

# **EXPLANATORY AND TRAINING MANUAL**

## **FOR PREVENTING**

## **CONFLICT OF INTEREST**

### **No. 1**

*Prepared by:*

High Inspectorate for Declaration and Audit of Assets (HIDAA)

*In cooperation with:*

Training Institute of Public Administration (TIPA)

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## MANUAL PURPOSE

The Manual on Preventing Conflict of Interest is a working instrument, which can be used primarily by every official and public institution that is responsible for an effectual prevention of conflict of interest. It is also a training instrument, which can be used by trainers specialized for the same purpose. However, it has been prepared to serve every citizen or other nonpublic entity in understanding conflict of interest and being capable of protecting their interests or the public interest from actions of irresponsible officials.

The Law on Prevention of Conflict of Interest has managed to develop a very extensive and elaborate concept of conflict of interest between the official's private interest and his official duty. However, explicating the relation of cause and effect between private interest as a *cause* and improper performance of the duty as an *effect* is not always an easy analytic process in the context of every day situations.

To that effect, the manual combines a conceptual approach of the most important issues of the law with examples specially prepared and so developed that serve to guide in the solution of problems. In some cases, the examples hide the direct answer or they are deliberately approached in a wrong way to make the reader more inquisitive in analyzing them and finding a correct answer. Examples are followed by questions and topics for discussion, which help the reader and/or the trainer to avoid an unmindful understanding of them and ponder over or figure out the logical mechanism of addressing the relations of cause and effect. At the end of the manual, there is a brief description of an accurate addressing of the questions.

With regard to examples, we clarify that any similarity with real cases is just coincidental and unintentional.

The manual consists of five chapters.

- **Chapter I** – Scope
- **Chapter II** – Case-by-case conflict of interest and its prevention
- **Chapter III** – Continuing conflict of interest and its prevention
- **Chapter IV** – Conflict of interest in the case of official's employment and career
- **Chapter V** – Invalidity of acts under conflict of interest

The manual also contains several annexes that provide references to other laws and address or have some relation to conflict of interest prevention and answers to the questions from examples.

The manual is related to other commentaries issued by the High Inspectorate for Declaration and Audit of Assets (HIDAA), and it forms a supplement to them. It only focuses on certain aspects of conflict of interest issues that are regarded as the most important ones to be clarified, either as a result of their complexity or due to the fact that they are not adequately enlightened by present descriptive and instructive documents. On the other hand, it does not directly deal with the process of periodical or case-by-case declaration of interests. Up to now, these issues are considered as relatively well explained by either commentaries or the implementation of the process itself under the direction of HIDAA. Nevertheless, these two aspects are addressed and explained to a certain extent in various examples and are applied as concepts linked with provided examples.

While the manual has addressed the conflict of interest concept largely and in depth, it does not provide a thorough explanation of it. This would be an unfounded claim for every attempt in this field. Therefore, every other initiative is kindly received if it clears up more issues, addressed or not in this manual.

In any case, we call the reader's attention to the fact that the main difficulty in analyzing conflict of interest does not lie in the essence of the concept, but in the possibility of finding enough facts that help making judgments and raise a rational doubt in anticipation of every confidence in relations of cause and effect.

Indeed, the essence of conflict of interest concept is simple. An official with a clear consciousness must ask the following question to himself: "If I were instead of a citizen waiting for a decision of an official, who has the same competences and interests as me, could I, as a citizen, have confidence in the fairness and impartiality of that official's decision-making?" Every honest person, in most cases, would provide a correct answer to the question.

The preparation of this manual was initiated and completed under the authority and auspices of High Inspectorate for Declaration and Audit of Assets (HIDAA), based on its joint initiative with Training Institute of Public Administration (TIPA).

The manual was prepared by a group of Albanian experts from public institutions or free-lance occupations led by Institute for Contemporary Studies (ICS), which is a member of Albanian Coalition against Corruption (ACAC)<sup>1</sup>. ACAC/ICS played a fundamental role in drafting the Law on Prevention of Conflict of Interest in Exercising Public Functions, while some of the experts that prepared this manual were also members of the expert group engaged in the preparation of the proposed law.

The service of the expert group and the preparation of this manual were made possible by the technical and financial assistance of the Rule of Law Program of the United States Agency for International Development (USAID), which is implemented by the American Consultancy Association CASALS.

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<sup>1</sup> Names of experts are provided in Annex No. I of this manual

On behalf of HIDAA, I would like to thank you USAID for the support and at the same time to congratulate the experts who have been preparing the manual.

Inspector General of HIDAA  
Fatmira Laska

# **CHAPTER - Scope of the Law on Prevention of Conflict of Interest in Exercising Public Functions**

## **1. Introduction**

Subjects, which are first of all to apply the Law No. 9367, of April 07, 2005 “On Prevention of Conflict of Interest in Exercising Public Functions” (law PCI), are described in the Article 4 of this law. They are officials, persons related to them and public institutions.

In principle, every official is subject to this law if he/she plays a certain role in decision-making about an act or if he/she has a certain public function. Every state institution, every organ, and entity created or controlled by a state institution is subject to this law as well.

In this chapter, we will address issues with reference to the scope of the Law on Conflict of Interest by focusing especially on the official himself and his role in various decision-makings.

## **2. The official and decision- making**

Being an official in the sense of this law means first of all that this person

- Holds a public function
- and/or
- Plays an essential and decisive role in decision-making about a certain act

This sense is of a static or dynamic nature.

The *static* sense of being an official is expressed in the Article 4, Paragraph 1, Letter c, of the law. It involves a considerable number of officials holding specific positions in various public institutions. The Law on Prevention of Conflict of Interest has defined several specific duties and/or limitations on officials having specific public functions. These duties or limitations are brought into play only by being in such a position, but they are not directly related to a specific decision-making.

However, the term “official” has, for purposes of the Law on Prevention of Conflict of Interest, a primary *dynamic* sense, which is related to a case-by-case and concrete decision-making. This means that every official, even holding a position apparently unimportant in the hierarchy of a public institution, may have in the context of a decision-making process and because of his/her specific duty,

which may be only for a moment or on one occasion, an essential and decisive role in issuing an act as a product of this decision-making.

### **3. Essential and decisive competence for an act Preliminary moments of decision-making**

The dynamic concept of the term “official” is related to his/her essential and decisive role in a case-by-case decision-making. The meaning of the essential and decisive role is a critical moment in finding out whether a conflict of interest of any kind is present or not.

The Legal Commentary No. 3 of HIDAA in June 2006 has explained in details the meaning of “the essential and decisive competence” and that of “preliminary moments of decision-making”.

According to the Instruction No. 239, February 02, 2006 of HIDAA, the essential competence may be considered as stemming from the

- i) commanding, proposing, advising, executing or assisting role
- ii) control of information or
- iii) special causes as specified in internal regulations of every public institution

However, the above causes are not exhaustive. In every concrete case of decision-making, there is a need to analyze all facts and circumstances before coming to a reasonable conclusion that an official involved in the process of decision-making has an essential and decisive competence.<sup>2</sup>

The meaning of preliminary moments of decision-making about an act is just as well important to find out whether or not a conflict of interest is present, especially to take effective measures of a preventive and/or punitive nature. According to the Legal Commentary No. 3 of HIDAA, June 2006, preliminary, but not exhaustive moments of decision-making about an act may be the following cases:

- The official or officials draw up a draft-act and present it to the body or official who has the competence to make a decision.
- Other officials from the institution or outside it provide comments, opinions, suggestions, or any other documented contribution concerning this draft act.
- Involvement of any official in this draft act or provision of comments, opinions, suggestions or any other documented contribution concerning it by him/her because of requests, claims, or information on it from interested stakeholders.

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<sup>2</sup> See also Point 4 of the abovementioned instruction



- Involvement of any official who has the competence to make a definite decision on this draft act or provision of comments, opinions, suggestions, or any other documented contribution concerning it by him/her.
- Inclusion of any preliminary, provisional, and/or accompanying document of a decision-making about an act or contract closely connected with the organization, incomes, expenses, strategies, human resources, functions, administrative duties and responsibilities, which is necessary for establishing a definite content of the draft act or contract and for making a final decision on it.

In addition to previously mentioned cases, every public institution must be as provident as it can by specifying as much as possible according to its specific nature and its typical decision-makings in its internal regulation the preliminary moments of decision-making and the essential and decisive competence.

# CHAPTER II – Case-by-case conflict of interest and its prevention

## 1. Introduction

Article 6, Chapter I, of the Law on Prevention of Conflict of Interest sets forth the obligation of every common and superior official to avoid any kind of case-by-case conflict of interest.

Section 1, Chapter III, of the Law has fully addressed limitations and prohibitions in relation to some specific issues aiming to prevent public officials from falling into case-by-case conflict of interest.

In this chapter we will address

- The overall concept of case-by-case conflict of interest;
- The case-by-case conflict of interest with relation to
  - Prohibition of making contracts with a party, which is a public institution
  - Prohibition of earning an income because of a specific function
  - Prohibition of accepting gifts, favors, promises or preferential treatments

Explanations will be provided by analyzing concepts and legal references, as well as some examples created for didactic purposes.

## 2. Meaning of the case-by-case conflict of interest Its management and resolution in a generalizing situation

According to *Article 3* of the Law on Conflict of Interest, case-by-case conflict of interest is defined as:

*“...the situation with an actual, apparent, or potential conflict of interest, which appears case-by-case and is related to a particular decision-making...”*

As for the concept of case-by-case conflict of interest, we must concentrate on two major issues:

- *Firstly*, there must be an appearance of a conflict of interest in the form of an actual, apparent, or potential conflict. In this case, it is necessary to refer to the concept of conflict of interest and to these three specific types of conflict.

- *Secondly*, case-by-case conflict of interest is related to one or more particular decision-makings; thus the falling into a conflict of interest, the possibility of falling into such a conflict in the future or, also the apparent falling into a conflict of interest will be judged based on a concrete decision-making and on the role played by the official in it.

Case-by-case conflict of interest is and must be understood as a momentary incompatibility (i.e. with reference to “that” decision-making) between the official's public duty and his private interest.

*According to Article 6 of the Law on Prevention of Conflict of Interest, it is the obligation of every official in any position, starting from the lowest level and, for any kind of interest, which may turn into a cause, to prevent and resolve any case-by-case conflict of interest. This is, at the same time, the obligation of every official's superior.*

Although apparently simple, the comprehension, interpretation, and management of case-by-case conflict of interest concept demands in practice caution and a deep analysis for an accurate and correct application of the concept.

To conclude whether case-by-case conflict of interest exists or not, it is recommended to pursue the following methodological steps:

1. *What are the concrete and detailed duties and competences of the official in question?*
2. *Does he have any essential and decisive competence in decision-making for issuing concrete normative and/or individual acts?*
3. *What is the sphere (area, field) of this decision-making impact?*
4. *How strong is the impact of this act on this sphere?*
5. *What are the private interests of the official in question?*
6. *What chances does the act have in favoring private interests of this official?*
7. *What are the chances that official's private interests will negatively affect his role in decision-making about this act?*
8. *Is there any strong cause-effect relation between the interests and the act, which may lead to an unfair public decision-making solely for this cause?*

According to the meaning of case-by-case *potential* conflict of interest, which has not occurred, but which is likely to do so and in order to prevent at a suitable time the official from falling into a conflict of interest, the previously mentioned methodological questions must be made as soon as possible before a concrete decision-making takes place. Every common and superior official must perform this analytical process.

According to the meaning of the *actual* case-by-case conflict of interest, we have to do with a conflict that

- Is happening

- Has happened as a result of a decision-making already completed or
- Might have happened in a decision-making already completed

Therefore, the above methodological steps must be applied either to an ongoing decision-making or to a completed decision making.

In the first case, as long as decision-making has not taken place, the official under conflict of interest will always be positively regarded if he/she engages in an honest conduct and takes measures to avoid it before decision-making and the corresponding act come into effect or start causing effects. This would prove that he/she is acting unintentionally or that he/she has possibly not realized in due time the conflict of interest. This will also serve as a mitigating circumstance for every subsequent judgment. The same conduct is expected from his/her superior.

