

CONFLICT OF INTEREST AS A RISK OF FRAUD

Transparency International – Česká republika, o.p.s. is part of the international network of Transparency International non-governmental organizations. The mission of the organization is to identify and actively contribute to reducing the level of corruption in the Czech Republic. Transparency International Česká republika mainly promotes the enforcement of systemic, legislative, and organizational changes that limit room for corruption, both in public administration and in the private sector. Furthermore, it provides legal advisory services to individuals, who encounter corrupt practices, as well as assistance to people reporting corruption (whistle-blowers). Last but not least, it helps to identify corrupt practices and bring attention to cases involving corruption.

This publication is a part of the “Conflict of Interests as a Risk of Fraud” project supported by the European Union Programme Hercule III (2014 – 2018). This programme is implemented by the European Commission. It was established to promote activities in the field of the protection of the financial interests of the European Union. (for more information, see hec.europa.eu/anti_fraud/policy/hercule/index_en.htm).

The publication reflects the authors’ views and the European Commission is not responsible for the views displayed in the publication and/or in conjunction with the activities for which the grant is used. Solely the authors of this communication shall be liable for its contents. The information included herein may not necessary reflect the policy or opinions of the European Commission.

Project Manager: Ivana Dufková

Authors: Ivana Dufková, Martina Kotouček Mikolášková

2018 © Transparency International – Česká republika, o.p.s.

www.transparency.cz

CONTENTS

INTRODUCTION	4
WHAT IS A CONFLICT OF INTERESTS?.....	6
CONFLICT OF INTERESTS AND CORRUPTION	8
LEGAL REGULATION OF CONFLICT OF INTERESTS	9
CONFLICT OF INTERESTS AND THE LAWS OF THE CZECH REPUBLIC	14
INDICATORS OF THE CONFLICT-OF-INTERESTS RISKS.....	23
OTHER INSTRUMENTS FOR OF CONFLICTS OF INTERESTs REGULATION	31
REFERENCES.....	37
LIST OF ABBREVIATIONS	37

INTRODUCTION

The last decades have brought new forms of relationships of the public, private, and non-profit sector, resulting in closer forms of cooperation, such as public-private partnership projects (PPP). As public and private interests intersect in a continuously changing manner, conflicts of interests (or the perception thereof) become real challenge for practitioners and policymakers in many countries of the world. Conflicts of interests have turned into a recurring problem, particularly with regard to public procurement, subsidy schemes, or projects co-financed by the EU.

In most countries, expectations of citizens and of the private sector have been increasing in terms of higher standards of integrity¹ in public administration, public institutions, and public services. Citizens expect public officials² to carry out their duties with integrity, honestly, and impartially, not allowing their private interests jeopardize official decisions and governance. In this context, conflicts of interest in all their forms represent a significant factor in day-to-day work of government officials at any level. Identification and resolution of conflict of interest situations is crucial for ensuring due governance and maintaining confidence in public institutions.



The objective of this publication is not to provide a comprehensive overview of all issues relating to conflict of interests. We wish to clearly describe what a conflict of interests is, how it is defined by law, what the conflict of interests indicators and risks are, and how it is possible to prevent its consequences. Special attention is given to the conflict of interests risks relating to public procurement and subsidy schemes, including projects under the European Structural and Investment (ESI) funds.

¹ Public sector integrity may be described as proper use of financial funds, resources, assets, and powers for their intended purpose. In this regard, the opposite of integrity is corruption or abuse of powers.

² The term public official is used throughout the text; it includes politicians, elected local officials, public administration and local officials, and officials of other public institutions. Therefore, it is a larger group compared to the definition of Act No. 159/2006 Coll., on Conflict of Interests.

This publication also reflects the experience of participants to an international conference and seminars for providers and beneficiaries of grants and projects under various programmes co-financed by the EU and public contracting authorities. These took place as part of the *“Conflict of Interests as a Risk of Fraud”* project carried out by Transparency International – Česká republika, o.p.s. in 2017 – 2018.

Any information and legal regulations specified herein shall be up to date as of December 2017.

We would like to thank those public administration officials, members of managing and supervisory bodies, EU funds beneficiaries, and conflict of interests experts, who cooperated with us throughout the project implementation.

For more information about the project and its outputs, go to <https://www.transparency.cz/stret-zajmu-jako-riziko-podvodu/>.

WHAT IS A CONFLICT OF INTERESTS?

A conflict of interest is a complex and sometimes ungraspable concept. Since all public officials have their rightful interests that stem from their private lives, conflicts of interest cannot be easily prevented or banned.

Examples

A wife of an official, who is in charge of preparing a public tender for a contracting authority, works for one of the potential tenderers.

A contracting authority's manager coincidentally spent his vacation at the same resort as an executive director of a company that takes part in a public tender launched by the contracting authority.

A contracting authority's official and an executive director of one of the companies that take part in a public tender are both members of a civic association's audit committee.

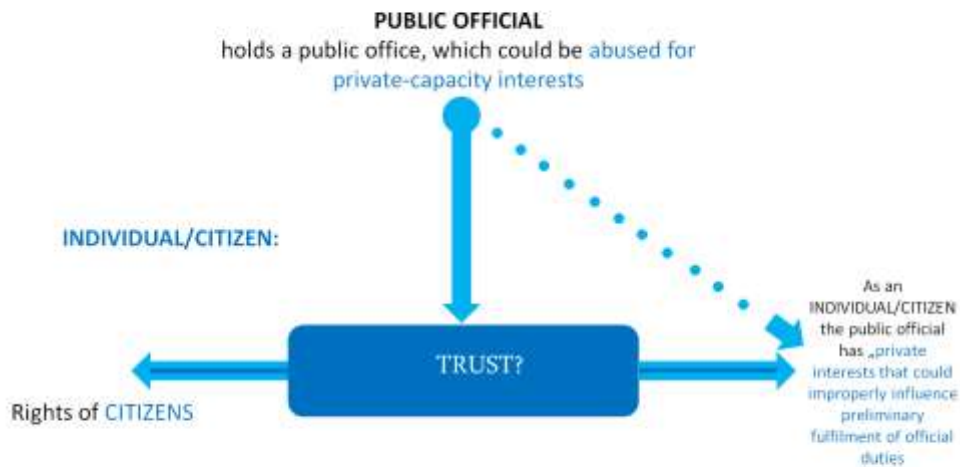
Historically, the definition of a conflict of interests was subject to many different approaches. Today, this term comprises a conflict between public obligations and private interests of public officials, whereas such private interests could adversely affect the fulfilment of their official obligations and duties. Private interests do not only concern financial benefits or interests that result in direct personal benefits for a public official. A conflict of interests may also involve otherwise legitimate private activities, personal relationships, and family interests, provided they are likely to inappropriately affect the fulfilment of official obligations. Based on specific conditions, such situations may involve: financial interests, debts, relationships with non-profit, social, trade union or professional organizations, and other private interests and relationships. A special type of conflict of interests is a situation involving future employment after one's public sector engagement; for example, negotiating on future employment with a private company while still holding a public office is generally considered a conflict of interest.

Warrant Officer A.B., as Chief Inspector of the General Crime Department of the Criminal Police and Investigation Service performed screenings through internal police systems using his official computer and own user name/password during his time off. To justify the situation, he said he needed to find an address of S.T., who was his daughter's boyfriend at the time, because his daughter called him, stating that S.T. wanted her to leave for Germany and then to Bulgaria with him. He then used the personal data of S.T., to which he was not entitled, located S.T., kicked down a door at his residence, attacked S.T. with punches in his face, and subsequently took his daughter from the apartment.

The defendant was sentenced to 15 months in prison, wholly suspended for 24 months, together with a prohibition to carry out employment or official engagement with armed forces or municipal police forces within the Czech Republic for the period of 24 months.

Judgment of the District Court in Louny (2015)

CONFLICT OF INTERESTS



The general public's confidence may be reinforced by ensuring that there are no improper links between official functions of a public official and his/her private interests, including those of related individuals or organizations – for example by disclosing the relevant private interests within the given public institution, and even outside such institution for high-ranking officials.

Case study

A public administration employee is in charge of analysing the results of a recent public survey commissioned by a Ministry regarding proposed amendments to laws governing environmental protection in forestry. The employee wilfully excludes answers that contradict his own personal opinion concerning the need for more stringent environmental protection by the government, particularly with regard to forests. The official is a qualified and experienced forestry expert.

Is it a conflict of interests?

Yes, this is an actual real conflict of interest.

Why is it wrong for me to enforce my own views if I am convinced they are correct?

Based on an absolutely strict assessment of this situation, it is a serious breach of professional ethics – i.e. unfair conduct or violation of trust.

CONFLICT OF INTERESTS AND CORRUPTION

In September 2014, a defendant - a policeman with long-term experience in a senior position – discovered that criminal proceedings are under way with regard to a suspicion of unauthorised disposal of protected wild fauna. It was ascertained that A.L. sold a young bird of prey, thereby committing an illegal disposal of young sparrowhawks. The defendant then disclosed the aforementioned information to A.L., who thus gained unjust benefit, as he was warned about a search of other premises aimed at finding a bird of prey at his possession and securing such animal's DNA. The defendant knew A.L. from a Huntsman's Association.

It is clear that the information about the planned search (in the course of criminal proceedings) benefited both A.L. and other individuals, who A.L. had been in contact with and who could have practically used the information about the planned search to hide the searched bird of prey.

