU Member States, they are generally limited to cases of corruption.

Are rules and standards the solution?

With increasing contact between public and private sectors, due to the trend towards private-public partnerships, potential conflict-of-interest situations are becoming more frequent. Calls for rules and standards have become more pressing, even in the private sector itself. Recently US economists have set rules on conflicts of interest, to help restore their credibility after criticisms about their predictions concerning the crisis.

More rules and standards = fewer infringements and more public trust?

However, it appears that regulations do not necessarily lead to less corruption. For example, most Nordic EU Member States have much fewer rules and standards in place than other Member States but at the same time have relatively low levels of corruption and bribery.

It is also feared that more ethics rules lead to more investigations and prosecutions. This decreases public trust while increasing collective costs, and this may outweigh individual benefits. At the same time, public service can hardly oppose increased rules on ethics, because this has become popular and may be considered critical from the political point of view. On the other hand rules may be misused for moral stigmatisation. Disclosure rules may reduce the attractiveness of posts.

It is argued that there is no single solution for all situations. Countries in which high levels of public trust exist ("high trust" countries) need different rules and standards than "low trust" countries with higher levels of corruption. Regulation as such is not considered a sufficient solution. Infrastructure including a combination of awareness-raising instruments, transparency policies, rules and standards, as well as deterrent measures is needed. For better implementation, it is considered that more training and access to organisational support are necessary.

Disclosure obligations

The recent trend to increase disclosure obligations and transparency is also disputed because it may violate

fundamental rights. It may also create unnecessary bureaucracy, and may not lead to the reduction of conflicts of interest. [3]

Monitoring bodies

A study on holders of public office in the EU concludes that stronger emphasis should be placed on the credibility and accountability of monitoring bodies. It also questions how ethics observers analyse their behaviour.

In the EU, the definitions of public sector, public service, public employee, civil servant and senior official differ from Member State to Member State. In addition, there are different categories of personnel: some Member States have many civil servants, others have fewer; and then some are public employees under labour law, some statutory staff and some have permanent and some temporary contracts. Often no distinction is drawn between different types of staff, or their tasks and roles, when assessing ethical behaviour.

Besides the requirement of high standards for monitoring bodies, it is observed that the prevailing system of internal self-control in most Member States is not necessarily sufficient. An independent body, with an independent budget, may provide more objective opinions on the state of ethics enforcement.

It is observed that such independent and outside control of holders of public office is rare. It is more common that public bodies control themselves via internal reporting obligations and monitoring mechanisms.

Secondary employment in the private sector

The issue of public officials moving to the private sector (also called "revolving doors" or "pantouflage") is one of the key problems causing conflicts of interest, in particular with increasingly closer cooperation between the two sectors. However, the current regime does not appear to be sufficient to provide satisfactory solutions.

A recent report by the Group of States against Corruption (GRECO) showed that a majority of members evaluated (26 of 40) had received recommendations to establish or enhance their systems for regulating the movement of officials to the private sector. But after a compliance review of 15 of these members, only two had satisfied the recommendation. When sharing good practices and pitfalls, it turned out that there is no perfect system as such but that certain general standards could be established.

What have EU institutions done?

The EU institutions have entirely different and separate conflict-of-interest rules and standards. Based on the density of regulation it was observed in 2007 that the European Investment Bank (EIB) and the European Commission regulate most issues, followed by the European Central Bank and the European Court of Auditors (ECA).

The study concluded that most EU institutions are regulated more strictly than equivalent institutions at national level.

The most important regulatory instrument of the institutions are codes: more than ten have been adapted by the institutions. Within the institutions, specific conflict-of-interest regulations apply to different categories of office-holders, in accordance with their specific tasks and duties. The EIB is the only body which has introduced the function of Chief Compliance Officer. As to transparency, more and more institutions have registers of interest in which the declarations of interest by office-holders are recorded. The European Parliament introduced a new code of conduct in December 2011.

An EP study on the effectiveness of whistleblowers in the EU institutions concluded that the current whistleblower framework could be improved both with regard to the substance of the provisions and their implementation.

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Main references

Managing Conflict of Interest in the Public Service, OECD Guidelines and Country Reports / OECD, 2003, 245p.

Managing Conflicts of Interest-Ethics Rules and Standards in the Member States and the European Institutions / Demmke and Henökl, Eipascope 2007/3.

Effectiveness of Public-Service Ethics and Good Governance in the Central Administration of the EU 27 / Demmke and Moilanen, Peter Lang 2012.

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Endnotes

[1] Transparency International Global Corruption Report 2003, p. 320.

[2] The 2007 BEPA study includes chapters giving detailed information on the regulatory regimes in each Member State.

[3] Effectiveness of Public-Service Ethics and Good Governance in the Central Administration of the EU 27/ Demmke and Moilanen, Peter Lang 2012, p.77.

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