The distinction between the second and the third case lies in the fact that, if in the second case we are certain about the effects or consequences caused by official's private interests on the unfair performance of the duty on his/her part, in the third one we have to do with a possibility rather than an absolute certainty. The second case implies that we have a certain cause and effect relation and we are able to prove it beyond any reasonable doubt. In the third case, we have to do with a reasonable doubt about the possibility that official's private interests have influenced him/her to perform his/her duty not in a fair manner and this must be proven. In case this cannot be proven, the situation will be as if the conflict has never occurred. Additionally, in the third case, we must always bear in mind that the conflict might also have not occurred.

Although the official has or might have already committed a mistake, his self-reaction bearing a feeling of responsibility is commendable. It is to the public interest to identify and understand at any time decisions made under conflict of interest, because this provides for the possibility of remedying the mistake (for example, re-granting of a right to a third person), but it also assists the education process and thus the prevention of similar cases in the future. Such a conduct of an official would constitute a mitigating circumstance for any subsequent judgment. The same conduct is expected from his/her superior.

Even if the answers to the above 1-8 methodological questions were such that we would conclude that there are no signs of any appearance of an actual or potential conflict in a given concrete decision-making, it nevertheless does not mean that the analysis has been completed.

- (i) In this case, analysis must continue to see whether there is a risk of the emergence of an apparent kind of conflict of interest or not. To this end, questions from 6 to 8 must be asked again, but, this time, from the perspective of a potential perception of the public rather than from the perspective of the case when it is analyzed by the official or his/her

superior.

- (ii) In other words, the official or his/her superior who analyzes this case, must place himself/herself in the position of a common individual from the public, who is normally informed and reasonable and then make to himself the following question:

9. *Would he (the individual from the public) have confidence in the decision-making of the official in question, if he knew about the existence of private interests and their interference with this official's duty?*<sup>3</sup>

As emphasized above, case-by-case conflict of interest may appear in the case of every official in any position, even in low ones, and for interests of any kind. Therefore, every official and his/her superior must analyze the issue according to the approach suggested above and take every appropriate measure, as set forth in the law, to prevent the conflict.

Article No. 37 of the Law on Prevention of Conflict of Interest defines the measures that the official or his/her superior can take to this effect. In their substance, these measures are linked either with the alienation of the official's private interests or with the modification of his/her official duties. The basic rule is that the official himself/herself must declare the interest if he/she believes that he/she can fall into a conflict because of it, and when he/she is convinced of the possibility of conflict emergence, he/she must avoid involvement in decision-making. Consultation with his/her superior is always recommended. The superior official on his/her part, who is informed about the facts, must take measures, as recommended by this article, up to excluding the official from participating in that particular decision-making.

*It is worth emphasizing that, although conflict of interest avoidance is very important, it could be harmful, to the same extent, to the public interest if this obligation would be used as a "an excuse" or "a pretext" by the official or his/her superior to avoid performance of the duty. Such a behavior is a conflict of interest in itself.*

In addition to the Law on Prevention of Conflict of Interest, there are other specific laws, which define types of interests, their management and the relevant procedures in dealing with this subject.<sup>4</sup>

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<sup>3</sup> To analyze from this perspective means to accept the conclusion that a normal person from the public, no matter how advanced the information system is, will absorb and have less information in making a judgment for the issue in question than the official or his/her superior. So, in other words, when it is a question of judging whether or not an apparent conflict of interest exist, we must consider the available data on public opinion about issues linked with the concrete case without rendering them absolute. Good customs and accepted rules of moral are also a good guide.

<sup>4</sup> Annex No. III of the manual provides a list of laws, which address conflict of interest in different spheres.

### **3. Case-by-case conflict of interest with relation to specific issues**

Section 1, Chapter III, of the Law on Prevention of Conflict of Interest focuses on several case-by-case conflicts of interest with relation to specific issues:

- Prohibition of making contracts; here, the specific issue is the contract – the decision-making output.
- Prohibition of earning an income because of specific functions; here, the issue here is the specific function.
- Prohibition of accepting gifts; here, the specific issue is the acceptance of gifts.

#### **3.1 Prohibition of making contracts with a party, which is a public institution**

The legal framework in force of the Republic of Albania provides a series of prohibitions on making contracts with a party, which is a public institution and from which various officials may benefit in a direct or indirect manner, thus causing the emergence of a conflict, even apparently, with, or without the direct involvement of officials in making those contracts<sup>5</sup>.

The Law on Prevention of Conflict of Interest has devoted a particular article to prohibition of making contracts (Article 21). It defines making a contract as a particular decision-making, which, due to the importance and public assets values that it may convey and involve, is endangered to experience damage from the impact of private interests of officials involved in this decision-making. Conflict of interest in making contracts with a party, which is a public institution, is a specific type of case-by-case conflict of interest.

Through a logical inclusion, the Law on Prevention of Conflict of Interest has exhausted prohibitions set forth in other laws with regard to making contracts due to conflict of interest, although it is recommended to always consult other laws when it is a question of contracts or officials that are included in their scope of application.

Article 21 of the Law on Prevention of Conflict of Interest defines two types of prohibitions:

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<sup>5</sup> Annex No. III of the Manual provides a summarized list of various laws, which set forth such prohibitions.

- Prohibition of an “absolute”<sup>6</sup> nature (Points 1, 2 and 6)
- Prohibition of a “relative” nature (Point 3)

The prohibition of an “absolute” nature is related only to the category of the official, i.e. with his/her function and does not depend at all on whether the official's authority for making contracts is essential and decisive or not. In fact, it applies even if the official does not participate or does not have the opportunity to participate in making the contract. The purpose of the “absolute” prohibition is to avoid any conflict of interest, including the apparent one, for specific categories of officials, which are, as a rule, high position ones, with whom the public has basically vested its trust on institutions. In addition, this type of prohibition applies only to certain kinds of interests, which are less than those considered in the case of a “relative” restriction.

The prohibition of a “relative” nature is nothing other than a case-by-case conflict of interest in a decision-making that ends in making a contract and, the only solution to this is noninvolvement (recusal) of an official in that decision-making, when he has interests, which could cause conflict.

### 3.1.1 “Absolute” prohibition of making contracts

The “absolute” prohibition of making contracts has pursued the logics of the Article 70/3 of the Constitution, which stipulates that Members of Parliament “... *may not carry out any profit-making activity that stems from the property of the state or of local government, nor may they acquire their property....*”

Point 1 of Article 21 of the Law on Prevention of Conflict of Interest defines that:

**No contract can be made between a public institution, regardless of what it is, on one hand**

**and on the other hand**

an official mentioned in Chapter III, Section 2, (except for officials of low and medium leading positions, first instance courts and courts of appeal judges and prosecutors) and persons related to him (as per Article 24: husband/wife, major children, official parents and parents of the official's husband/wife), who are parties in the capacity of an individual, a physical person, free profession, etc.,

or

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<sup>6</sup> Terms “absolute” and “relative” are applied in this Manual for methodical purposes and they are not terms of the Law on Prevention of Conflict of Interest.

an entity, which carries out profit-making activity (commercial company, partnership or a common company or any other form of profit organization) where this official or persons related to him (as per Article 24: husband/spouse, major children, official's parents and parents of the official's husband/spouse) posses shares or capital stocks in whatever amount.

By analyzing Articles 21, Point 1, 24 and 25 of the Law on Prevention of Conflict of Interest, we distinguish: i) officials subject to prohibition, ii) types of prohibited contracts, iii) types of interests, iv) prohibition due to an indirect interest, v) prohibition for persons related to the official.

*i) Categories subject to prohibition:*

- President;
- Prime minister, deputy prime minister, ministers and deputy ministers;
- Members of Parliament;
- Constitutional Court and Supreme Court Judges; members of High Council of Justice (HCJ), General Prosecutor, Chairman of Supreme State Audit (SSA), Ombudsman, Members of Central Election Commission (CEC), General Inspector of High Inspectorate of Declaration and Audit of Assets (HIDAA)
- Members of regulatory agencies (Supervisory Board of Bank of Albania including the Governor, Deputy Governor, competition, telecommunication, power, water supply, insurance, securities, media)
- General secretaries, directors of departments and general directors of central institutions, as well as any other official in any public institution, who is, at least, equivalent in terms of position, to general directors<sup>7</sup>

*ii) Types of prohibited contracts*

With regard to above categories of officials, absolute prohibition includes, as a rule, all types of contracts like: public procurement of buildings, goods or services, sale, exchange, lease/emphyteusis, donation, supply, sub-contraction, transportation, and every other contract, which is not exempted by Point 5 of Article 21 of the Law on Conflict of Interest.

*iii) Types of interests*

For purposes of Article 21, Point 1, the only cases taken into consideration are those where the official appears as a party that makes a contract with a public institution in the capacity of an individual, a physical person, free profession or

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<sup>7</sup> The meaning of equivalency at medium leading positions is also analyzed for the purpose of periodical declaration of interests in Commentary No. 2 of HIDAA issued in February 2006, page 41. The concept of equivalency at high leading positions can be applied based on the same logical approach.



where the party appears as any profit organization form in which the official possesses property interests – shares or capital stocks.

*iv) Prohibition due to indirect interest*

Prohibitions defined in Article 21, Point 1 of the Law on Prevention of Conflict of Interest apply not only to the case of the aforementioned parties, which are directly involved in the contract and have, of course, a direct interest in it, but also to the cases where the official's interest in making a contract arises in an indirect manner.

According to Article 25 of the Law on Prevention of Conflict of Interest, these prohibitions are applied when contracting parties are a public institution and a commercial company, a partnership or a common company "A", resident or non resident in the Republic of Albania, whose shares or capital stocks are owned by a commercial company, a partnership or a common company "B", in which the official is a stockholder or a partner.

*v) Prohibition involving persons related to an official*

Prohibitions defined in Article 21, Point 1 of the Law on Prevention of Conflict of Interest, apart from the relevant exemptions, are applied to the same extent to persons, who have family relations to the aforementioned officials as per Article 24 of the Law on Prevention of Conflict of Interest. Persons related to the official are husband/wife, major children and the official's and husband's/wife's parents.

Further, as regards **Point 2 of Article 21**, the scope of the "absolute" prohibition is restricted only to contracts made by the municipality, the commune or the regional council and their subordinate institutions, on one hand, and the officials mentioned in this point, on the other hand, enough for those officials to have an interest of the type as stated in Point 1 explained above. This means that local officials are not exempted from the possibility of making contracts with any other public institution (central or local), except for the local institution where they exercise their function. It is worth to emphasize that the high leading position concept of a local government unit official, as related to Point 2 of Article 21, has a relative meaning inside that institution pursuant to the statutory definition of the institution itself. This definition in this article is different from the high leading position concept as set forth in Article 31, which, as explained in Chapter III of this Manual, is an absolute meaning.

As regards **Point 6 of Article 21**, making contracts is prohibited between

- An official, who is a member of a regulatory agency (for example, in power sector, telecommunication, water, bank and financial sector, competition, etc.), persons related to him down to the second degree, commercial entities

or every person, who enjoys interest relations like those listed in letter “a” of this point, with this official, on one hand, and,

- Operators, which are subject to regulation by the respective agency, on the other.

As to these officials, it is noted that, while the scope of prohibition jurisdiction becomes more limited (scope under jurisdiction of the relevant institution), the scope and kinds of interests that activate prohibition expand, including an increase of persons related to the official down to the second degree and of the contracts between subjects under the same jurisdiction and other subjects out of this jurisdiction.

As to the prohibition of an absolute nature, the legislator has been reasonable enough to set forth exemptions, which, in their substance, are based on the usual contract relations and without involving any privileges due to the function.

**It is worth emphasizing that involvement or noninvolvement of an official in decision-making for making a contract is beside the point whether it activates the prohibition of Point 1, Article 21, or not, if the conditions mentioned above are to be satisfied. This is one of the essential distinctions between Points 1, 2 and 6 of Article 21 of the Law on Prevention of Conflict of Interest, on one hand, and the Point 3 of it, on the other.**

**If a contract has been made in violation of at least one of the previously mentioned rules of the Law on Prevention of Conflict of Interest, in the end it is bound to be rendered invalid.<sup>8</sup>**

### 3.1.2 Relative prohibition of making contracts

Prohibition of making contracts as provided in Point 3, Article 21, is a formulation in other words of the obligation to avoid case-by-case conflict of interest in a decision-making, which is part of a contracting process that is carried out by a public institution. This means that such prohibition is activated for every official having interests, which could lead to his/her unfair performance of the duty if he/she has an essential and decisive role in making a contract for the institution, in which he/she exercises his/her public function. The expression “every official” implies even those described in Points 1 and 2 of Article 21, as well as those excluded in the Point 1 or those, who are not mentioned in any of these points, but now it covers a much larger scope of pecuniary and non-pecuniary interests (see, Article 37, Code of Administrative Procedures), including those defined by Point 1 of this Article.