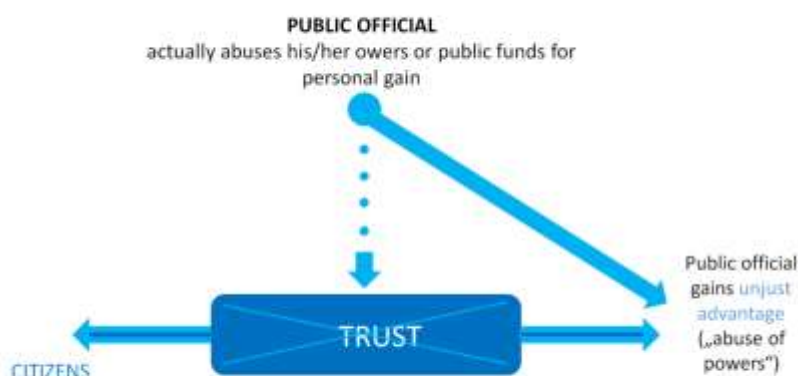
A financial sanction was imposed on the defendant, together with a prohibition to carry out employment with armed forces of the Czech Republic for the period of two years.

Judgment of the District Court in Hradec Králové (2015)

A conflict of interests is not the same as corruption; corruption is defined as an “actual abuse of public office to gain personal benefits”. Corruption usually requires an agreement of at least two partners as well as certain bribe/payment/benefit. A conflict of interests involves several aspects and occurs in situations, in which an individual may be in a position to give priority to his/her private interests to official obligations.

If not addressed, conflict of interests may result in corrupt practices, abuse of public office, unethical conduct, violation of trust or other illegal activities. Another important factor is the fact that the general public's confidence in the integrity of public institutions may be severely impaired.

How a conflict of interests turns into corruption



In general, the above mentioned violation of trust may involve unfair conduct (e.g. fraud, alternation of data), breach of applicable legal regulations, abuse of financial funds or resources, abuse of one's

office (e.g. requested bribes or unauthorised imposition of sanctions), failure to take appropriate or correct measures, etc. in order to gain personal benefits.

On the other hand, there are various conflicts of interests that do not involve corruption. For example, a public official, who takes part in a decision, in which he or she has personal interests, may still act rightly and by law. Another public official may accept bribes (corruption) in respect of decisions made by him or her without any conflict of interests involved.

However, it is also true that most corrupt practices occur in situations, in which prior private interests adversely affect public officials' performance. This is why it is useful to address conflict of interests as a part of a wider policy covering prevention and fight against corruption.

Case study

In an office kitchenette, you overhear a conversation of employees of another department. One of them jokingly described how he recently forced his manager to promote him. He claimed that he had told the manager he would not report the fact the manager had been accepting bribes from individuals at risk of prosecution for various transgressions.

You know that it is a crime to accept bribes. Moreover, the Code of Conduct of your institution stipulates that managers must lead other employees by example. You are also aware of the fact that the given manager is very popular among employees and the management of the institution.

Is it a conflict of interests?

Yes. You have a personal interest "not to hear" in order to avoid an unpleasant situation.

On the other hand, it is a serious problem – bribery and corruption relating to promotion.

At the same time, if the story is not true, it is a risk for the given manager's reputation, as such "rumours" travel fast and it is virtually impossible to clarify them.

The fact that you are not a manager of the given department is not relevant; you – as an official – are required to act in a way that ensures the given matter is duly investigated.

LEGAL REGULATION OF CONFLICT OF INTERESTS

The applicable legal regulation describes situations, in which concerned public officials may find themselves at the intersection of law and morality. These are situations, in which a public official does not directly engage in illegal activities; however, such situations are somewhat problematic.

It must be emphasized that the term "conflict of interest" should not be confused with the term "unfair prejudice/bias". Unfair prejudice is not acceptable under any circumstances. It may relate to judicial or administrative proceedings and an official, who meets the given definition, shall be excluded from the relevant decision-making process. For more detailed description of unfair prejudice/bias, we refer to Section 14 of Act No. 500/2004 Coll., Code of Administrative Procedure, that states the following: *"Every person directly involved in the execution of powers of an administrative body (hereinafter an "official"), who – due to his/her relation to the case under consideration, to participants in the proceedings or to their representatives – may be justifiably believed as having such interest in the outcome of the proceedings, which appears to cast doubt on his/her impartiality, shall be excluded from performing any act, which may influence the outcome of the proceedings."*

Conflict of interests in European law

The legislation of the European Union does not introduce any general regulation of conflicts of interest; such regulation is not included in the primary³ or secondary⁴ legislation of the European Union.

However, Article 57(2) of Regulation No. 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation No. 1605/2002 (hereinafter the “Financial Regulation on the General Budget of the EU”)⁵ includes an important definition of a conflict of interest. This Regulation sets down general terms and conditions, under which it is possible to provide budgetary support as an instrument for external action. The definition applies to all types of public tenders financed from Structural and Cohesion Funds of the EU – irrespectively of their amount:

“1. Financial actors and other persons involved in budget implementation and management, including acts preparatory thereto, audit or control, shall not take any action which may bring their own interests into conflict with those of the Union.

(...)

2. For the purposes of paragraph 1, a conflict of interests exists where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with a recipient.”

The aforementioned definition is very broad; it covers many situations, from which a conflict of interest could be inferred – even due to the fact that it does not consider solely economic interests of concerned officials, but also family and emotional aspects, with both positive and negative views possibly involved.

Due to the broad scope of the quoted provisions, the Commission was empowered (under Article 57(3)) to adopt delegated acts setting out what is likely to constitute a conflict of interests together with the procedure to be followed in such cases. Consequently, the Commission issued Commission Delegated Regulation No. 1268/2012 of 29 October 2012 on the rules of application of Regulation No. 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (hereinafter the “Commission Regulation”)⁶.

According to Article 32 of the Commission Regulation, the following acts and situations constitute a conflict of interests:

- a) Granting oneself or others unjustified direct or indirect advantages;
- b) Refusing to grant a beneficiary the rights or advantages to which that beneficiary is entitled;

³ The primary legislation comprises the so-called founding treaties (for example, available here: <http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-founding.html?locale=cs>).

⁴ The secondary legislation comprises regulations, directives, and other legal acts (for example, available here: https://europa.eu/european-union/eu-law/legal-acts_cs).

⁵ <https://www.h2020.cz/cs/storage/7859a5813a7e3efb98d3aa28d5a4f33750015e3d?uid=7859a5813a7e3efb98d3aa28d5a4f33750015e3d>

⁶ <http://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:32012R1268&from=CS>

-
- c) Committing undue or wrongful acts or failing to carry out acts that are mandatory;
 - d) Acts which may impair the impartial and objective performance of person's duties such as, inter alia, the participation in an evaluation committee for a public procurement or grant procedure when the person may, directly or indirectly, benefit financially from the outcome of these procedures;
 - e) Situation, in which an applicant, candidate or tenderer is a member of staff covered by the Staff Regulations, unless his/her participation in the procedure has been authorised in advance by his superior.

With the exception of the above listed specific conflict of interests situations, it does not introduce any specific procedures for the resolution thereof. It usually includes general formulations, such as: *"He/she shall not have a conflict of interests between his/her duties as Chair of the panel and any other official duties."* (Article 144 of the Commission Regulation); *"In such case, they shall make the necessary arrangements in order to avoid any conflict of interests."* (Article 54 of the Commission Regulation); *"In the event of a conflict of interests, the authorising officer by delegation shall take appropriate measures to avoid any undue influence of the person concerned on the process or procedure in question."* (Article 32 of the Commission Regulation). It is clear from the aforementioned quotes that the Commission emphasizes the prevention of conflict of interests; the Commission also defines various actions and situations that constitute conflict of interests; however, there are no specific steps described that would lead to their resolution.

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014

Specific regulation of conflict of interests is also included in the so-called Public Procurement Directive, i.e. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (hereinafter the "Public Procurement Directive"⁷). Starting from the preamble, the Public Procurement Directive asks contracting authorities to prevent distortions in public procurement procedures stemming from conflict of interests and to use procedures to identify, prevent and remedy conflict of interests. Article 24 of the Public Procurement Directive specifies the minimum scope of situations that may involve conflict of interests. This may be any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

The Public Procurement Directive also introduces specific measures for resolving existing conflict of interests, specifically the possibility of the contracting authority to exclude an economic operator from a procurement procedure, where a conflict of interests within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures [Article 57(4)(e) of the Public Procurement Directive]. Moreover, it is necessary to ensure that contracting authorities always document their procedure for excluding a participant and verify that the participant's exclusion was the only solution

⁷ <http://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:32014L0024&from=CS>

– without adversely affecting the procurement procedure as a result of a conflict of interests; contracting authorities must also possess evidence documenting the conflict of interest existence⁸.

Conflict of Interests from the OECD perspective

The publication “Managing Conflict of Interest in the Public Service⁹” of the Organisation for Economic Development and Cooperation is a comprehensive document in the area of conflict of interests. The definition introduced by the OECD is much simpler compared to the definition of the above mentioned Financial Regulation on the General Budget of the EU. According to the OECD, “a conflict of interests is a conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities.” The OECD does not specify whether a conflict of interests stems from family relations, other emotional ties to another person, or political affiliations. According to the OECD, a conflict of interests is, in general, any situation, in which there is a conflict between public interests and private-capacity interests of a specific public official.

The OECD distinguishes three types of conflict of interests:

An actual conflict of interests is a conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities.

An apparent conflict of interests can be said to exist 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.