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<sup>8</sup> See Article 40 of the Law on Conflict of Interest Prevention and Chapter V of this Manual.

**There is only one alternative for every official in any position, who has an interest even of the aforementioned type in a certain preliminary or final decision-making, which leads to a contraction with a party, which is a public institution: the official must declare his/her interest and must not participate in the decision-making. Otherwise, the contract will be invalid.**

**Differently from Point 1 of Article 21 of the Law on Prevention of Conflict of Interest, Point 3 can be activated, first of all, only if the official has an essential and decisive competence in decision-making for making a contract. This condition being met, application of Point 3 requires also meeting of other conditions as set forth in it. On the other hand, if the official does not have any essential and decisive competence in decision-making for making a contract, then prohibition set forth in Point 3 is not activated.**

Point 3, Article 21, is automatically applied in the case of all high leading position officials subject to “absolute” prohibition, as set forth in Point 1, Article 21, of the Law on Prevention of Conflict of Interest, and only for the kinds of interests as defined by this Point. In other words, Point 3, Article 21, remains a void (unnecessary) provision, since prohibition is absolute, regardless of involvement in decision-making. If the same official has even one single interest, which is different to those set forth in Point 1, Article 21, but of the type set forth in Point 3, Article 21, of the Law on Prevention of Conflict of Interest and if he/she has an essential and decisive role in making a contract for the public institution where he/she exercises his/her function or for every other subordinate public institution, then the prohibition set forth in Point 3, Article 21, of the Law on Prevention of Conflict of Interests is instantly activated.

Articles 37 and 43 of the Code of Administrative Procedures explicitly define types of interests, prohibition of involvement in decision-making and invalidity of contract.

#### **Article 37** **Disqualification cases**

1. *No employee of administrative bodies can take part in a administrative decision-making process or in a contraction where the administration represented by him/her is a party in cases he/she is or/and is suspected to be in any of the following conditions:*
  - a) *He/she has a direct or indirect personal interest in the case in question;*
  - b) *His/her spouse/husband or the person living with him/her or kin up to the second degree have a direct or indirect interest in the case in question;*
  - c) *The employee or the persons mentioned in paragraph b) of this article have a direct or indirect interest in case similar to the case in question;*
  - d) *The employee has been an expert, adviser or lawyer in the case in question;*
  - e) *Persons mentioned in paragraph b) of this article have participated as experts, advisers or lawyers in the case in question;*
  - f) *When a court proceedings has been initiated by the interested parties against the employee or persons mentioned in the paragraph b) of this article;*

- g) The case is an appeal to a decision taken by the employee or persons mentioned in paragraph b) of this article;*
- h) The employee or persons mentioned in paragraph b) of this article are debtors or creditors of the interested parties involved in an administrative proceeding or a contraction in which public administration is a party.*
- i) The employee or the persons mentioned in paragraph b) of this article have received gifts from the interested parties in the administrative proceeding or the contraction, before or after the initiation of the administrative proceeding or the contract signing.*
- j) The employee or the persons mentioned in paragraph b) of this article are friendly related or are hostile to the interested parties in an administrative proceeding or a contraction.*

**Article 43**  
**Disciplinary measures**

- 1. Acts and contracts involving employees of administrative bodies who are affected by disqualification provisions are invalid.*
- 2. Any failure to the obligation of the official to make known the existence of disqualification conditions, according to paragraph 1 of article 38 constitutes a grave disciplinary violation."*

### **3.2. Prohibition to earn incomes due to the function<sup>9</sup>**

Point 1, Article 22, focuses on officials, who have an essential and decisive competence for granting a status by way of which a company benefits tax or custom facilities/exemptions or, gains the right to conduct activity in a free zone. In this case, these officials are prohibited from any direct or indirect benefit.

Point 2, Article 22, focuses on officials with a special role: representatives of public institutions in the assembly of a company shareholders or partners. Prohibitions aim to prevent actions of these officials, either alone or in cooperation with other persons, which satisfy private interests to the detriment of public institution interest.

### **3.3. Prohibition to receive gifts, favors, promises, or preferential treatments<sup>10</sup>**

The concept of gift and its prohibition is largely addressed in the Albanian legislation.

*The substance of addressing the gift is to prohibit its acceptance if this could lead to the emergence of a conflict of interest even in its apparent form. So, in any case, a decision either to accept or to refuse a gift must be made by analyzing it as per the aforementioned 1-9 methodological steps.*

The only permitted gifts or preferential treatments are those offered for protocol purposes, which are and remain an asset of the respective institution, even though in any specific case they may cause an apparent conflict of interest.

#### **3.3.1 Meaning of Terms**

Although the Law on Prevention of Conflict of Interest and the Law No. 9131, September 08, 2003 “On Rules of Ethics in Public Administration” apply, in form, different phraseology, they are in full compliance and coherence. Therefore, Decision Nr. 714, October 22, 2004, of the Council of Ministers “On outside Activity and Making Gifts during the Activity of Public Administration Servant” issued pursuant to Law on Ethics, is an act, which provides valid definitions and solutions for both laws. However, definitions of this decision must be considered

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<sup>9</sup> Annex No. III of the Manual provides the list of specific laws regarding this issue.

<sup>10</sup> Annex No. III of the Manual provides the list of other specific laws and acts regarding gifts, including the Law “On Rules of Ethics in Public Administration” and decision Nr. 714, of October 22, 2004 of the Council of Ministers “On outside Activity and Making Gifts during the Activity of Public Administration Servant”.

not exhaustive and the highly recommended manner could be correct and direct implementation of both laws.

The Law on Prevention of Conflict of Interest uses terms “gift”, “favor”, “promise” and “preferential treatment”, which bear, even in explanations provided in the aforementioned Decision of the Council of Ministers, the same meaning with the single term “gift” used in the Law “On Rules of Ethics in Public Administration”.

The legislator has considered that the above four terms of the Law on Prevention of Conflict of Interest are easily understandable. Defined cases, clarifications, and prohibitions set forth in the aforementioned Decision of the Council of Ministers go into more details as to the meaning of various terms and situations, and to their solutions and prohibitions.

### 3.3.2 Peremptory Prohibitions

Decision No. 714 of the Council of Ministers defines a number of peremptory prohibition cases in relation to accepting gifts either from various private entities, or from other subordinate officials.

This decision applies to public administration servants, except elected officials, Council of Ministers Members, and judges. If specific regulations are not in place for the latter, then Article 23 applies directly.

Nevertheless, it could be recommended to these institutions to define prohibition cases and specific approaches of addressing “gifts” in the context of their internal regulations (statutes).

## **4. Principles of addressing conflict of interest**

Article 37 defines ways of addressing and resolving the general type conflict of interest. Other articles of the law define specific ways for specific types or cases of conflict of interest.<sup>11</sup>

A careful observation of these provisions leads to, at least, three basic principles:

- Measures taken for avoiding conflict must be proportional. They must be taken in an escalatory manner (Points 1 and 4 of Article 37). This means that in addressing conflict of interest we must choose a method of avoiding it and the measures we take to avoid it must be adequate. For that reason, Article

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<sup>11</sup> Articles 21, 22, and 23 define addressing and solution ways, which are applicable only for the type prohibition regarding some specific types of case by case conflict of interest. Meanwhile, Article 38 defines procedures and timelines for addressing and applying the prohibitions set forth in articles 27-33 in relation to specific cases of continuing conflict of interest.

37 describes a series of measures that must be taken either from the official or from his/her direct superior official and, that these measures. Taken separately or by combination, they will ensure conflict avoidance.

- Obligation to avoid conflict is an outcome obligation, i.e. regardless of the measures taken by the public servant or his/her superior official, their responsibility is not excluded if the measures taken did not prove to be successful and the conflict situation goes on (Points 3 and 8 of Article 37).
- Obligation to take measures to avoid conflict extends throughout the hierarchical line starting from the official himself/herself and reaching one by one all superior officials and institutions (Point 4 of Article 37).

It is exactly these principles, which must shape the official's conduct and that of his/her superiors in choosing a method of addressing and avoiding conflict of interest. It must be remembered that the Law on Prevention of Conflict of Interest has primarily a preventive character. All parties must implement the solutions it provides with good faith and these solutions must serve the realization of public interest.

## **5. Sanctions**

In case the official and/or his/her superior fail to take the necessary measures to prevent, address, and resolve the case-by-case conflict of interest, the Law on Prevention of Conflict of Interest set forth in its Articles 44 and 45 administrative penalties and disciplinary measures.

Despite the fact that the Criminal Code does not use the term “conflict of interest,” violations of the Law on Prevention of Conflict of Interest, in proportion to their extent, circumstances and effects, and when the official fails to perform his/her duty in a fair manner because of private interests, may constitute one or more criminal offences provided by the Criminal Code, such as abuse of office, passive corruption, violation of participants equity in bids, forgery of documents, etc.

In each case, criminal liability applies regardless of any administrative and/or disciplinary responsibility and vice-versa.

## **6. Invalidity of acts in the case-by-case conflict of interest**

Article 40 of the Law on Prevention of Conflict of Interest has defined cases of acts invalidity issued under conflict of interest conditions. Depending on the type of the act (administrative, civil, judicial, notary, etc.), invalidity will be considered

and judged based on respective procedural laws and/or specific laws, which govern the regime of these acts.<sup>12</sup>

## 7. Examples on prohibition of making contracts

### Example 1

Ministry of Health General Secretary's wife, AB, makes a contract with a shareholding company, which provides water supply service to city K, where the municipality owns 52% of its shares. The contract was made following a clear, transparent, and competitive process conducted by the company under the supervision of the municipality.

*Issue:* Is this contraction prohibited?

- In this case, the official is classified as a high leading position official, thus he is subject to general prohibition set forth in Point 1 of Article 21.
- Wife is a person related to the official, and so she is subject to the same prohibition (Article 24).
- A public institution controls the shareholding company (Letter “d”, Point 1, Article 4).

Therefore, this contraction is not allowed and, in case it has been signed, it must be annulled by applying at the same time the respective penalties on the responsible persons and by remedying the effects that this contract might have caused.

*Topics for discussion:*

- *Would prohibition apply if key variables of the example get modified (official's position, related person, percentage of shares owned by the municipality)?*
- *What is the importance of the fact that the contraction process has been a fair one in terms of defining the activation of prohibition?*
- *What, if the contract was made before the Law on Prevention of Conflict of Interest had come into effect, what could be done in this case? Consider the case assuming that the contract is made for a 2-year term and the case when the contract is made for the same term, but with the prescription that, after the first year, parties have the right to make a decision whether to continue or to cancel it due to reasonable causes, while the second year starts after the law at issue has come into effect.*

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<sup>12</sup> For a more detailed analysis of invalidity, see Chapter IV of this Manual.



## Example 2

AB Company Ltd., whose capital is completely owned by the son of a Supreme Court judge, purchased a site, which was a state owned property, in a tourist area. Purchasing of the plot was based on a public auction organized by Ministry of Tourism. Auction arrangement was in full compliance with the law. AB Company Ltd. deserved the purchase due to its best financial and technical bid that it proposed.

*Issue:* Is this contraction subject to conflict of interest circumstances?

- In this case, the official is classified as a high leading position official, and so he is subject to general prohibition set forth in Point 1 of Article 21.
- Supreme Court judge's son is a person related to the official in question, and he must be subject to the same prohibition (Article 24) as the official himself, thus including also the company where he owns even only a single share in the capital.
- The contract is made with a public institution (Ministry).

Therefore, this contract is not allowed, and even if it has been made, it should be cancelled by associating it with the respective penalties and remedies for its effects.

*Topics for discussion:*

- *What could be done if the contract was made before the Law on Prevention of Conflict of Interest had come into effect?*
- *Analyze the case of a contraction before this law comes into effect under the scenario that the official would be a Member of Parliament, and <sup>13</sup>:*
  - *Purchase was carried out by AB Company Ltd.*
  - *The official himself conducted purchase.*

## Example 3

Ministry of Interior Internal Audit Director's father owns shares of *Alfa* Ltd., which carries out its activity in the area of hydrocarbons wholesale and retail trade. The official's scope of duty is to observe the legality of the proceedings and the efficient use of public funds. Once bidding and delivering of proposals was announced, one of the bidders claimed that *Alfa* Ltd., could not bid due to conflict

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<sup>13</sup> The case and the issues here may also be raised in the case of Example 1

of interest and prevention as per Point 3, Article 21, of the Law on Prevention of Conflict of Interest.

The ministry judged that the official in question belonged to a medium leading position and he was not entitled to any essential competence for setting contract terms and evaluating bids, because he was responsible only for observing the legality of proceedings and not for assessing technical specifications and, in this concrete case, he did not have any role. Therefore, Alfa Company was not disqualified from bidding. In fact, Alfa Company won the bid because it provided the best financial proposal, which met at the same time the technical conditions.

Once notified by the bidder, who made the claim, HIDAA started a process of administrative investigation and concluded that this case involved a conflict of interest and the contract between the ministry and Alfa Company must not be signed. According to HIDAA, the conflict of interest was caused due to official's position, which would presumably have, at least apparently, an essential role. HIDAA analyzed this role not only in view of involvement in decision-making, but also as a potential influence over this decision-making (for example, the possibility of getting out information at an earlier stage in favor of Alfa Company or, the possibility of exercising influence over the officials involved in this decision-making). In this case, HIDAA referred to apparent conflict of interest and the definitions of Letter "c", Point 2, Article 4, and recommended the ministry the annulment of the contract and imposed a fine both on General Secretary and Director of Human Resources of the ministry, because they had not prevented conflict of interest in this case. Ministry applied the fine, but failed to take any further action as to the termination of contract.

*Issues to discuss:*

- *Discuss whether we have to do here with a conflict of interest or not? WHY?*
- *What should the ministry have done to prevent this situation?*
- *Reconsider the example by modifying the official's role into the position of a head of a sector in the procurement unit and, in another case, into the position of a director in the statistics directorate of this ministry.*
- *Reconsider the example when the interest under consideration is of a different type (for example, a gift, promise for employment in the future, etc.).*

#### **Example 4**

Ministry organized a bid for its building reconstruction. An ad hoc Commission according to legal procedures approved terms of reference. Five bidding companies participate in bidding. The proposals evaluation commission consists of five members:

- The wife of commission chair is the head of finance sector in one of the participating companies in the bid;
- Member A is a shareholder of one of the bidding companies;
- Member B has filed a criminal prosecution against the administrator of one of the companies participating in bidding for defamation and insulting. B claims that this administrator has insulted him for “being a corrupted person”, “unprofessional” and that “his wife has committed adultery with the minister, therefore B is still in that job position”;
- Member C, a common specialist, is a shareholder in a building company, which does not participate in bidding;
- Member D is a shareholder of *Beta*, which does not participate in bidding, but which is a shareholder of *Gama* Company, which is participating in bidding.

*Issue 1.* Is there a conflict of interest, according to Article 21, involved in any of the above cases?

- The commission chair is under conflict of interest, because he is subject at the same time to two of the conditions set forth in Point 3, Article 21. First, the commission chair has an essential and decisive competence in decision-making for the evaluation process of bidders and proposals. Secondly, according to Article 37 of the Code of Administrative Procedures, the commission chair has a private interest involved. His wife has an indirect interest involved in this affair. For that reason, this official must not be the commission chair, or even a member of this commission.
- According to Point 3, Article 21, Member A is subject to conflict of interest circumstances. This member must resign from commission and must not participate in any of the procedures for this bid, starting from the beginning of preparations to the end. If member A has been involved in, at least, one of the important procedures of this bid and the company in question is the winner, this contract is quite likely to be considered invalid. Here the case must be addressed pursuant to Article 40 of the Law on Prevention of Conflict of Interest.
- Furthermore, in the case of member B, we are faced again, according to the Point 3, Article 21, with a conflict of interest. For this official has an essential and decisive competence in the decision-making and, according to Article 37 of the Code of Administrative Procedures (hereinafter referred to as CAP) he has a private interest involved, since the relationship between B and the company administrator is a widely known hostile one.
- Member C is not subject to conflict of interest circumstances. There is not

obstacle for him to participate in that commission.

- In the case of member D, it is applied Article 25 of the Law on Prevention of Conflict of Interest. This article prohibits, in an explicit manner, making contracts even in the case when ownership of shares or of parts of capital stock is related to a commercial company, co-partnership or, with a common company, when the latter stands as a party in a contraction. Therefore, member D is subject to conflict of interest circumstances and he cannot be part of this commission.

After conducting the procedure, from which all members under conflict of interest have resigned in advance and have been replaced with other officials, *Alfa* Company is awarded the bid. This company, after the award, makes a sub-contract with *Delta* Company, where member C is a shareholder.

*Issue II:* Is there any conflict of interest involved, according to Article 21 of the Law on Conflict of Interest Prevention?

- In this case, it is extremely important to carry a very careful administrative investigation and to analyze all the data, which official C had in his disposal before bidding was conducted.
- If this member did not know beforehand which of the companies was going to be awarded the bid and with which the contract was going to be made latter on, he is not subject to conflict of interest circumstances.
- If it is confirmed that the official C knew beforehand that, if *Alfa* company was going to be awarded the bid, it was going to make a subcontract with *Delta* company and he has behaved in a way that made *Alfa* the award-winner, this official has been subject to conflict of interest circumstances. In this case, it is applied the prohibition set forth in Article 21 of the Law on Prevention of Conflict of Interest. Definitions set forth in Article 40 of the Law on Prevention of Conflict of Interest apply to the administrative act. Sanctions described in Chapter VII of the Law apply against the official.

*Topics for discussion:*

- *Are the conclusions of Example 4 correct? WHY?*

## **Example 5**

A member of the Bank of Albania Supervisory Council has a bank deposit in X Bank. After some time, the official makes an order contract with X Bank to invest the deposited money in European financial markets. In addition, the official

borrows from Y Bank based on market terms, but setting as collateral only a bank guarantee issued by X Bank. After some time, he declares these data in the interest declaration.

*Issue:* Is there any conflict of interest in opening bank accounts? What about the case of the order contract for investment and what about the loan contract and the bank guarantee?

The official presented to the Supervisory Council of Bank of Albania a complete set of data about these contract relations with X Bank. Information was also sent to the Parliament, to Council of Ministers, and HIDAA. The first two asked HIDAA to clarify the issue. HIDAA established a working group consisting of trained experts to deal with the issue. Group of Experts came out with the following conclusions:

- The official's answer to the preliminary question concerning why he had not requested in advance the Supervisory Council opinion was that this was something that he did not deem necessary. Meanwhile, the working group concluded that the official was legally obliged to request the preliminary opinion of the Supervisory Council.
- Bank deposit contract is a typical bank contract that is part of the main activity of the bank. It is offered to the public upon equal conditions for all. Hence, opening of a bank account does not make up a conflict of interest for the official, because, according to Article 21/4/b of the Law on Prevention of Conflict of Interest, contraction between the official and an entity controlled by a public institution is allowed, if the contract does not provide for "any special or individually preferential treatment".
- As to the order contract with the bank for investing deposited money in European financial markets, experts were divided into two opposite sets of opinions with the same number of members supporting each of them.
  - The first group held that when investment conditions, especially the proportion between risk and benefit are conditions set by the bank and closely the same for all similar type customers (size of investment, types of markets, etc.), and that the bank had dozens of such customers, then we would not be faced with a situation of prohibiting the contraction. In this case, the official behaves like any common saving customer and the bank treats him as such.
  - The second group held that this service, which is different, compared to the deposit service, is of a "special nature" and a "special treatment". While it seemed that it was not provided to the official upon individually preferential conditions, as to some other customers, again, being of a special nature, it was sufficient to classify it as a prohibited contract, because it was not included in the exemptions set forth in the Letter "b",

Point 6, Article 21, of the Law on Prevention of Conflict of Interest.

- Therefore, both groups agreed that there must be no preferential treatment and the official must have the legal obligation to request preliminary approval of the Supervisory Council, but they could not reach any agreement on the issue of special treatment.
- In the case of loan contract made under normal market conditions, the group of experts came to the same conclusion as in the case of deposit.

*Topics for discussion:*

- *Is the group of experts' opinion correct in the case of deposit and in that of the loan?*
- *Discuss about opinions provided by both groups of experts in the case of investment contract. Which of the two groups makes an analysis that is more accurate?*
- *Modify example conditions in such a manner that one can come to a unquestionable conclusion either for the eligibility of the investment contract in one case or even for its prohibition in another case.*
- *Act in the same way with the loan.*

## **8. Examples of promises, gifts, favors, preferential treatments and prohibitions of income earning due to a specific function**

### **Example 6**

A collection of 10 best publications of the last year is provided as a gift to Official AZ, who holds the position of the Director of Pre-University Education Directorate in the Ministry of Education and Science, by "Alfa Publications" Company, which owns a printing house and a publishing house. His name and that of the institution are printed on the package.

The collection value is about 40% of the official's salary and the publications are basically of juridical character. Given that the official's daughter is a lawyer, he is willing to accept the gift.

A bidding for schoolbooks is scheduled to take place as usual by the end of summer season. Pre-University Education Directorate is responsible for setting bidding terms.

The official decides to accept the gift and takes it home. When Pre-University Education Directorate starts the bidding terms setting process, official AZ, taking into account that “Alfa Publications” Company might participate in the respective bid, asked his superior to exclude him from terms setting process by informing, at the same time, about the gift that he had accepted.

*Issue:* Do we have here a prohibited gift in the sense of the Law on Prevention of Conflict of Interest?

To find out definitely whether or not, we need to ask the question: Does the acceptance of this gift lead to a conflict of interest, even to an apparent one, taking into consideration duties of the official and methodological steps 1-9 explained for the case-by-case conflict of interest?

Owing to his function, Pre-University Education Director cannot avoid his essential and decisive role in setting the curricula, the content of schoolbooks and indeed the specifications of technical conditions for purchasing schoolbooks on the part of ministry. “Alfa Publications” Company is a potential candidate to be a pre-university schoolbooks supplier, except for the case when there could be an undisputable information holding that this company has never been involved in any bidding and is not planning at all to be involved in the future, something which is less likely to be genuine. Under these circumstances, when the gift has been already accepted, the emergence of conflict of interest of any kind seems unavoidable. Therefore, the official should not have accepted the gift.

*How should this case be addressed?*

According to Article 23 of Law on Prevention of Conflict of Interest and Article 11 of the Law on Ethics, the official should have refused the gift and should have immediately informed his superior. Official AZ has not met his legal obligation; instead, he has rather committed a legal violation. Nevertheless, in a second moment, he made a request for nonparticipation in setting the bidding terms by informing his superior about the gift he had accepted, thus providing his contribution to avoid conflict of interest. The recommendation to solve this case is to accept Official AZ nonparticipation in setting bidding terms, impose a fine (Article 44) and a disciplinary measure against him because he has accepted a prohibited gift and has failed to inform at once his superior. This measure must be in proportion to the violation, but it must consider that the official has made in a second stage a commendable effort to avoid conflict of interest and, therefore, he must become subject to a more moderate punishment. On the other hand, the gift must be returned to the donor.

*Topics for discussion:*

- *What analysis should we make if gift acceptance was noticed by his direct superior based on information from outside the institution and after tender?*

- *The same situation, in an activity organized under the auspices of the City Education Directorate, five most distinguished students (where also official AZ's son is included) of 9-year schools, which participated in the spring Olympiad, were awarded, in a form of prize, five books of "Alfa" publications. Would this situation involve circumstances of a prohibited gift?*
- *How would you judge the same case of the basic example if the official, to whom the gift is delivered, is a specialist in a subsidiary directorate in the Ministry of Education and has practically nothing to do with purchasing of schoolbooks?*
- *In case the analysis explained while treating example 6, that is, application of 1-9 methodological steps, does not lead to a convincing conclusion regarding the existence of even an apparent conflict of interest, would the question "Had the gift been delivered, if the official were not in that position?" help?*
- *Discuss also the following methodic questions:*
  - *Is the gift made in a sincere way and without any intention?*
  - *Is it made in a transparent manner?*

## **Example 7**

A theatre company applies at the Ministry of Tourism, Culture, Youth, and Sports for funding an activity according to topics announced by the Ministry. Projects director in this Ministry asks the leader of Theater Company to include also his daughter in the project by giving her a role to play in the performance. The head of Theater Company promises that he will give director's daughter a role if he will ensure funding from the Ministry. Theater Company wins the project and director's daughter wins the role promised by the head of Theater Company. There were many discussions in the theater community about the award of the contract to this particular company, which was known as an unsuccessful one always staging poor theatrical performances. Even in this case, it seemed that the same phenomenon was in place again.