A potential conflict of interests arises 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 relevant (i.e. conflicting) official responsibilities in the future. One example is a situation involving a public official, whose wife is soon to be appointed as an executive director of a company affected by a recent decision of the given official; the official is aware of the appointment. In this case, there is an assumption that the official’s private interest could improperly influence his conduct or decisions.

⁸ Transposition of the Public Procurement Directive is specifically addressed in a chapter relating to Act No. 134/2016 Coll., on Public procurement (hereinafter the “PPA”).

⁹ <https://www.oecd.org/gov/ethics/48994419.pdf>

Case study

A husband of a Member of the Parliament has a business dispute with a specific private company that provides security services. There have recently been discussions in the nationwide press and television about the need to reform the sector of private security services providers, as a result of accusations of their connections with organized crime, employment of illegal immigrants, failure to comply with contractual obligations, tax evasion, and illegal trafficking of drugs and firearms.

The Member of the Parliament delivers a written communication to the Ministry that grants licenses to private security services providers. She files a complaint about the conduct of a specific security service provider, asking for a review of its license. She writes her request using official Parliament letterhead.

Is this a violation of professional ethics?

This example is complicated. On the one hand, the Member of the Parliament is required to defend “public interests”.

On the other hand, there are business (commercial) interests of her husband that are clearly not related to any matters, which could be said to represent public interests (even if we assume the dispute is justified).

In this context, it is not appropriate to use official Parliament letterhead to write a request for review of activities of a private security services provider. Such conduct may be viewed as an abuse of public office for private-capacity interests.

CONFLICT OF INTERESTS AND THE LAWS OF THE CZECH REPUBLIC

The laws of the Czech Republic have a special legal act that governs the area of conflicts of interest, specifically Act No. 159/2006 Coll., on Conflict of Interest (hereinafter the “Conflict of Interest Act”). However, there are also other regulations that take conflicts of interest into account, such as Act No. 134/2016 Coll., on Public Procurement. Moreover, conflicts of interests are also regulated in Section 460 of Act No. 89/2012 Coll., the Civil Code, Section 401 of Act No. 90/2012 Coll., on Commercial Corporations, Section 77 of Act No. 234/2014 Coll., on Civil Service, etc. However, for the purpose of this publication, we shall only address those legal regulations that affect official duties of public officials or relate the disposal of public funds, as appropriate.

Conflict of Interests Act

Act No. 159/2006 Coll., on Conflict of Interest, is not the first legal regulation in this area under the laws of the Czech Republic. It superseded Act No. 238/1992 Coll., on Selected Measures Relating to Protection of Public Interests and on Incompatibility of Some Public Offices. In this publication, we will mainly discuss significant changes to the Conflict of Interest Act that took place in 2017.

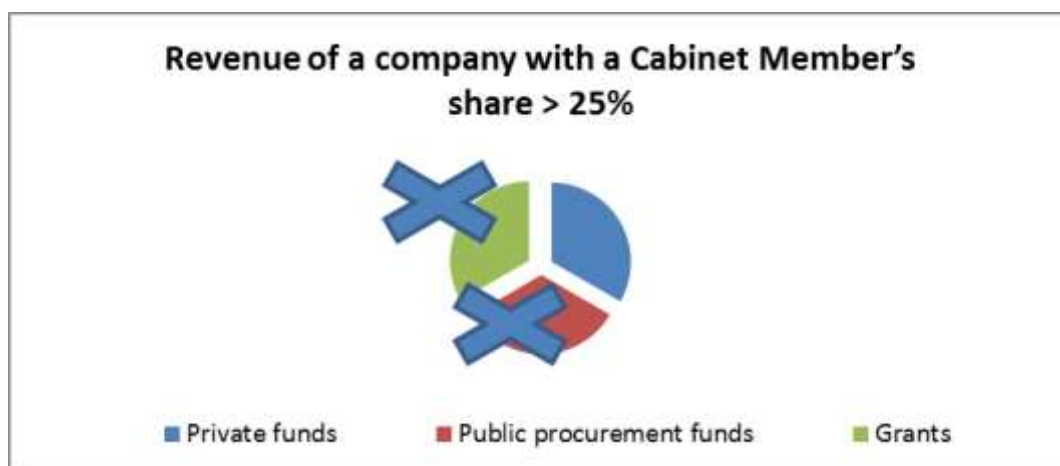
Subject matter of regulation of the Conflict of Interest Act



According to the Conflict of Interest Act, public officials must carry out their official duties (offices) in a way that prevents conflicts between their private-capacity interest and interests they must enforce or defend in their official capacity. Moreover, public officials are required to report any facts that allow the supervision over their activities carried out in parallel to their public office, public review of their assets acquired during the term of their office, and inspection of other proceeds, gifts, and benefits acquired throughout the term of their office, as well as other public officials' liabilities, as appropriate. With regard to the aforementioned reporting obligations, the explanatory memorandum states the following: *"the mere fact that a person is required to clarify their financial status represents a step towards restraining potential corrupt practices"*.

Since, as acknowledged by policy makers, certain level of conflict of interests is so risky that it cannot be tolerated, the Conflict of Interest Act also defines the so-called incompatible offices, which certain specific public officials are forbidden to carry out certain types of activities. For example, Members of the Parliament, Senators or Cabinet Members cannot act as members of a supervisory body of a commercial company.¹⁰ An amendment to the Act expanded the list of forbidden activities; as of February 2017, public officials specified in Section 2(1) cannot act as radio or television broadcasting operators or publish periodicals. Furthermore, such public officials cannot act as shareholders or members of a controlling entity that acts as the operator. In case an office is assumed by a public official, who owns the aforementioned media, he/she must terminate these activities within 60 days from the commencement of the term of the office.

Another prohibition concerns the possibility of legal entities owned by Cabinet Members or heads of central administrative authorities to apply for public contracts or acquire receive grants. In case the ownership share of a Cabinet Member / head of a central administrative authority¹¹ exceeds 25%, such company cannot be involved in public procurement even as a subcontractor; moreover, such company cannot receive grants pursuant to Act No. 218/2000 Coll., on Budgetary Rules and amendments to related acts.

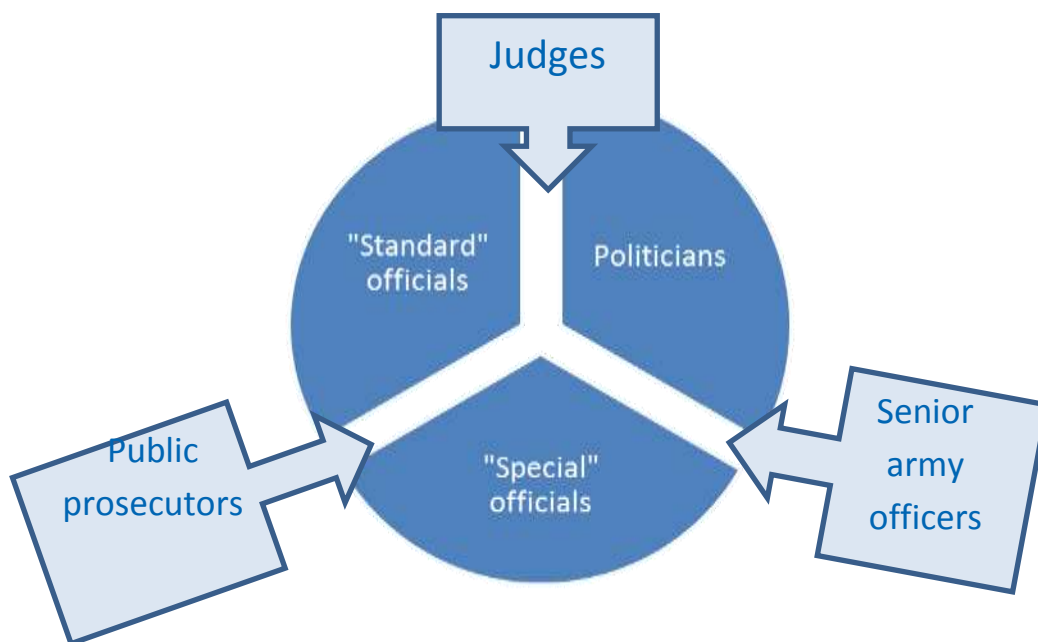


¹⁰ Section 4 of the Conflicts of Interest Act

¹¹ Czech Statistical Office, Czech Land Surveying and Cadastre Authority, Czech Mining Authority, Industrial Property Office, Office for the Protection of Competition, Administration of State Material Reserves, State Office for Nuclear Safety, National Security Authority, Energy Regulatory Office, Office of the Government of the Czech Republic, Czech Telecommunication Office, Office for Personal Data Protection, Council for Radio and Television Broadcasting, Office of Oversight of the Economic Management of Political Parties and Political Movements, Transport Infrastructure Access Authority, National Cyber and Information Security Agency

Specific bans include the so-called non-compete clause (Section 6 of the Conflict of Interest Act), which prohibits public officials from acting as members of private legal entities' bodies or from concluding employment with employers carrying out business activities, provided such legal entities or employers had entered into any contract/agreement subject to such public official's decision over the period of 3 years prior to his/her office termination date. An amendment to the Act also expanded the non-compete clause to controlling or controlled entities.

Who is a public official



Section 2 of the Conflict of Interest Act includes an exhaustive list of public officials. This list is being supplemented with associated amendments; it was significantly expanded on the basis of Act No. 14/2017 Coll., to such officials as judges, public prosecutors, professional soldiers (with rank lieutenant colonel or higher) or heads of research institutions pursuant to the Public Institutions Act. For the sake of convenience, public officials may be classified as **standard officials** (members of armed forces – 2nd to 4th management level, managers of legal entities established by law or organizational units of the state – 2nd to 4th management level, etc.), **politicians** (Members of the Parliament, Senators, Cabinet Members, regional and municipal representatives, mayors, etc.), and **special officials** (Chairman of the Office for Personal Data Protection, Members of the Bank Board of the Czech National Bank, Members of the Council for Radio and Television Broadcasting, Members of the Czech Telecommunication Office, President and Vice-President of the Supreme Audit Office, etc.).