*Issue:* Is there any of the specific cases of prohibition involved, according to Article 23 of the Law on Prevention of Conflict of Interest?

In this case, we certainly have to do with a requested favor prohibited by Point 1, Article 23, of the Law on Prevention of Conflict of Interest, based on the same mechanism explained in the above example. Prohibition defined by Point 1, Article 23, of the law has been violated and this situation involves an actual type of case-by-case conflict of interest. Reasons leading to this conclusion relate to the private interest that has been promised to the official and to the benefit that he received due to his position as a projects director and due to his essential and decisive competence in decision-making for technical specifications, for selecting and choosing the project winner.

*Topics for discussion:*



- *What could be a proportional sanction for this violation?*
- *How could this case be addressed if official's daughter had not received the promised role, because the company owner failed to keep his promise?*
- *How could the example be interpreted if this official's daughter was a talented actress and, under the concrete circumstances, there was no doubt that she deserved playing that role and that every theater company would have preferred only her to play the respective role?*
- *It is practically difficult to find facts that prove this agreement between the official and the theater company. What could be those circumstances, which could enable establishing of a reasonable doubt on the unfair performance of duty on the part of official?*

## Example 8

Official D is assigned by his superior to participate in an international conference in Thailand. When he comes back, he brings to his superior a typical gift from this country. What should his superior do?

*Issue 1: Are gifts among officials prohibited?*

The judgment mechanism, which brings us to the hypothesis of Article 23, remains the same. Does this gift lead to even an apparent conflict of interest?

An explicit regulation of this prohibition is found in the Decision of the Council of Ministers No. 714, October 22, 2004, "On Outside Activity and Making Gifts during Public Administration Servant Activity<sup>14</sup>", issued pursuant to the law on ethics, which prohibits the public servant from directly or indirectly making any gifts or from mediating making of any gifts in favor of a higher position official or his family relative, and from asking or accepting gifts from any public servant of a lower position than him or from related persons to the latter, due to official relations and attributes (Point 10).

To conclude about this concrete case, there must be raised in every case some simple questions: Was such a gift going to be offered, irrespective of its value, if the person accepting it did not have the official position and, what is more, that of a superior official? Has such a gift of the same value ever been offered in similar cases to other colleagues of the same position or of a lower one? Circumstances surrounding this case do not mention this fact, something which leads to an negative answer and makes up an additional element for thinking that such gifts are, as a rule, prohibited.

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<sup>14</sup> As regards this decision, we must take into account that its scope is narrower than that of the Law on Prevention of Conflict of Interest.

*Issue 2: Is there any prohibited gift involved in the sense of the law, despite its traditional value?*

Article 23 relates gift prohibition with its donation due to the position and with the risk of falling, even apparently, into a conflict of interest. Does this gift constitute a potential cause (even apparently) that can affect the superior impartiality to this official vis-à-vis other officials, even though the gift is of a traditional kind? Let us suppose two persons who participated in the conference, but only one of them made a gift to the superior. Would it be more than reasonable to think that, under such circumstances, it could be difficult for the superior official to ignore the feeling of gratitude for the person who made him a gift and, maybe, a feeling of dissatisfaction with the other one, who failed to do so? Therefore, these gifts under such circumstances are prohibited.

*Topics for discussion:*

- *Could there be an involvement of a prohibited gift condition, as defined by Law on Prevention of Conflict of Interest, if officials were colleagues and, certainly, without any interdependent relations between them? What could be the judgment mechanism in this case?*
- *Could there be an involvement of a prohibited gift condition, as defined by Law on Prevention of Conflict of Interest, if officials make their superior on his retirement, a gift consisting of a set of fishing rod and tackle, for which he is passionate?*
- *On traditional end-of-year holidays, the staff of a directorate consisting of six members made gifts to each other. Discuss whether this involves or not any of the prohibitions set forth by law in the two following cases:*
  - *All of them make presents to each other, except the superior official, who only receives gifts.*
  - *All of them make presents to each other, including also the superior official and the gifts are traditional ones with a similar value.*
- *Compare the above case with the situation, when, instead of presents, all go for a lunch and the boss is the only person who does not pay as against the case when he pays his due like the rest of others.*

## **Example 9**

Official BE is a Director of Legislation Directorate in the Ministry of Finance and, at the same time, he is designated by the Minister of Economy, Trade and Energy as a member of the Supervisory Council of “FG” Company Ltd, which is a company where the state owns 50% of shares, while another international company owns the rest of shares. According to the agreement made between the two owners, the respective owners have elected 2 members each for the

Supervisory Council and the fifth member has been jointly elected. Upon the proposal of the company director, the Supervisory Council makes a decision holding that the next meeting will be held in a neighboring country (which is the country where the main Office of the international company is located). Members of the Supervisory Council are allowed to take with them their husbands/wives and the joint venture will cover all expenses.

*Issue: Is there any circumstance of prohibition involved, as defined by the Law on Conflict of Interest?*

Letter “b”, Point 2 of Article 22, prohibits the official from accepting any gift from the company. As explained above, the term “gift” has the same meaning with “favor”, “preferential treatment” or “promise”. Therefore, the official has two choices, either to go there alone, or, otherwise, cover the husband/wife’s expenses himself/herself.

*Topics for discussion:*

- *Is the conclusion, which prohibits the official, who is a state representative in the company, from accepting this preferential treatment, a correct one?*
- *Consider for a moment that prohibition in Letter “b” of Point 2 of Article 22 was not set forth by the law. Could the same conclusion be reached? Why?*

## **CHAPTER III – Continuing conflict of interest and its prevention**

### **1. Introduction**

Articles 26-36, Section 2, Chapter III, of the Law on Prevention of Conflict of Interest have, respectively, defined the particular cases of continuing conflict of interest for some specific categories of officials and special types of interests. In addition, Chapter IV defines the ways of addressing and resolving conflict of interest. Article 38, in particular, offers specific ways of addressing and resolving particular cases of continuing conflict of interest. Nevertheless, this specific regulation does not imply that conflict of interest avoidance is limited only to these cases, types of interests or categories of officials.

*Continuing conflict of interest must always be avoided, just like case-by-case conflict, regardless of officials' positions and/or the variety of private interests. This is an obligation deriving from the overall sense of the law and from the definition of this type of conflict.*

This Chapter will address and explain:

- Continuing conflict of interest concept and the ways of addressing it, regardless of officials' categories or types of interests involved;
- Identification, management and resolution of specific cases of continuing conflict of interest for two large groups of officials:
  - Officials of political positions, constitutional institutions, as well as judges and prosecutors (Articles 27, 28, 29 and 33 of the Law on Prevention of Conflict of Interest), which from now on will be referred as "Group A Officials";
  - Civil servants of medium and high leading positions, members of regulatory agencies, other public servants of medium and high leading position, public servants of medium and high leading position of police and armed forces, as well as, officials of customs and tax system, who are directly involved in revenue collections (Articles 30, 31 and 32 of the Law on Prevention of Conflict of Interest), which from now on will be referred to as "Group B Officials".

Explanations will be provided through analyses of concepts and legal references and through examples developed for didactic purposes.

## **2. Meaning of continuing conflict of interest Its management and resolution in a generalizing situation**

According to *Article 3* of the Law on Prevention of Conflict of Interest, the continuing conflict of interests is:

*“...a situation, in which a conflict of interest might appear repeatedly and/or frequently in the future...”*

This definition draws attention to two fundamental issues:

- *Firstly*, there must be an appearance of conflict of interest, which might be potential and/or apparent. For this purpose, it is indispensable to refer to conflict of interest basic concept as well as to both of its types, potential and apparent.
- *Secondly*, there must be in place significant possibilities that, due to private interests, the official in question may or seems to behave as if he/she will perform his/her public duties in an unfair manner in most cases of his/her decision-makings.

Continuing conflict of interest is and must be comprehended as an *incompatibility between the official's public duty and his/her private interest*.

*According to Article 6 of the Law on Conflict of Interest Prevention, it is the obligation of every official, holding any position starting from the lowest position and for any kind of interest, which can turn into a cause, to prevent and resolve every case of continuing conflict of interests. This is, at the same time, every official's superior obligation.*

Although apparently easy, the comprehension, interpretation, and management of continuing conflict of interest concept requires, in practice, caution and a deep analysis for an accurate and correct application of the concept.

To conclude whether a continuing conflict of interest exists or not, it is recommended to pursue the following methodological steps:

1. *What are the concrete and detailed duties and competences of the official in question?*
2. *Does he possess any essential and decisive competence in decision-making for issuing normative and/or individual acts?*
3. *What is the sphere (area, field) of this decision-making impact?*
4. *How strong is the impact of this decision-making on this sphere?*
5. *What are the private interests of the official in question?*
6. *What are the chances that decision-making will affect private interests of this official in his favor?*

7. *What are the chances that official's private interests will negatively affect his role in decision-making?*
8. *Is there any strong cause-effect relation between interests and decision-making to such an extent that public decision-making can be solely for that an unfair decision-making?*
9. *Is this a rare and spontaneous relation, or a recurrent and/or frequent one?*

Questions 1-8 are methodological common questions either for *the case-by-case conflict of interest* or for *continuing conflict of interest*. The existence of the first conflict is a necessary but not a sufficient condition for that of the second. The only difference in application 1-8 steps between two types of conflicts is that we analyze in the first conflict the concrete duty of the official in a concrete decision-making as against his/her interests, while in the second one every official's duty that determines his/her roles in various types of decision-making as against his/her interests.

If, from the above analysis and after a positive answer has been provided, it is likely to appear even in a single case a case-by-case conflict of interest, it becomes necessary to analyze whether this appearance would be *frequent or recurrent* to that extent that it would compromise the sense itself of those duties performing and of authorities exercising by this official.

- Frequency concept is as a rule a numerical quantitative concept, but the following factors should also be considered.
  - It is clear that, when an official risks falling into a series of case-by-case conflicts of interest, then, this conflict can also be considered as a continuing one.
  - However, in practice, there may be cases, when the number of decision-makings of a significant importance, in which an official participates, is rather limited. In such a case, there must be considered *the relative number of decisions-makings risked* by conflict as against all the important decision-makings about the relevant issues of this official.
  - Further, there is a need to see whether these decision-makings, limited in number as they are, *make up, or not*, the substance of this official's duty.
- Even if we conclude from the answer provided to the methodological question No. 9 that a potential type of continuing conflict of interest is not likely to emerge, this does not mean that the analysis is complete.
  - i. In this case, the analysis must continue to see whether there is any risk that a continuing conflict of interest of apparent type is likely to emerge. For this purpose, questions from 6 to 9 must be asked again not any more from the perspective analyzed by the superior official, but from the perspective of public's potential

perception.

- ii. In other words, the official himself/herself or his/her superior, who makes the analysis in this case, must place themselves in the position of a common individual coming from the public, who is normally informed and has a common sense, and ask the following question to themselves:

*10. Would he/she (the individual from the public) have confidence on decision-making of the official in question, if he/she knew about the private interests and their interference with this official's duty?*<sup>15</sup>

As emphasized above, continuing conflict of interest may involve any official of any position, even of a low one, and for various kinds of interests (see example 10 below). Therefore, every official and superior must analyze the issue in the manner suggested above and take all the appropriate measures described by the law to prevent the conflict. Article 37 of Law on Prevention of Conflict of Interest provides the relevant measures that can be taken by the official or his/her superior. In their essence, these measures have to do either with the alienation of official's private interests or with modification of official duties. With regard to the latter, the law determines an escalation of measures up to transferring the official to another position.

In every newly developed situation due to private interests or duty modification, we must carry out the same analysis process, as explained above. We can consider the issue resolved when the measures we took based on the above analysis lead us to a logical conclusion that continuing conflict of interest, either potential or apparent, is not likely to emerge.

### **Example10.**

Low position official's case

The wife of official AB, who holds the position of a specialist in the monitoring sector of sanitation service of municipality K, is vice-director of the private company, which was awarded the cleaning bid of city K.

Immediately after the contract was signed between municipality and company, official AB informed his superior about this fact. After consulting with the personnel director, the superior official assessed based on judgment according to

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<sup>15</sup> To judge from this perspective means to accept that a normal person from the public, no matter how advanced the information system is, will absorb and have less information with regard to his judgment on the relevant issue than the official or his/her superior. Therefore, in other words, when it is a question of making a judgment in relation to existence, or not, of an apparent conflict of interest, we must consider the available data on the position of public opinion about issues linked with the concrete case, but without rendering it absolute. Good customs and accepted rules of moral are also a good guide.

10 methodological steps explained in Point 2 of this chapter that the daily task of this official and of every other official in the sector, where he was working, was to monitor implementation of the contract by the company and, for that reason, it was practically impossible for the official to avoid the almost daily occurring conflict, which he was going to face while carrying out his duty and, which would take, in this case, the shape of a continuing conflict of interest. As a conclusion, the municipality general secretary decided to transfer this official to the sector of citizens' complaints assuming that, in this way, the continuing conflict of interest situation would be avoided. On the other hand, this official had been working for several years in this municipality and his performance had been positively appraised, so he was promoted to the position of the chief of this sector.

After some months, a group of citizens presented a petition to municipality K Mayor about the poor work of the sanitation company in their neighborhood claiming failure of the municipality to respond even after a series of complaints had been delivered to the complaints office.

The working group, established by the Mayor to make the necessary verifications, found out that citizens' complaints were right and that citizens had presented their complaints to the Citizens' Complaints Office several times and had exactly met with official AB, who had not provided any feed back to his superiors about the situation in question.

The final decision of the municipality was the dismissal of this official due to his falling into a conflict of interest, which had recurred several times. Further checking also indicated that other citizens from other city neighborhoods had filed complaints, which had not been considered.

In addition, Mayor issued a written reprimand for the general secretary, personnel director and two heads of respective sectors for failing to prevent and to address in an effective way the continuing conflict of interests, which did not get resolved with the transfer of official AB from one sector to another.

*Topics for discussion:*

- *Why the solution through transfer to the complaints sector was not the appropriate one?*
- *What other private interests, apart from the wife's employment in the relevant company, could create a continuing conflict of interest situation in the given case?*
- *How could we judge another case of an official, who holds the position of a specialist in the urban planning directorate and, whose wife is a shareholder in a building company? Compare the two cases when the city is a large one, when building companies are numerous and the number of constructions is large as against the diametrically opposite case.*



- *Based on the above paragraph, what could be the judgment in both cases if the official was a high position municipality official (for example, the city Mayor in person)?*
- *Try to develop other examples of the existence of continuing conflict of interest regarding cases of low position officials' involvement across various institutions.*

### 3. Specific cases of continuing conflict of interest

Section 2, Chapter III, of the Law on Conflict of Interest deals with some specific cases of continuing conflict of interest in Articles 27-33. The legislator's aim has been to set apart from the officials' entirety some of their specific categories according to the functions they perform and the competences they exercise on one hand, and some specific types of their private interests, through establishing a set of incompatibilities and, consequently, a set of absolute prohibitions, on the other.

The legislator aim has been to prevent public officials who play an important role in public decision-making from falling into conflict of interest. To this end, the legislator has considered the higher risk of them falling into conflict of interest, on one hand, and, on the other, the considerable damage that may be inflicted on public interests or on third parties' rights, thus affecting the public confidence on institutions and on the law. In consequence of that, the legislator has defined a number of specific prohibitions on persons related to these officials.

It must also be emphasized that, while defining incompatibilities and restrictions, the legislator has adhered even within this defined category of officials to the principle of proportionality in the cause-effect relation of the continuing conflict of interest mechanism, namely the risk of unfair performing of duties due to private interests. In addition, he has showed regard for the particular nature of every considered sub-group of public functions.

Finally, the Law on Prevention of Conflict of Interest does not only thoroughly provide restrictions on private interests aiming to prevent conflict of interest. Points 1, 2, Article 26, and Points 2, 3, Article 5, of this law also determine a very important principle that regulates the rapport of its restrictions with other specific laws, which provide their own restrictions on various categories of public officials. This principle is as follows: *If there are two different restrictions on the same interest in two different laws, then, the strictest restriction applies*, so, in other words, the restriction, which diminishes, more than others do the risk of conflict of interest emergence.<sup>16</sup>

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<sup>16</sup> Annex No. III of the Manual provides a list of specific laws, which provide restrictions on interests of specific categories of officials for avoiding specific cases of continuing conflict of interest (or incompatibility).

### 3.1 Types of interests

The following are types of interest, on which the legislator has been focusing with regard to specific cases of continuing conflict of interest in the Law on Prevention of Conflict of Interest:

- *Propriety interests*: ownership of shares or capital stocks
- Commercial *private activities* of various forms including several types of free professions
- *Leading role* in profit and nonprofit organizations
- Full time *second employment*

However, according to points 1, 2, Article 26, and Points 2, 3, Article 5 of the Law on Prevention of Conflict of Interest, these are not the only types of interests, which must be considered as factors leading to emergence of a continuing conflict of interest specific cases. Nor are they the only types of restrictions. In any case, actions and decisions must be taken based either on the Law on Prevention of Conflict of Interest or on any other specific law that addresses continuing conflict of interest and, which have defined in order to prevent it specific restrictions on specific functions and interests including the direct implementation of Constitution.

### 3.2 Group A Officials

This group, according to Articles 27, 28, 29 and 33 includes:

- *Article 27* : Prime Minister, Vice-Prime Minister, Minister and Vice-Minister;
- *Article 28*: Members of Parliament
- *Article 29*: Municipality Mayor, Commune Mayor, Chairman of Regional Council
- *Article 33*: President of the Republic, Judge of Constitutional Court, Judge of Supreme Court, Head of Supreme State Audit, General Prosecutor, Ombudsman, Central Election Commission Member, High Council of Justice Member and HIDAA General Inspector

It must be remembered that the aforementioned articles are not the only ones in which restrictions on private interests to prevent specific cases of continuing conflict of interest (incompatibility cases) are exhausted.

As emphasized above, the Constitution or other specific laws, which regulate either the aforementioned functions or other scopes of public activity, define specific incompatibilities for specific functions as in the case of judges, prosecutors, notaries, bailiffs, teachers, physicians, police officers, army staff, etc. Therefore, failure to mention these officials in Section 2 of Chapter III of the Law on Prevention of Conflict of Interest does not release them from obligation of avoiding specific incompatibilities regulated by other laws. Every common and superior official must be very attentive in knowing and implementing these laws. Point 2, Article 26 of the Law on Prevention of Conflict of Interest expresses explicitly on this issue.

### 3.2.1. Constitutional and legal frame regarding Group A officials, in addition to the Law on Prevention of Conflict of Interest,

Below are provided some Constitution definitions with regard to incompatibilities between public function and private interests of some officials, which must be treated as specific cases of continuing conflict of interest.

- *Article 61/4 of Constitution:* “The Ombudsman may not take part in any political party, carry on any other political, state and professional activity, nor take part in the management organs of social, economic, and commercial organizations.”
- *Article 70/2 of Constitution:* “Members of Parliament may not simultaneously exercise any other public duty with the exception of that of a member of the Council of Ministers. Other cases of incompatibility are specified by law.”
- *Article 70/3 of Constitution:* “Members of Parliament may not carry out any profit-making activity that stems from the property of the state or of local government, nor may they acquire their property.”
- *Article 70/4 of Constitution:* “For every violation of paragraph 3 of this article, on the motion of the Speaker of the Parliament or one-tenth of its members, the Parliament decides on sending the issue to the Constitutional Court, which determines the incompatibility.”
- *Article 89 of Constitution:* “The President of the Republic may not hold any other public duty, may not be a member of a party, or carry out other private activity.”
- *Article 103/2 of Constitution:* “A minister may not exercise any other state function nor be a director or member of the organs of for-profit companies.”
- *Article 130 of Constitution:* “Being a judge of the Constitutional Court is incompatible with any other state, political or private activity.”

- *Article 143 of Constitution:* “Being a judge is not compatible with any other state, political or private activity.”
- *Article 154/3 of Constitution:* “The membership in the Commission [CEC] is incompatible with any other state and political activity.”

### 3.2.2. *Analysis of continuing conflict of interest existence* *Application of specific prohibitions for Group A officials*

The Law on Prevention of Conflict of Interest has an explicit and unambiguous definition of restrictions applied for certain private interests of these officials. To orientate ourselves in what these restrictions mean, it is recommended to start the analysis from Article 27, which is also the basic article regarding restrictions. Restrictions on MPs and Local Government Units mayors are relatively moderate. Restrictions on judges, prosecutors, and the officials defined in Article 33 are stricter when referring to Constitution and other related specific laws that apply the term “incompatibility”.

Regarding the incompatibilities (continuing conflict of interest), we must clearly understand some key issues in relation to this group of officials:

*“Private Activity Prohibition Concept”:* The Constitution and other specific laws have defined “prohibition of carrying out private activity of any kind”, which, if carried out by the official, leads to incompatibility with the relevant public function. Constitutional concept of “private activity” is more encompassing than the same concept used in the Law on Prevention of Conflict of Interest, thus, *even stricter*. Therefore, in the case of making a judgment about prohibition of private activities for officials, when this prohibition is defined by the Constitution, the meaning of private activity and its prohibition cases aimed at avoiding continuing conflict of interest must be based on the constitutional concept and on other specific laws with regard to these functions.

Albanian jurisprudence does not seem to have an exhaustive definition of “private activity” concept, although practice has managed to provide a considerable number of activities, which explain, to a certain extent, this concept. The Law on Prevention of Conflict of Interest has managed to provide a variety of private activities, which by its definition are prohibited or restricted on specific cases. To identify other cases of private activities, which may create, according to Constitution, a cause of incompatibility, we may refer, with the intention of orientating ourselves, to the purpose of prohibition, which, as a rule, relies on:

- The possibility of continuing conflict of interest emergence due to this activity

- The exclusion of private activities, which require such a commitment that could prevent the normal performing of public duty
- The need to keep up the public image of these high position officials

An additional orientative criterion is the “activity” concept in the sense of actions, which have some sort of continuation and periodicity leaving out sporadic actions or actions that have no solid connection between them.

*“Jurisdiction territory concept”*: In the sense of Letter “a,” Article 29 of the Law on Prevention of Conflict of Interest, it is clear that the jurisdiction concept matches to the territorial space of the relevant local government unit. In other words, it implies the regional territory for the chair of regional council and the territory of municipality or commune for the municipality or commune mayor. In this case, the jurisdiction territory concept does not take into consideration the concrete competences of these officials; the existence of activity of profit organizations in this territory suffices to apply prohibition set forth in Letter “a,” Article 29, even though these officials have no competence at all to act over these entities. Here we have to address with particular caution three cases:

- a) The activity of profit organization<sup>17</sup> expands only partially over the corresponding local government unit. This fact suffices to apply the relevant prohibition.
- b) If the profit organization, which carries out its activity in the local government territory, is owned or controlled even partially by another organization, which, at first sight, does not seem to exercise any activity in this territory, this fact suffices to prohibit the mayor of the respective local government unit from having a role in the second company or being a member of its governing bodies. This conclusion relies on the conflict of interest concept as a whole and on the analogous extension of Point 4, Article 26 of the Law on Prevention of Conflict of Interest.
- c) The restriction, based on the same line of reasoning, is valid also in the case when the profit organization has only its main office located in the territory of the respective local government unit, while it conducts its commercial or production activity in another local government unit.

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<sup>17</sup> The term “profit organization”, as applied in Section 2, Chapter III, includes all forms of company organization (shareholding, ltd, collective, etc.), common forms of organization as per the Civil Code and other permanent or temporary company organization forms for profit purposes, which do not necessarily require acquisition of legal personality by registration (commitment contracts, temporary consortiums, etc.).

### 3.2.3. Prohibitions on persons related to Group A Officials

Peremptory prohibitions on persons related to an official are applied only in cases of family relations to officials explicitly defined by Articles 27-33 of the law on Prevention of Conflict of Interest.