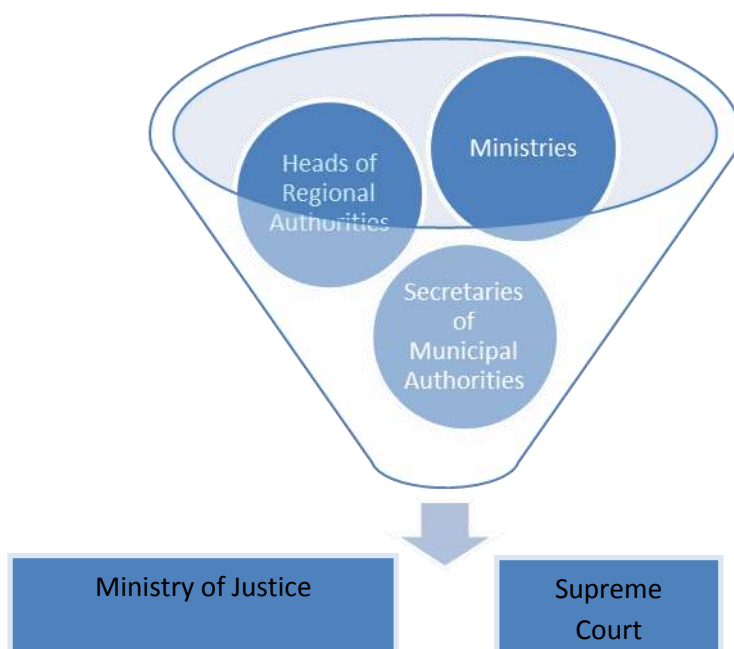
Conflict of interests – definition

According to Section 3 of the Conflict of Interest Act, a conflict of interests shall mean any conduct, in which public official's private-capacity interests may influence such official's public duties. For the purpose of the Act, private interests shall mean such interests that result in an increase in property, financial or other benefits, prevention of impairment to financial or other benefits with regard to the

public official, his/her close person, legal entities controlled by such public official or his/her close person.

Compared to the original wording of the Conflict of Interest Act (prior to 1 September 2017), the definition of the term “conflict of interests” was broadened and now explicitly includes interests of individuals close to public officials or interests of legal entities controlled by them. At the same time, the Act currently defines measures that must be taken by public officials if there is a risk of conflict of interests. According to the original wording of the Act, public officials, who were in a conflict-of-interest situation, could not give priority to their private interests; under the new wording, public officials must refrain from any conduct, in which their private interests might influence their official duties. Therefore, the Act anticipates that each public official, who is in a conflict-of-interest situation, should exclude himself/herself from dealing with the given matter. At the same time; however, any actions or decisions, in which a public official in a conflict-of-interest situation was involved, are still valid, whereas the given official is not subject to any financial or other sanction. The explanatory memorandum for Act No. 14/2017 Coll., states the following: *“Even though this is ultimately a proclamation, it is significant by reason of its incorporation in the laws of the Czech Republic, because the given individuals are required to behave in a certain manner – in spite of no explicit sanction being imposed. This proclamation is namely important for elected public officials, who must take an oath for their mandate; in their oath, they undertake, among others, to adhere to the Constitution and laws of the Czech Republic.”*

Records and monitoring



The Conflict of Interest Act received relatively significant attention and criticism in the Anti-Corruption Action Plan for 2015¹², which referred to insufficient enforceability of the existing legal regulation, inefficient monitoring mechanisms, or formalism relating to disclosure of declaration of assets. Based on the aforementioned significant shortcomings, specific objectives were defined aimed at improving the overall monitoring of potential conflicts of interest of public officials. In principle, all the defined objectives were reflected in the legal regulation currently in force and effect during 2017. The following measures were thus adopted (among others): obligation to submit declarations (affidavits pursuant to Section 7) as of the office inception date, stricter sanctions, computerisation of declaration of assets, and consolidation of the record-keeping authority.

Under the original legal regulation, the network of record-keeping authorities was very fragmented; in addition to the Mandate and Immunity Committee of the Chamber of Deputies of the Parliament of the Czech Republic, records were kept at all Ministries, by heads of regional authorities, secretaries of town and municipal authorities, and others. Overall, there were nearly six thousand and five hundred record-keeping authorities. According to the amendment in effect since 1 September 2017, there are currently two record-keeping authorities, specifically the Ministry of Justice of the Czech Republic for all public officials with the exception of judges, who submit their affidavits to the Supreme Court.

Therefore, the new legal regulation will also make it easier to monitor the overall number of public officials – not precisely known until then. Based on a qualified estimate of the explanatory memorandum, there were around 35 thousand public officials. As of 6 December 2017, the Ministry of Justice registers 37,320 public officials in the Central Register of Conflicts of Interests¹³.

Record-keeping authorities collect affidavits from all public officials with regard to their assets, offices they hold, and received gifts and other revenue. Public officials submit these affidavits electronically, which – together with public access to substantial part of the Register without any password – promotes the public monitoring aspect. In the past, it was rather complicated to get access to public officials' affidavits; anyone seeking such information had to submit a written application to a record-keeping authority first, with specific legal requirements set down for such applications. Applicants then received their login details; sometimes, these logins were valid for a very limited period of time, expiring before applicants could actually use them¹⁴. Moreover, individual affidavits – completed in writing – were sometimes not clearly legible and the completed data could have been incomplete. The whole system is simplified with computerisation. Moreover, the record-keeping authority's powers were strengthened (Section 14c of the Conflict of Interest Act), and it is now also authorised to access other public registers and systems and thus verify the factual correctness of submitted affidavits.

¹² <http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2015-2017/Akcni-plan-boje-s-korupci-na-rok-2015.pdf>

¹³ <https://cro.justice.cz/verejnost/funkcionari>

¹⁴ In its Decision no. 7 A 12/2011 – 37, the Municipal Court ruled that the limited validity period of user name and password is illegal.

Sanctions

CZK 1,000 - 50,000	<ul style="list-style-type: none">• Failure to submit an affidavit• False information provided in an affidavit
CZK 5,000 - 250,000	<ul style="list-style-type: none">• Incompatible office (activities) carried out• Unjustified remuneration collected• Media ownership
CZK 25,000 - 500,000	<ul style="list-style-type: none">• Non-compete clause breach

In case a public official – an individual or a sole trader – commits an infringement pursuant to the Conflict of Interest Act, he or she is usually exposed to the risk of financial sanction. According to Section 25 of the Act, infringements pursuant to the Conflict of Interest Act are addressed by municipal authorities of municipalities with extended competence, in which the relevant public officials or other individuals, who committed such infringements, reside. Based on a legislator's decision, the authorities competent to address infringements lost their right to waive punishment, explaining that *the existing unsatisfactory practice of imposing sanctions for infringements of the Conflict of Interest Act, with relatively low sanctions (if any) imposed or warnings issued instead of punishment, represents one of the factors that have rendered the Conflict of Interest Act inefficient*; at the same time, the legislator set down minimum financial sanctions for specific infringements. Based on a review of individual sanctions, it is possible to infer that, in the legislator's view, the breach of the non-compete clause is the most serious breach of the Act. The merits of this infringement have also been broadened in the light of a recommendation by the Group of States against Corruption of the Council of Europe, as stated in the explanatory memorandum. *The fact that the non-compete clause is not financially compensated stems from the public interest in preventing individuals, who obtained valuable information in connection with their office, from using or abusing such information after leaving their office, thereby causing damage to the authority, in which they previously held their office, as well as to the Czech economy, for example.*

As already stated above, the imposition of duties relating to avoidance of conduct that would put a public official in a conflict-of-interests situation is only a proclamation. This was not always the case. The "old" Offence Act (Act No. 200/1990 Coll.) defined a so-called residual category of infringements (Section 46); in this context, infringements also included a breach of other obligations than those specified in Sections 21 through 45, provided they were set down by special legal regulations, including statutes/regulations of municipalities and district or regional authorities. Therefore, when the Act set down an obligation that a public official could not give priority to his/her private interests in case of a conflict between his/her private interests and public interests, any public official, who actually gave priority to public interests, could have committed an infringement pursuant to Section 46 of Act No. 200/1990 Coll., on Offences. This legal regulation was superseded by Act No. 250/2016

Coll., on Liability for Offences and proceedings relating thereof; according to Section 5 of the aforementioned Act, *an offence is an illegal act that is harmful to society, that is explicitly identified as an offence in the act, and that has the characteristics defined by law, unless it is a crime*. Since neither the Conflict of Interest Act nor any other legal regulation defines an action, where a public official is in a conflict-of-interests situation or where a public official gives priority to his/her private interests, as an offence (infringement), no proceedings can be initiated in respect of such action. Moreover, the Act does not foresee the sanction of declaration of invalidity of the action— even if a public official is in a conflict-of-interests situation and fails to disclose it.

The sanction consisting in invalidation of actions is only associated with the so-called incompatibility of actions – in case a grant is awarded to a legal entity pursuant to Section 4c or in case a contract/agreement is concluded with a legal entity excluded from procurement procedures pursuant to Section 4b of the Conflict of Interest Act. Otherwise it is not possible to apply for invalidation of actions – e.g. in case of a municipal council's resolution on the sale of assets that are partially owned by a specific representative voting on such resolution, etc.

Public Procurement Act

As a preliminary remark, it should be noted that previous public procurement acts did not regulate conflict-of-interest situations; however, Act No. 137/2006 Coll., on Public Procurement, regulated unfair prejudice/bias of evaluation committee members as follows: *Evaluation committee members cannot be biased with regard to a public contract or bidders; in particular, they cannot be involved in the preparation of bids, they cannot gain any benefit or incur any loss from the procurement procedure outcome, they cannot have any private interests in awarding a public contract, and they cannot have any personal, professional or other similar affiliation with bidders*. This was a relatively specific definition of forbidden ties of the committee members; moreover, any biased committee members were excluded from evaluation of bids, etc.

Individuals that may find themselves in a conflict-of-interest situation

Section 44 of the Public Procurement Act (PPA)¹⁵ introduces a simple definition of a conflict of interests, as well as an obligation of contracting authorities to act in a way that prevents conflicts of interest. Specifically, *a conflict of interests is a situation, in which interests of individuals involved in the procurement procedure or with actual or potential interest in the procurement procedure outcome, pose risk to their impartialness or independence in connection with such procurement procedure*. The aforementioned definition applies to a broader group of individuals, who cannot find themselves in a conflict-of-interests situation in connection with public procurement procedures. This concerns not only evaluation committee members, but also administrators, who may influence public procurement procedures, or individuals authorised to act for or on behalf of a contracting authority. Conflicts of interests may also exist with regard to various consultants in charge of defining technical specification of tender documentation, for example.

¹⁵ Act No. 134/2106 Coll., on Public Procurement

Moreover, conflicts of interests may also occur in respect of specific suppliers/bidders. In general, conflicts of interests may exist for suppliers, who were involved in preparation of previous project or tender documentation. In this context, it will be highly questionable, to which extent contracting authorities would be able use third-party consultation/preliminary activities (e.g. for technical specification) pursuant to Section 36 of the PPA, while avoiding situations, where the same individuals or their employers (legal entities) ultimately apply for the given public contract. Pursuant to Section 36(4) of the PPA, a contracting authority is required: *if any part of the tender documentation was prepared by a person different from the contracting authority, other than its legal counsel or tax advisor, identify such part, together with identification of the person, who prepared it.*

Since the scope of individuals, who may find themselves in a conflict-of-interests situation during public procurement procedures, is very broad pursuant to the PPA definition, it is necessary to examine in more depth private interests that may influence public procurement procedures. Pursuant to Section 44(3), interests are, in principle, only limited to financial aspects: *For the purpose of this act, an interest of individuals specified in paragraph 2 shall mean an interest to gain personal benefits or reduce financial or other benefits of the contracting authority.*

Remedy of conflicts of interests

In connection with conflicts of interests, contracting authorities must focus on two groups of individuals. The first group includes employees of the contracting authority or individuals authorised to act on behalf of the contracting authority or involved in the preparation of tender documentation or public contract administration. The second group comprises suppliers.

In case of the first group, contracting authorities may (pursuant to Section 44) request an affidavit from all committee members, invited experts or individuals representing the contracting authority regarding conflicts of interest. In case a contracting authority identifies any conflict of interest, it is required to adopt measures to eliminate such conflict of interests. In general, this will concern measures aimed at excluding the relevant person from further involvement in the preparation or implementation of the procurement procedure. However, the contracting authority should also examine, whether the given conflict of interest did not influence the public contract in question in future. Moreover, contracting authorities are advised to request all individuals, who submit their affidavits, to notify any changes to circumstances that can result in a conflict-of-interests situation. It is fully at the contracting authority's discretion, if it provides certain examples of conflict-of-interests situations directly in the affidavit or if it only uses general provisions foreseen by law.

With regard to the second category, i.e. suppliers, contracting authorities may (pursuant to Section 48(5)(b)) *exclude public procurement participants on the grounds of incompetence, in case it is proven that a conflict of interests exists and no remedy is available other than the public procurement procedure annulment.* Even commentaries allow for the above described situation. A conflict of interest *may occur if, for example, a contracting authority and a supplier, who prepared the procurement procedure, agree that the supplier would not take part in the procurement procedure;*

*however, the supplier does not honour such agreement and fails to document – upon the contracting authority’s request – that it did not gain any advantage.*¹⁶

The fact that a contracting authority does not always have to exclude a bidder in a conflict-of-interest situation may also be inferred from Judgment of 13 October 2015 in Case T-403/12 *Intrasoft International v. European Commission*; according to Section 76 of the Judgment, *the awarding authorities are under no absolute obligation to exclude systematically tenderers in a situation of a conflict of interests, such exclusion not being justified in cases in which it is possible to show that that situation had no impact on their conduct in the context of the tender procedure and that it entails no actual risk of practices liable to distort competition between tenderers. On the other hand, the exclusion of a tenderer where there is a conflict of interests is essential where there is no more appropriate remedy to avoid any breach of the principles of equal treatment of tenderers and transparency.*

Monitoring conflicts of interests in public procurement procedures

According to Section 248 of the PPA, the Office for the Protection of Competition (OPC) is authorised and competent to monitor public procurement procedures and special procedures. In case a contracting authority fails to prevent a conflict of interest or adopt appropriate corrective measures, and – as a result of such conflict of interest – a procurement procedure is influenced, this situation is likely to constitute an administrative offence pursuant to Section 268(1)(a), which states that *a contracting authority commits an administrative offence by not complying with the rules set down by this act for public procurement procedures or special procedures pursuant to part six, and the contracting authority thereby influences or may influence the supplier selection or selection of a design in a design contest, and awards a public contract, enters into a framework agreement or the design contest is considered as completed following the design selection.* According to Section 268(2)(a), a penalty of up to 10% of the contract value or CZK 20 million may be imposed on contracting authorities for such offence.

We are currently not aware of any case, where a contracting authority would commit an administrative offence by not preventing a conflict of interests or by failing to adopt such measures that would prevent adverse effects of such conflict of interest, as appropriate. It is thus a pity that the Office of the Protection of Competition (OPC) – in its Decision No. S0174/2017/VZ-19826/2017/511/SVÁ - did not address the objected conflict of interest, solely stating that *it did not address in more detail the petitioner’s assertion, specified in the petitioner’s statement on background documents for the decision and relating to a potential conflict of interests of a committee member, from which the petitioner infers implausibility of committee members’ affidavits presented by the contracting authority during the administrative proceedings, as the contents of such affidavits is not relevant for the OPC’s conclusion on non-transparent conduct of the contracting authority since the OPC came to such conclusion on the basis of other facts.*” Therefore, in order to apply best practices of contracting authorities, it is necessary to adopt measures that would define minimum requirements for affidavits as well as the level of formalism that may or may not be accepted.

¹⁶ Dvořák, D., Machurek, T., Novotný, P., Šebesta, M. et al. Public Procurement Act. Commentary. 1st edition. Prague: Nakladatelství C. H. Beck, 2017, 1320 pp.

INDICATORS OF THE CONFLICT-OF-INTERESTS RISKS

In case a conflict of interest is not identified and regulated, it may distort the key principles of public administration. It may pose risk to legitimate decisions, distort the rule of law, policy development and enforcement, market functioning, influence allocation of public resources, and promote corruption, thereby damaging general public's trust in public institutions.

Risk indicators show potential adverse effects of conflicts of interest. They represent an item or set of items of unusual nature or varying from standard activities. It is a signal that things deviate from normal limits and should be addressed and taken into account. These indicators should result in more rigorous monitoring and inspection activities, with managers adopting necessary measures aimed at either confirming or disproving the conflict-of-interests risk. They are required to allay any and all doubts arising on the basis of such warning signals.

Some of these warning signals are common - relating to a number of different situations and being limited to conflicts of interests only. It is necessary to keep in mind that these indicators should support primary inspection – in order to either allay doubts or confirm the probability of potential illegal conduct. The existence of such warning signals indicates that the situation should be closely monitored.

General checklist for identification of conflict-of-interest risk areas

	YES/NO
Other employment	
Does the organization have rules and procedures in place for approval of other/second jobs?	
Are all employees aware of such rules and procedures?	
Do these rules identify potential conflicts of interest arising from other employment as a factor that must be assessed by managers when approving such other employment?	
Are there any formal proceedings, under which employees may apply for approval of other employment?	
Are these rules applied rigorously and responsibly?	
Are approved other/second jobs monitored from time to time to ensure their continued compliance with the rules?	
Insider information	
Does the organization have rules and procedures in place to ensure that confidential information is secured against unauthorised use? This mainly concerns: - Sensitive business information - Tax-related information - Personal data - Economic and financial information	
Is each employee informed about the existence of such rules and procedures?	
Are all managers informed about their responsibility for enforcing such principles?	
Agreements and contracts	
Are there procedures in place to ensure that employees involved in the preparation of contractual relations, supplier selection, implementation or supervision of a public contract concluded by the organization disclose any private-capacity interests relating to such contract/agreement?	
Are employees prohibited from taking part in the preparation, supplier selection, implementation or supervision of a public contract (even in excess of the PPA), if they have private interests therein, or are they required to disclose or otherwise address such interests before assuming such role?	
Is the organization entitled to terminate or amend a contract/agreement, if it is proven the contractual procedure was significantly distorted by a conflict of interests or corrupt practices on the part of a public official or supplier?	
In case it is confirmed that a contract was compromised by a conflict of interest on the part of a (former) public official, are other important decisions taken by such official assessed retroactively?	
Official decisions	
Are there any rules in place to ensure that each employee, who takes significant official decisions relating to the organization, its resources, strategies, employees, functions, administrative or statutory obligations (e.g. decisions on bills, procurement, budget allocations, law/policy implementation, licence or permit awarding/refusal for individuals, appointments, recruitment, promotion, employee assessments, etc.), disclose any private-capacity interest relevant in terms of such decisions, where a conflict-of-interests situation could exist on the part of the given decision-maker?	
Are public officials prohibited from taking part in the preparation, evaluation, management or verification of official decisions, if there are conflicts with private-capacity interests, or are they required to declare or address such interests?	
Is the organization entitled to review, amend or annul official decisions, if it is proven the decision-making process was significantly distorted by a conflict of interest or corrupt	