However, other officials (not included in the aforementioned articles), under other similar conditions in reference with persons related to the official, are not *a priori* released, in every case, from risk of falling into a continuing conflict of interest. The judgment mechanism based on the general explanation of continuing conflict of interest (see also example 10 of this chapter) must be applied in every case.

Prohibitions on persons related to an official (husband/wife, major children, official's parents, and husband/wife's parents), apply only to two types of interests:

- a) Ownership of shares or of capital stocks according to Point 2, Article 35
- b) Running a commercial activity as per Point 4, Article 35

In the case of officials described in articles 27, 28, 29 and 33, prohibition of shares or capital stock ownership for persons related to them is applied automatically and without any analysis *to the same extent to which the officials<sup>18</sup> are subject to* and in the same way as if they themselves have been entitled to these rights.

Activity prohibition as a physical person affecting the related person applies only in cases when the judgment mechanism, as explained above in this chapter, leads us to the conclusion that a continuing conflict of interest is likely to emerge. (Here we must apply the methodological steps 1-10).

Persons related to officials who are members of regulatory agencies may be even prohibited from employment in entities, which are under the supervision of the relevant agency or from having any contract relation with it (Letter "a", Point 6, Article 21).

Nevertheless, the legislator has provided a couple of reasonable exemptions as regards the activity of the related person as a physical person (etc.).

- c) When the activity as a physical person, etc., of the person related to an official generates a gross income up to 10 million lekë per year, this activity, according to the Law on Prevention of Conflict of Interest, is

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<sup>18</sup> In the case of MPs, the restriction of property rights over shares or capital stocks applies only when the relevant company has a dominant position in the market. In the case of mayors of local government units, active property restriction over shares does not exist.

not subject to any prohibition despite the official's duty.

- d) In the case of persons related to MPs, to members of local government units elected councils and to judges, the activity as a physical person, etc., run by the related person is not subject to any prohibition even though it generates incomes higher than 10 million lekë. In this case, it is more than clear that these officials may act respectively only based on laws, local councils' ordinances and court decisions.

In both aforementioned cases, the only concept remaining to be addressed is the existence or not of the case-by-case conflict of interest in specific moments.

### 3.3 Group B Officials

Officials of this group, as specified in Articles 30, 31 and 32 of the Law on Prevention of Conflict of Interest, are described through a more detailed analysis in Annex II of the Manual. It is worth reemphasizing that these articles include only a category of officials and specific cases of continuing conflict of interest, but this concept must be addressed and avoided in every type of interest and public official.

Article 31 is the key article, which includes a considerable number of officials belonging to medium and high positions in every public institution. It is important that the meaning of medium and high positions be well interpreted in a coherent manner for all public institutions. HIDAA Commentary Nr. 2, February 2006, provides an accurate interpretation of the concept of *medium leading position* in these institutions. Medium position, according to this interpretation, is not a *relative* and *specific* position in every institution. On the contrary, this definition comes near to an *absolute* position based on the evaluation of significance of duties according to the method of classifying jobs<sup>19</sup>. Based on this definition, we are not likely to find a medium or high leading position either in small-sized institutions or at the low level of institutional hierarchy.

#### Example 11

Meaning of medium leading position

Director of Directorate in a ministry corresponds to a medium leading position. The ministry has a subsidiary public company with 10 employees and a modest activity. There is always a medium leading position present in the internal hierarchy of this company, but this is not applicable to the concept of medium

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<sup>19</sup> The principle of "equal responsibility, equal salary" is used in the wages system. Similarly, the meaning of medium position, for the purpose of continuing conflict of interest and restrictions and prohibitions that it activates, must be considered as "equal responsibilities, equal restrictions".

leading position as specified in Article 31 of the Law on Prevention of Conflict of Interest. To find out whether there is at least one official in this company, whose position can be classified according to this article as medium leading position, we must see whether or not the official in question has a responsibility similar in terms of weight and importance (according to the method of classifying jobs) to that of Director of Directorate. A practical guidance tool in this case, but not only that, could be salary rate. In the same example, if the company has an important public activity and/or a considerable number of employees, it might be possible to come upon a high or a medium position as specified in the Article 31. In any case, the officials' responsibilities in this company must be weighed and carefully compared starting from its leader as against the Director of Directorate in the relevant ministry of, who is responsible for the activity of the public company.

### *3.3.1 Analysis of continuing conflict of interest existence Activation of specific prohibitions*

After having defined the types of officials included in Article 31 category, two cases of prohibitions must be distinguished from this moment:

- (i) *Firstly*, as regards medium or high position officials, the legislator has provided an absolute prohibition in cases described in letters "a" and "c" of Article 31. Thus, if they are *classified, at least, as medium leading position officials*, they are prohibited from a leading position in profit organizations, from running a commercial private activity, from engaging in certain types of free professions and from having a second fulltime job. The concrete competences of such officials are not considered when applying these prohibitions.
- (ii) *Secondly*, there is another prohibition provided for the same category of officials when private interest interferes with the scope of State activity. In this case, the official or his/her superior is given the *opportunity* to judge whether he/she (the official) can fall, or not, into a continuing conflict of interest due to interests set forth in letters "b" and "ç" of Article 31. Being, at least, an official of medium leading position is a necessary, but not a sufficient condition to activate these two prohibitions, unless it comes out of the 10 steps methodological analysis that there is a risk of the official falling into a continuing conflict of interest (potential or apparent).

### *3.3.2 Prohibitions on regulatory agencies officials*

The same judgment mechanism and the same restrictions as those defined in Article 31 (explained above), but involving stricter prohibition apply to those officials, which are mentioned in Article 30. When conditions of letter "ç," Article 31 (see explanation of point 3.3 above) are met, these officials are prohibited



even from passive or indirect ownership of shares or capital stocks. They are also prohibited from any pecuniary interest related to entities conducting their activities within the supervisory competences of the relevant institution.

In relation to these officials, the question of what is the sphere of activity and of competences to act is much more clearly detailed compared to the typical official's case in Article 31. What takes more analysis is the question of *what is the area of interest for entities, which operate in the regulation sphere of the relevant regulatory agency*. In cases when these entities are under the direct supervision of the agency, the existence of conflict due to official's interests in them is very clear. The analysis ought to become deeper in the case of an entity, which appears in a *second line or in an indirect relation as to the regulations provided for by the agency* (such as suppliers of entities supervised by the agency). Letter "b," Article 30, includes also these cases, but, nevertheless, the issue must be analyzed according to the 10 methodological steps.

Prohibitions in this article on these officials are also supplemented by prohibitions set forth in Point 6 of Article 21 (prohibition of contraction). The latter ones, although related in fact to the case-by-case conflict of interest, due to the fact that contract relations are of various kinds, they unavoidably mingle with prohibitions on property rights, direct or indirect ones, which are also described in Articles 25, 30 of the Law on Prevention of Conflict of Interest.

In the regulatory agencies administration, some officials enjoy the status of the public servant. With regard to these officials, the continuing conflict of interest analysis would be based on their real duties according to the same logical mechanism as in the case of officials described in Article 31. Yet, even here, the scope of activity is sufficiently clear. Whereas the activation of stricter prohibitions set forth in Article 30 and Point 6 of Article 21 would require an analysis for every concrete case according to the conflict of interest definition and the obligation to avoid it (see Point 2 of this chapter).

### 3.3.3 Prohibitions on tax or customs office officials

As regards customs or tax system employees, we must distinguish two cases:

- e) Officials without a direct role in tax or custom duty collections – In this case, only prohibitions set forth in Article 31 apply with the condition of being a medium or high position official and according to the same judgment mechanism as explained above.
- f) Officials with a direct role in tax or custom duty collections – In this case, regardless of the level of responsibilities (low, medium or high) and apart from prohibitions set forth in Article 31, there are applied two other more specific prohibitions defined in Letters "a" and "b," Article 32

of the Law on Prevention of Conflict of Interest.

Regarding these officials, it must be born in mind the additional prohibitions set forth in the relevant laws and the principle of a stricter prohibition/restriction.

#### *3.3.4 Prohibitions on persons related to Group B Officials*

Prohibitions on persons related to an official of this group (husband/wife, major children, official's parents, and husband/wife's parents) apply only to two types of interest:

- g) Ownership of shares or capital stocks according to Point 2 of Article 35
- h) Commercial activity as in Point 4 of Article 35

In the case of persons related to Group B officials, as different from the case of persons related to Group A officials, both prohibitions apply only in cases when the judgment mechanism based on 10 methodological steps leads us to the conclusion that the official would be subject to continuing conflict of interest if he shared the same interests with the related person.

Persons related to officials who are members of regulatory agencies may even be prohibited from employment in entities under the supervision of the relevant agency or from having any contract relation with it (Letter "a", Point 6, Article 21).

Out of two exemptions set forth in letters "a," "b," Point 4, Article 35, only the criterion of annual gross income limit of 10 million lekë is applied to persons related to Group B Officials.

## **4. Management and resolution of specific cases of continuing conflict of interest**

Continuing conflict of interest specific cases analyzed in Point 3 of this chapter are addressed pursuant to definitions in Article 38 of the law (see also examples in point 7 of Chapter II of this Manual).

## **5. Sanctions**

In case the official and/or his/her superior fail to act appropriately in terms of preventing, addressing, and resolving the continuing conflict of interest, the Law on Prevention of Conflict of Interest provides administrative penalties and disciplinary measures, which are described in its articles 44 and 45.

Despite the fact that Criminal Code does not use the term “conflict of interest”, violations of Law on Prevention of Conflict of Interest, in proportion to their extent, circumstances and effects and when the official fails to perform his/her duty in a fair manner because of private interests, may constitute one or more criminal offences provided by the Criminal Code, such as abuse of office, passive corruption, violation of participants equity in bids, forgery of documents, etc.

In each case, criminal liability applies regardless of any administrative and/or disciplinary responsibility and vice-versa.

## **6. Examples of continuing conflict of interest**

### **Case of Group A Officials**

#### **Example 12**

Official AR was appointed member of Constitutional Court.

#### *Interests Identification and reporting*

Within 30 days from the date of his appointment, he made a declaration of interests; his declaration revealed that he was a shareholder with 60% of shares in AF Pharmaceutical Company Ltd.

#### *Ways of addressing and resolving conflict of interest*

AR held consultations with HIDAA about his obligations in relation to these interests. HIDAA recommended to him two ways of avoiding the continuing conflict of interest:

- i) Transferring shares to a passive ownership through a trusted person, who must be none of these persons defined in Letter “c”, Point 1, Article 38 of the law. This action was to be carried out as soon as possible, but not later than 2 months from the date of conflict emergence, which, in this case, was going to be its promulgation date by the President of the Republic.
- j) Full conveyance of property over shares to a third entity, which ought to meet the same conditions as described in the case of trusted person. Concerning the shares conveyance deadline, HIDAA clarified that this could be accomplished in any time and without any deadline, but with the condition that shares had to be transferred by AR from active into passive ownership within 2 months. However, in case he would not use or fail to apply the first approach, the selling of shares had to happen inevitably within 2 months from the moment of conflict emergence.

AR decided to apply the first way, so he designated Bank X as the trusted person, notified, and documented this act by meeting the deadline, to the President, Parliament and to HIDAA.

After 8 months, Bank X became subject to investigation concerning fiscal evasion and during the investigation, it was found that AF Company Ltd had purchased 30% of bank shares two months before the investigation. Bank X had notified in fact official AR of this act.

Being informed through the media about this charge, the official cancelled the contract with the trusted person (Bank X), as he thought to avoid his involvement in this financial scandal. However, these facts did not skip media attention, which handled the case by insinuating doubts about the official's implication in Bank X fiscal evasion.

Upon the President's request too, HIDAA considered the case and concluded that the official ought to have cancelled the fiduciary contract with Bank X right from the moment when the latter had informed him about the purchasing of a part of its shares by AF Company. Therefore, it imposed a fine against official AR and Bank X, in the capacity of trusted person.

Meanwhile, official AR resigned facing media pressure and after a parliamentary debate on this issue.

*Topics for discussion:*

- *Discuss about reasons for the incompatibility of Bank X as a trusted person. In which moment did this incompatibility occur and why? Try to analyze apparent continuing conflict of interest emergence. Find references in the Law on Prevention of Conflict of Interest. Has HIDAA acted correctly?*
- *Who are the official's superiors according to the meaning of this term in the Law on Prevention of Conflict of Interest?*

### **Example 13**

AB was a Supreme Court member. His wife established a notary Office near the Supreme Court and by the first year she made 10,500,000 lekë, whereas in the second year she reached the amount of 13, 500, 000 lekë.