practices on the part of an employee?	
Gifts and benefits	
Does the organization address conflicts of interests arising from traditional and new forms of gifts or benefits?	
Does the organization have an administrative procedure in place to monitor gifts – e.g. definitions of acceptable and unacceptable gifts, acceptance of gifts on behalf of the organization, disposal or return of unacceptable gifts, guidance to recipients on refusing gifts, and declaration on significant gifts offered to or accepted by public officials?	
Personal, family, and social expectations and opportunities	
Is there general awareness that potential conflicts of interest arise from expectations of individual public officials, their immediate family or their surroundings, including religious or ethnical communities?	
Does the organization acknowledge potential conflicts of interests arising from work or business activities of other members of the public official's immediate family?	
Parallel offices	
Does the organization define circumstances, under which public officials may hold parallel offices in a management board or supervisory body of an external organization or entity, particularly where such entity may be involved in a contractual, controlling, partnership or sponsorship arrangement with the organization? For example: - Community group or non-governmental organization - Professional or political organization - Other governmental organization or authority (body) - State-owned enterprise or commercial organization	
Commercial activities or activities in non-governmental organizations after the term of office	
Do legal regulations and/or the organization define specific terms and conditions, under which former public officials may be employed by or involved in activities of another organization?	
Does the organization actively manage procedures that identify potential conflicts of interests, if a public official, who is about to leave his or her office, negotiates about future appointment, employment or other relevant activities with another entity?	
Where a public official leaves the organization to take employment with a non-governmental or commercial organization, does the organization retroactively check his/her previous decisions to ensure they were not distorted by undisclosed conflicts of interests?	

The answer should always be YES. In case the answer is NO, the given organization should ask the following question: "Why is there no such procedure and what should be done for the implementation thereof?". The organization should then ask the following question: "What is the procedure in the given case and is it effective?"

Conflict-of-interests risks in public contracts and subsidy (grant) schemes

During an external meeting of the mayor, vice-mayor, and head of the regional development department, also attended by Mr. G. as part of his job description, it was decided that it is necessary to carry out preliminary works consisting in the demolition of stands and athletes' gate in connection with a planned investment project (athletic stadium reconstruction), for which a grant application had been submitted. When asked by the participants, Mr. G. stated the price of these preliminary works is estimated at about CZK 500,000 excl. VAT.

Based on municipal provisions, it was possible – in justified cases - to award public contracts with expected value of up to CZK 500,000 solely on the basis of an approval of the mayor (or her deputy) in the form of a formal notice. Mr. G. was commissioned to procure at least 3 bids and then to agree with his managers on the awarding and financing of a small-scale public contract.

Mr. G. took advantage of the given situation to enter into an agreement with Mr. A., with whom he had long-term friendly relations and from whom he had received various services and assistance; per the agreement, the public contract would be awarded to Mr. A. without a proper procurement procedure, with feigned procedure only taking place.

Mr. A. asked owners of other companies, whether they would be willing to “pretend” their participation in a procurement procedure, and they agreed.

Mr. A. procured three bids, with the lowest bid submitted by his company (CZK 694,574.85 excl. VAT). Other bids were delivered to agree companies.

An evaluation committee meeting took place in June 2014. Prior to the meeting, Mr. G. signed an untrue affidavit stating that he is not biased with regard to the given public contract, that he did not take part in the bid preparation, that he does not have any private-capacity interests in awarding the given public contract, and that he has no personal, professional, or other similar relationships with the public procurement bidders.

Therefore, Mr. G.:

- In connection with a public procurement procedure and tender procedure, arranged an advantage for a supplier/bidder to the detriment of other suppliers/bidders with a view to secure unjust benefits for others, committing such offence as an evaluation committee member;
- Acting as an official, exercised his powers in a way that constituted a breach of another legal regulation in order to secure unjust benefits for others.

Note:

Mr. A. and owners of companies that agreed to fictively participate in a public procurement procedure were sentenced. Suspended sentences were imposed on all defendants, with Mr. G. also being prohibited from holding an office or employment in government authorities, state organizations, local self-governing units and contributory organizations established by such local self-governing units, where the office or employment would be associated with the preparation, organization, and awarding of public contracts and participation in evaluation committees.

Judgment of the District Court in Bruntál (2014)

The issue concerning conflicts of interests must already be addressed during the preliminary stage of a contract, starting from the initial stage – i.e. the preparation of documentation. The situation, in which a person, who takes part in the preparation of documentation, may try to directly or indirectly influence a tender procedure (wording of an invitation to tender) for the benefit of his/her private-capacity interests or interests of such person’s relatives, friends or business partners, constitutes a risk. Similarly, it is a risk factor if a public official tries to obtain information although he/she is not in charge of the tender procedure (call for bids) preparation; this may lead to information leaks.

Risk indicators – preparing an invitation to tender / call for bids

- Public official in charge of the documentation preparation insists that it is necessary to employ a third-party employee to assist with the documentation preparation process – even though this is not necessary;
- Several studies with a single topic are commissioned to external companies, with someone applying pressure on public officials to use one of these studies in the documentation preparation process;
- Public official in charge of the documentation preparation organizes the procedure in a way

that there is not enough time for rigorous review of the documentation prior to the commencement of the procedure;

- Several contracts for identical items are awarded during a short period of time and for no apparent reason – resulting in the application of a less competitive tender procedure method;
- Selection procedure based on negotiation although it is possible to use open procedure;
- Unjustified selection criteria are applied, favouring a specific company or offer;
- Rules for the contract/invitation implementation are too strict – with only one bidder able to submit a bid;
- Contracting authority's employee has relatives, who work in a company that may participate in a tender procedure;
- Contracting authority's employee had previously worked in a company that may participate in a tender procedure.

After the relevant period expires, the contracting authority verifies that the presented bids comply with requirements and evaluates them. If necessary, the contracting authority asks bidders to remedy any defects or provide specific information or additional explanations. Based on the criteria specified in the invitation, the contracting authority determines which bids are valid. There is a risk of potential manipulation with bids to cover up the fact that a bidder failed to comply (could not comply) with the given terms and conditions. During the evaluation process, individual members of the evaluation committee may try to influence others to influence the final decision.

Risk indicators – evaluation and selection

- Documents and/or certificates were clearly altered (e.g. crossed out)
- Evaluation committee members lack the necessary technical expertise to evaluate the presented bids, with one person dominating the whole committee
- Subject factors dominate the evaluation criteria system
- Incomplete address of a winning bidder/grant beneficiary – e.g. with only a post box specified (it could be a fictional company)
- Limited number of tenderers, who requested documentation, submit their bids – particularly when more than half of them choose to drop out
- Contract/grant awarded to unknown companies without any history

Each contract/grant must be implemented in full compliance with the requirements set down in a call for bids, technical specifications, and within specified deadlines. Suppliers/grant beneficiaries may be permitted to partly modify the implementation, if proven that such change could not have been anticipated and provided the sustainability/financial balance is ensured.

Risk indicators – implementation

- Low quality
- Insufficient continuous monitoring
- False certificates
- Frequent or insufficiently justified changes approved by one public official
- Long and unjustified delay between the selection of a winning supplier/recipient and contract signing (this may suggest negotiations on certain "signing bonus")
- Unjustified change of name or legal form of the supplier/beneficiary
- No timetable for implementation

- Significant changes in technical specification or terms and conditions
- Reduced scope (of deliverables) without corresponding cost reductions
- Increase in the number of man-hours without corresponding increase in quality/scope of deliverables
- Insufficient documentation for payment
- Insufficient communication between the supplier/grant beneficiary and the contracting authority/provider

Gifts

Examples

The mayor and several employees of the office attend a football game of the local club. They run into Mr. Krátký in front of the stadium; for the last five years, Mr. Krátký has been supplying office supplies for the town hall. Since the game does not start for another twenty minutes, Mr. Krátký invites the mayor and others for a drink and some snacks.

The regional labour office organizes annual Christmas gathering of employees and business partners, with some of these partners providing free refreshments for the event.

Before the end of the year, representatives of different companies come to the Ministry to thank for mutual cooperation and to wish happy new year. They usually bring some small presents, such as a diary or a calendar, but also other business gifts featuring logos of their companies – e.g. a bottle of wine, glasses, t-shirts or wall clock.

During an inspection, a social department employee discovers that social benefits for Mr. Loucký were assessed incorrectly and he is entitled to a higher amount. She corrects the given mistake. Several days later, Mr. Loucký brings a flowering hibiscus plant in a flowerpot.

With regard to the area of conflicts of interests and integrity of public officials, the issue of accepting gifts tends to be one of the most frequently discussed topics.

According to Service Regulation¹⁷, government employees cannot accept any gifts in connection with their office that could influence due performance of their official duties. Moreover, government employees shall not accept gifts that cannot influence due performance of their official duties; if the value of such gifts exceeds CZK 300. This also applies to small recurring gifts from one person or relating to one matter during a short period of time, where the total value of such gifts exceeds CZK 300¹⁸. Under the Act on Officials of Local Self-Governing Units¹⁹, officials cannot accept gifts or other benefits in connection with their employment – with the exception of gifts or benefits provided by such local self-governing units²⁰.

¹⁷ Service Regulation of a Deputy Minister of the Interior for State Service No. 13 of 14 December 2015, setting down rules for government employees applying to ethics

¹⁸ Article 9 of the Service Regulation of a Deputy Minister of the Interior for State Service No. 13

¹⁹ Act No. 312/2002 Coll., on Officials of local self-governing units and amendments to some acts

²⁰ Section 16(1) of Act No. 312/2002 Coll.

However, is it always clear how to apply these provisions?

Case study

High public administration officials (Ministry for Infrastructure Development) attend – on different occasions and often in their spare time – lunches or dinners organized (and paid for) by different businesses, representatives of schools, churches, local newspaper and television operators, developers, consultants, manufacturers, and construction companies. This is viewed as part of activities of high Ministry officials and it has not been a problem for the Ministry.

Three of these officials have recently attended an event, organized by a prominent local construction company, described as a “lavish feast” in a newspaper the next day. It took place a week before the Ministry finally decided to conclude a number of major construction contracts. It was discovered that most contracts were awarded to the company that organized the aforementioned event.

What ethical risks are involved?

Even though contacts between officials and private sector representatives are unavoidable and often necessary, an (allegedly) “lavish” lunch is likely to raise doubts as to the impartialness of officials involved in the decision-making processes, as well as the processes themselves. It is an apparent conflict of interests to attend such lunch. The fact that it took place during the officials’ time off is not relevant either.

The Ministry must guarantee that procurement procedures are not inappropriately influenced or influenced by corruption. If this is not the case, it is an example of “state capture” – obtaining an official decision via concealed influence with the use of corrupt practices.

Even though the provisions of legal regulations are unambiguous, there are many situations in life, where it is very difficult or even impossible to refuse a gift. In our culture, it is customary to also express one’s gratitude materially – in case we feel someone did something for us beyond their obligations. Refreshments and snacks are offered during formal and informal meetings, corporate gifts represent an accepted form of expression of thanks for cooperation. Therefore, it is easy to say that gifts cannot be accepted, but it is a sensitive issue in practice. At best, a person offering a gift may perceive an inappropriate or insensitive refusal of such gift as the fact that he or she engaged in some illegal conduct, for which he/she would be “punished” in the future (“they will not do anything for me here the next time”). Or worse, the given person may come to a conclusion that the value of the gift was not sufficient (“I have to bring more the next time”).

Using common sense, many gifts by nature (coffee or non-alcoholic beverage during a meeting) cannot be viewed as something that could influence public official’s decisions in a specific matter or in the future. As part of our tradition, it is polite to not only offer a beverage, but also to accept it. At the same time, the need to establish partnerships, less formal contacts between the public administration and citizens, built on trust, has been repeatedly stressed. In our culture, it is common to express one’s thanks for high-quality work or work that exceeds strictly defined obligations with flowers, box of chocolates, etc. If refused, it causes distance, feelings of suspicion or hostility, thereby impairing cooperation. It is thus desirable to also use good manners in the area of small favours.

On the other hand, even if a gift is provided to a public official within an absolutely unselfish and innocent context (to express gratitude or appreciation), it may turn into a habit where provided more frequently. Such public official may later start requesting gifts and this situation is not very far from

corrupt practices. Since public officials receive standard remuneration for their work, any “bonuses” in the form of material benefits or services may lead to negative feedback of citizens or media and impair such authority’s credibility. Moreover, we can never be certain of motivation of those, who offer such gifts or favours. The reason may be to accumulate symbolic “capital” with a view to receive some favour or preferential treatment.

In case we leave decisions relating to acceptance or refusal of small gifts or favours at the public official’s discretion, we express our implied trust in his/her professional judgment in compliance with professional ethics. The following is true: trust is binding; however, the lack of trust undermines loyalty.

Basic rules:

- Gifts cannot be solicited (directly or indirectly).
- Nothing can be asked in exchange for gifts (or even suggested).
- Gifts cannot have an economic value, but primarily a symbolic value.

Based on the aforementioned, it is clear that the actual or expected relationship between the person offering a gift and the person accepting such gift plays an important role. Personal gifts to public officials (unlike official gifts to an organization) may lead to a question, whether there is a relationship between the gift provider and recipient that could distort the integrity of a public official or organization. Consequently, each organization should adopt rules (often included in a code of conduct/ethics) that define situations, which should be avoided by public officials, as well as steps to be taken in case of problems or doubt. These rules must be absolutely clear as well as flexible – to sufficiently quickly reflect changing circumstances. Each public official has a right to explanation from his superiors with regard to steps to be taken in specific situations (acceptance of specific gifts, invitation to an event organized by one of partnering organizations, etc.).

In Germany, Section 331 of the Penal Code defines an offense (crime) relating to conflicts of interest – “accepting advantages”. Government institutions then prepare relatively detailed lists of unacceptable gifts and benefits:

- Money and benefits of monetary nature, such as tokens or vouchers;
- Jewellery ;
- Any type of appliances or equipment for private-capacity use – e.g. electronic devices;
- Price reduction for private purchases/services;
- Reduced interest rates on loans;
- Unjustified high remuneration for an officially approved second job;
- Employment of relatives;
- Tickets, travel vouchers, expensive dinners;
- Cheap accommodation provided without justification;
- Special remunerations;
- Invitations to exclusive events;
- Sexual services.

Instructions for Ministers

OTHER INSTRUMENTS FOR OF CONFLICTS OF INTERESTs REGULATION

In a broader sense of conflicts of interests, we consider situations that involve unacceptable conflicts between public official's interests – in his/her private capacity – and his/her official duties, as well as situations that involve potential conflicts of interest.

Most important instruments for preventing conflict-of-interests situations:

- Restrictions on parallel employment;
- Declaration of personal income and property/assets;
- Declaration of family property/assets;
- Declaration of gifts;
- Security and controlled access to internal information;
- Declaration of private-capacity interests relevant to decision-making;
- Restrictions on and monitoring of activities after termination of public sector employment;
- Restrictions on and monitoring of gifts and other forms of benefits;
- Routine exclusion of public officials from discussions or decisions that could lead to conflicts of interests;
- Restrictions on private company ownership.

In a rapidly changing environment of the public sector, conflicts of interests will always lead to concerns. Conflicts between private interests and duties of public officials may – in case of insufficient monitoring or willingness to address them - lead to abuse of public offices or even corrupt practices - although a conflict of interests does not itself represent corruption. While public officials are personally liable for conflict-of-interest situations, in which they may find themselves as individuals, public authorities and organizations shall be responsible for proper implementation of strategies relating to the management thereof.

The goal of an efficient conflict-of-interests policy is not to simply ban all private-capacity interests of public officials – even if this were possible. The immediate objective should be to ensure ethical standard of the organization's work, administrative decisions, and public administration in general.

Overly strict monitoring of private-capacity interests may infringe upon other rights or may be dysfunctional or counterproductive in practice or discourage some individuals from applying for public offices. Therefore, a modern conflict-of-interests policy should seek balance by defining risks for ethical standards of public organizations and public officials, prohibiting unacceptable forms of conflicts of interests, promoting awareness of the general public and individual public officials about such cases, while ensuring that efficient procedures are in place for identifying, disclosing, monitoring, and promoting suitable resolution of conflicts of interests.

It is true that there are situations, in which private interests and relations of public officials represent or may represent a conflict with due performance of their official duties. Therefore, each public institution must define such specific situations, which represent a conflict with due performance of their official duties and exercise of their official powers. It is important to avoid any actual or anticipated conflicts of interests - for example, if a public official leaves his/her office for a private/non-governmental sector position or if a supervisory body is interconnected with a business

entity subject to its supervision. More detailed rules and examples of unacceptable actions and relations should be defined for groups of individuals, who work in at-risk areas, such as public procurement, supervisory functions, and procurement of materials and services. Special attention should be given to functions that are under rigorous scrutiny by the general public or the media.

The prevention, evaluation, and management of conflicts of interests are associated with certain costs. On the other hand, there are costs associated with any damage actually incurred in connection with specific conflict-of-interests situations. Therefore, similarly as in most areas of public administration, responses to any conflict-of-interests situation should be realistic as well as suitable and adequate within the given context.

Instruments for regulating conflicts of interests in public contracts/subsidy (grant) schemes

Naturally, the main requirements relating to professionalism and impartialness of public officials also extend to public procurement/allocation of grants. However, it is understandable that individuals, who are directly involved in the awarding/allocation thereof, are subject to higher standards. One of the standard instruments (also required for projects co-financed by the EU) is a conflict of interests declaration.

Who is responsible for submitting the declaration?
Any person, who is involved at any stage of a procurement/grant procedure (preliminary stage, preparation, implementation or monitoring), should sign the declaration and submit it to a responsible person. As a minimum, such obligation should apply to: <ul style="list-style-type: none"> - Manager of a contracting authority/grant provider and each person, to which his/her obligations are delegated; - Employees involved in the preparation of documentation; - Evaluation committee members; - Experts carrying out tasks associated with the preparation of documentation and/or evaluation of bids.
At which stage of a procurement/grant procedure should the declaration be submitted?
A conflict of interests declaration should be considered at any stage of a procurement/grant procedure (i.e. during preliminary stage, preparation, implementation or monitoring). A manager in charge of the procurement/grant procedure should be required to ask each person involved in such procurement/grant procedure to present a conflict of interests declaration and to archive such declaration. The manager should ensure that the given person is well aware of the fact that any change relating to conflict-of-interests situations must be immediately reported.
How should conflict of interests declarations be reviewed?
It is necessary to define rules and methodology for the review (audit) of conflict of interest declarations submitted by employees and third-party experts (e.g. previous employment, family status). The organization should have in place procedures for archiving and reviewing conflict of interest declarations (e.g. special register or information management system for each procurement/grant procedure).
What sanctions should be imposed if a person fails to disclose a conflict-of-interests situation?
The rules should refer to sanctions set down by applicable legal regulations. The difference between

cases involving employees and cases involving third-party experts or partners should be clearly specified.

Code of conduct (ethics) should govern employees' conduct. It should include a definition of a conflict of interests as well as relevant sanctions – disciplinary²¹ measures. Internal rules should also apply to infringements of third-party experts. Contracts concluded with such experts should include clauses regulating relevant sanctions (early termination of contract, exclusion from procurement/grant procedures for several years, etc.).

What measures should be adopted if a risk of conflict of interests is identified or a conflict of interest is identified/disclosed prior to or during a procurement/grant procedure?

The following measures may be considered – depending on whether or not a conflict of interests declaration was submitted, and also depending on the nature of such conflict of interests or stage of the procurement/grant procedure:

- Discussion about the relevant facts with the concerned person to clarify the situation;
- Exclusion of the concerned person from the procurement/grant procedure – it is not relevant whether it is an employee or a third-party expert;
- Change in assigned working/service tasks and obligations;
- Annulment of the procurement/grant procedure.

It is necessary to consider excluding an employee/expert from the procurement/grant procedure not only in case there is an actual conflict of interests situation, but every time there are doubts regarding their impartialness.

In exceptional cases, a public official or expert cannot be excluded due to insufficient resources or in case of highly specialised experts in certain areas. In this case, the contracting authority should warrant that the decision-making process is absolutely transparent, should clearly define the contribution of such employee/expert, and warrant that the final decision relies on impartial, justified, and verifiable facts.

A conflict of interests declaration should include the definition of a conflict of interests, as well as the rules for preventing and resolving conflict of interests situations:

- Clear reference to concerned procurement/grant procedure;
- Signatory's full name, date of birth, position in the organization and role within the procurement/grant procedure;
- Signing date.

It should allow the signatories to officially certify:

- That they are aware of a potential/actual conflict of interest in connection with the procurement/grant procedure in question;
- Whether there are any circumstances, for which they could find themselves in a potential/actual conflict of interests in the near future;
- That they undertake to immediately report any potential conflict of interest in case any circumstances occur that could lead to such conclusion.
-

Subsequent steps and updates to conflict of interests declarations

Conflicts of interests evolve over time. For example, no conflict of interests – either actual or potential – exists for any of the responsible public officials at the beginning of the procurement/grant

²¹ In case of public officials – government employees, pursuant to Section 89 of Act No. 234/2014 Coll., on Civil service

procedure. However, the relevant circumstances change during the procedure, as a public official or his/her family member becomes an employee of one of the potential tenderers. Since the situation changed, it is very important to update a conflict of interests declaration.

In case a public official obtains new information during the procedure (e.g. about entities proposed as subcontractors in a bid) or the relevant circumstances change (e.g. establishment of a legal or factual relationship that did not exist at the beginning of the procedure), the potential/actual conflict of interest must be immediately disclosed to his/her manager. Such public official must then be excluded from the procedure; where necessary and practicable, all relevant stages of the procedure, in which he/she was involved, must be repeated.

Review of conflict of interests declaration using other information sources

Conflict of interests declarations must be reviewed, although it may be argued that the mere existence of such declarations serves as prevention. The scope of such inspections will depend on the contracting authority's capacity and resources.

Inspections should be adequate, carried out with a view to establish balance between the need for monitoring and the need for simple processes and low administrative burden. They should take into account the contract/grant value as well as any other applicable rules (e.g. under the PPA).

Contracting authorities should consider the following two types of inspections:

- For the purpose of prevention: identify potential/actual conflicts of interests;
- For the purpose of sanctions/corrective measures: identify conflicts of interests, impose sanctions on concerned individuals, and remedy any damage incurred as a result of such conflicts of interests.

For these reasons, contracting authorities should introduce internal mechanisms that would allow regular and systematic assessment of situations that exist for public officials involved in decision-making processes. They should implement internal mechanisms, such as:

- Regular questionnaires to assess, whether public officials are aware of the risk pertaining to situations of potential/actual conflict of interests and can identify such situations;
- Checklists for public officials involved in decision-making to facilitate assessment of situations of potential/actual conflict of interests.

Such procedures should also feature “ex post” mechanisms to examine, whether conflicts of interest actually occurred. They should focus on conflict of interests declarations, which should be reviewed within the context of other sources of information:

- External sources (i.e. information on potential conflicts of interests provided by third parties, without any ties to the situation, in which such conflicts of interests occurred);
- Review of situations that entail high conflict-of-interests risk (based on internal analysis of risks or risk indicators – see above);
- Random checks;

-
- Comparison of information collected from different databases (commercial, insolvency, and similar registers);
 - Open sources.

The failure to comply with the conflict of interests rules in an organization should be considered at least a disciplinary infringement, with serious breaches involving actual conflicts of interests potentially resulting in sanctions for abuse of powers or prosecution for a crime of corruption. Other sanctions foreseen by the Conflict of Interest Act (see above) may also apply to public officials.

Sanctions should be enforceable – even with potential consequences for careers of relevant public officials. The application of conflict-of-interests rules may also involve retroactive annulment of concerned decisions or agreements and exclusion from further proceedings, as an effective preventive measure against those, who could profit from a breach of the conflict-of-interests rules.

Using information from whistleblowers

Since the 1970s, the term “whistleblowing” has been used to describe an exposure of any dishonest workplace activities. The expression “to blow the whistle” is to evoke the idea of a warning whistle that is blown when rules of the game are broken. Whistleblowing refers to a situation, in which current or former employees of an organization expose unfair workplace practices and contact institutions or authorities competent to verify the disclosed facts – usually posing risk to the general public and contradicting public interests – and to intervene, as appropriate. The main objective of whistleblowing is to prevent unfair conduct and avoid negative consequences thereof.

A whistleblower is a person that exposes unfair practices (*in Czech: “oznamovatel”*). Whistle-blowers do not go on crusades to monitor dishonest workplace practices; moreover, not every person that has a dispute with the management is a whistleblower. In general, a whistleblower is an employee, who discovers any irregularities in the course of his/her work or features information (study results, financial audit) that indicates practices, which cause damage or pose risk to public interests (safety, health, environment, public funds, etc.). Whistleblowers (organization employees) sensitively perceive the existence of personal ties between different entities involved in procurement/grant procedures and may provide consistent information about any situations that could influence decisions of contracting authorities/grant providers. Therefore, whistleblowers may protect public interests with their notifications.

Information from whistleblowers does not itself represent evidence. In case the relevant authorities (particularly managing and controlling bodies of contracting authorities) receive this type of information, they should immediately use their available means to verify, whether such information can in fact be verified and whether it could influence management of the organisation.

Clearly defined and specified mechanisms, which may be used by whistleblowers and ensure the relevant notifications are heard and investigated, represent one of the important factors of correct functioning of the whistleblowing principles. These mechanisms may be internal or external. Furthermore, it is necessary to ensure effective protection against harassment or retaliation by colleagues or employers. Similarly, any abuse of available means of protection should be subject to sanction imposed in respect of any disclosures not made in good faith.

Practical example

Transparency International addressed in detail a case of a whistleblower working at a central state administration authority. She found herself in a difficult position, as she had information that small-scale contracts awarded by her department are repeatedly awarded to entities with close ties to the head of such department. However, it was not possible to confirm that the supplied services were overpriced or that internal rules for awarding small-scale contracts were violated.

Transparency International rigorously analysed personal links within suppliers and confirmed the whistleblower's assumptions. However, upon analysing available legislative instruments and internal regulations, it had to conclude that potential sanctions of such conduct mainly exist in the area of employment (labour law) and concern ethical aspects. The possibility to publicise the case was considered; however, it did not ultimately take place due to concerns of the whistle-blower about her employment.

REFERENCES

Identifying conflicts of interests in public procurement procedures for structural actions. A practical guide for managers. European Commission.

SIGMA – a joint initiative of the OECD and the European Union, principally financed by the EU. Conflict-of-interest policies and practices in nine EU member states: a comparative review. Managing

Conflict of Interest in the Public Sector. A toolkit. OECD.

Managing Conflict of Interest. Frameworks, tools and instruments for preventing, detecting and managing conflict of interest. ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. OECD

Parote Pathranarakul, Ph.D.: Conflict of Interest: An Ethical Issue in Public and Private Management. Issue Paper. 5th Regional Anti-Corruption Conference. ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

Preventing Corruption in Public Procurement. OECD.

Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service. OECD.

Conflict of Interest in the Public Sector. OECD guidelines and country experiences. OECD.

LIST OF ABBREVIATIONS

EC	European Commission
ESIF/ESI funds	European Structural and Investment Funds
EU	European Union
OECD	Organisation for Economic Cooperation and Development)
OPC	Office for the Protection of Competition
PPA	Public Procurement Act
PPP	Public Private Partnership