*Interests' identification and reporting*

The above data were reported by the judge himself in the frame of annual declaration of interest.

### *The way of addressing and resolving conflict of interest*

Some MPs, who were briefed on the official's declaration, concluded that the activity of judge's wife was against the Law on Prevention of Conflict of Interest. They raised this issue in the Public Administration and the Legal Issues Commission, which asked HIDAA to consider and assess the case and, then, report its findings and opinion to the commission.

#### *Topics for discussion:*

- *Does the activity of a notary constitute a physical person activity in the sense of Article 35 of the Law on Prevention of Conflict of Interest?*
- *Is notary act regarded as an official document?*
- *Does the official have any possibility to utilize his acts (court decision) in order to exert his influence in favor of his wife?*
- *Based on answers provided to the two above questions, discuss about how HIDAA has possibly addressed the issue.*
- *What do you think about MPs judgment?*

### **Example 14**

The wife of the Minister of Education owns 30% of shares in a nonpublic school, which must renew its license in compliance with the rules in force. She inherits these shares from her father, she co-owns them with her brothers, and she neither is in any leading position nor employed in this company.

#### *Interests' identification and reporting*

The Minister declared the aforementioned interest in his declaration from the very moment he took office.

### *The way of addressing and resolving conflict of interest*

Minister is a part of the officials' group A, which, according to Letter "c," Article 27 of the Law on Prevention of Conflict of Interest, can not actively own shares or capital stocks in a company, regardless of what its scope of activity is. In addition, his wife is subject to the same obligation. Under these conditions, minister's wife decides to make an immediate transfer of shares into passive ownership and to appoint person GB as a trusted one, who is meeting all requirements set forth in Article 38 of the law. Minister also notifies HIDAA and Prime Minister and provides the relevant documentation.

The transferring of shares into a passive ownership, certainly avoids the situation provided for specific cases of continuing conflict of interest in Section II, Chapter III of the Law on Prevention of Conflict of Interest, in which the prohibition is absolute. By taking this action, the minister has met the obligation imposed by Articles 27, 35 and 38 of the Law on Prevention of Conflict of Interest.

Nevertheless, Prime Minister, following a parliamentary group review of this issue, made a request to the minister to help his wife so that she could convey, as soon as possible, all her propriety rights. Minister accepted and his wife, through the trusted person, sold her shares completely to her brothers within 2 months, thus abiding by the condition of other shareholders shares pre-purchase right as set forth in the company statute.

*Topics for discussion:*

- *Is the Prime Minister right when judging that the minister continues to be subject to continuing conflict of interest even after minister's wife transferred shares into a passive ownership? Provide answers through applying 1-10 methodological steps. Do you notice that, even in the circumstances of a passive ownership of shares on the part of minister's wife and her two brothers, it could seem that, due to this cause, minister frequently risks performing his duty in an unfair manner?*
- *Under the circumstances of a passive ownership of shares on the part of minister's wife, has the minister a priory got rid of the risk of falling into a case-by-case conflict of interest? What should the minister do so that the only conflict, which may potentially emerge, for example, in the moment of renewing the license, will be the apparent conflict of interest?*

## **Example 15**

Mayor of municipality Z lives in civil partnership with person ET, who is the head of a nonprofit organization called OM, the objectives of which include the monitoring of the decision-making on the part of locally elected official representatives. Because of a decision made by the prior local council, OM has been awarded the implementation of a 3-year project funded by the municipality to monitor all municipality decisions. OM report is expected to play a significant role in this municipality decision-making. The actual mayor is new in office and he initially develops, while working, an intimate relationship, which, after that, turns into a civil partnership, with person ET.

*Interests' identification and registration*

In the first meeting of the municipal council, whose object was to adopt the coming year budget, some of the opposition council members, as they were aware of the cohabitation fact, raised the claim that monitoring of municipal council decisions by this organization was not going to be fair. Mayor refused to provide answers to the questions raised by council members. Council members

informed the media, which supported the opposition council members' position on the risk of lacking fairness in municipality council decisions monitoring and the conflict of interest existence, at least apparently. HIDAA, which was also contacted by media, sent a team of inspectors, which concluded that there was a relationship between the mayor and the head of OM, but that there was not any contract relation in place, which would regulate the pecuniary regime of the two persons in civil partnership.

### *The way of addressing and resolving conflict of interest*

Political and media debate intensified even more. Under these conditions, the head of OM presented her resignation to OM steering board, which accepted it. She was employed in another organization. After this action, the debate was closed and the contract was executed in compliance with its terms.

### *Topics for discussion:*

- *What is the local public interest in connection with task to be carried out by OM? Is it in the public interest that the monitoring conducted by OM with municipality funds should be fair and impartial?*
- *Would the mayor be, even apparently, interested to have this monitoring conducted in such a way that it could be in favor of the majority, which he represents? If YES, would it be reasonable to think that he would use his relationship with OM head to affect monitoring results?*
- *Is this a mayor's conflict of interest? What is the interest, from which the conflict stems or, by which it is caused, is it mayor's political interest or his relationship with OM head? Test your answer through taking a similar example, but with the scenario where the head of OM does not have any relationship with the mayor, apart from being a well-known supporter of his party. Do both cases lead to similar result of prejudicing the monitoring process conducted by this organization? Do both cases lead to the same conclusion?*

## **7. Continuing conflict of interest examples**

### **Case of Group B Officials**

#### **Example 16**

Official AB was appointed to the position of Director of Directorate in the Ministry of Economy, Trade, and Energy (METE) and, in the moment of his appointment, he enjoyed the following private interests:

1. Head of "Alfa" Ltd., which operates in building business

2. Board member of Albanian Football Federation
3. His wife operates as a physical person in a pharmacy with an annual turnover higher than 10 million lekë
4. His father-in-law is a shareholder of “H&M” Ltd., which operates in fuel business

#### *Interests’ identification and reporting*

- Official AB has declared private interests 1, 2, and 4
- Media has announced private interest 3

#### *Ways of addressing and resolving conflict of interest*

*Interest 1:* Official AB, who holds the position of a director of directorate in the ministry, is of a medium leading position. Under such circumstances, prohibition set forth in Letter “a,” Article 31 of Law on Conflict of Interest (see explanation in Point 3.3 “a” of this chapter) is automatically applied. In this case, the only way of resolving conflict of interest could be resignation from one of the two duties, either the public or the private one. Official AB resigned within 15 days from the position of the head of “Alfa” Ltd and presented to the general secretary of the ministry and the director of human resources all the documentation, which confirmed this act. The result, following the verifications, was that official AB had correctly meet his obligations in relation with this issue.

*Interest 2:* His function, as a board member of the Albanian Football Federation, is not a conflict of interest, because his jurisdiction does not match or cross over the Albanian Football Federation scope of activity. This conclusion can be reached through analyzing the concrete responsibilities and competences to which the official has been entitled in the ministry as against his role in the Federation and its scope of activity.

*Interest 3:* Once learning the information from the media about the existence of his wife’s private activity, the General Secretary and Director of Human Resources in the ministry asked the official for explanations. The official admitted the existence of his wife’s activity and presented the necessary documentation. The result after verification was that the commercial activity of his wife as a physical person, though of more than 10 million lekë annual turnover, that is above the limit of the law, cannot be classified as a continuing conflict of interest case, since the official’s duties and competences do not cross over the area of interest of his wife private activity. However, given that the official failed to declare this interest, he has committed a violation of the legal obligation specified in Letter “c,” Point 1, Article 15 of the Law on Prevention of Conflict of Interest.



The General Secretary and Director of Human Resources of the ministry asked the official to give reasons for his failure to declare the interest. The High Inspectorate of Declaration and Assets Audit were informed beforehand about this. The explanations provided by him to HIDA inspector and to two ministry officials were not convincing; thus, HIDA decided to fine official AB for failure to declare interest in compliance with the deadline and for lack of reasonable causes according to Letter “c,” Point 1 of Article 44.

*Interest 4:* Official AB is a Director of Energy Policies Directorate, which is part of Policies General Directorate of the ministry. It was determined after an elaborate analysis of duties and competences of this official and those of the corresponding directorate that this official has a significant role in the process of policy drafting in which is included the policy of fuel trade. After going through common drafting and adoption of normative acts process, these policies are materialized into laws or sub legal acts of a general effect over fuel trade. On the other hand, the activity of his father's-in-law has to do with retail sales and is carried out through two fuel stations owned by his company. Although the official has an important role in the process of drafting and adopting draft acts, the institutional mechanism and procedure for drafting, considering and adopting normative acts involves a considerable number of other officials from both inside and outside the ministry, either of low or equivalent positions or, in particular, of higher leading positions. In addition, the fuel retail market includes hundreds of operators, whose activity is subject to the same legislation and sub legislation frame.

*The conclusion is that the cause-effect relation between the official's interest and the possibility or the appearance of a frequent unfair performance of his duties, i.e. the exertion of his influence on acts content to set competing advantages in favor of his father's-in-law business, is very weak and practically inexistent. It cannot be taken as a continuing conflict of interest or at least as an apparent one.*

It resulted after an extended analysis that, due to his function as a Director of Energy Policies Directorate, he was a member of the permanent licensing commission for retail fuel stations. The commission, apart from issuing licenses, reviewed complaints and decided on administrative measures up to canceling the license.

In this case, the conclusion was that the possibility of a frequent performance of his duties in an unfair manner, that is, the possibility of exerting his influence on acts content to set competing advantages in favor of his father's-in-law business was significant. His role as a commission member was confirmed to be functionally<sup>20</sup> inseparable from his position as director of directorate.

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<sup>20</sup> Ministry position, according to functional analysis of licenses issuing process, indicated the indispensability of director's involvement in this commission.

In the end, a request was made to the official to rid himself of interests (implying that his father-in-law had to transfer shares from an active into a passive ownership or to alienate them). The official was advised to pursue the procedures described in Article 38 of the Law on Prevention of Conflict of Interest. The ministry also sent an official notification to official's father-in-law with all relevant explanations.

Official's father-in-law refused, so official AB asked his superior to be transferred to another position. Following the request, the official was transferred to the position of Director of Economic Cooperation Directorate, inside the ministry, which was a position that did not implicate any important role in granting licenses, in conducting audits or in taking administrative measures against fuel retail traders. The decision was made based on the reasoning that, in this position, continuing conflict of interest situation, even in an apparent form, did not exist any more.

*Topics for discussion:*

- *Discuss about factors, which led only to the conclusion that the official's role in issuing normative acts did not constitute a continuing conflict of interest without taking into account for a moment, his membership in the licensing commission.*
- *Following the above conditions, could there be a same situation involving no conflict of interest if the official's father-in-law would be a shareholder in a wholesale fuel trading company? Assume that wholesale trading is carried out only by a handful of companies and it shows symptoms of an oligopoly<sup>21</sup> market.*
- *What are the factors that bring closer the officials in a ministry who perform duties in organization structures that deal with the regulation and/or supervision of markets on one hand, and with members or officials of specific regulatory agencies (telecommunication, competition, financial and banking sector, energy, insurance, water supply, media, etc.) on the other?*
- *Try to develop other similar examples either involving cases where conflict exists or non-conflict cases.*

## **Example 17**

Official EN, member of Telecommunication Regulatory Agency, enjoyed the following interests before his appointment:

5. physical person in a car-service shop;
6. his daughter is a partner in a ltd company, where fixed telephone service

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<sup>21</sup> Market is "oligopoly" when several companies enjoy the supply monopoly and they themselves affect market parameters, thus imposing counteractions over its other subjects.

- is its scope of activity;
7. Member of the governing body of “Light” culture association;
  8. His son has a job in “Alpha Mobil” Cellular Company Ltd.

*Interests’ identification and reporting*

The official has declared all aforementioned interests.

*The way of addressing and resolving conflict of interest*

*Interest 1:* Letter “c” of Article 31 prohibits the official from carrying out private activity in the capacity of a physical person. Official EN cancelled his registration in the court as a physical person and in the tax Office and, within 10 days, he presented all the documentation to the responsible authority of the institution.

*Interest 2:* Point 2, Article 35, and Letter “b,” Article 30 of the law prohibit official’s relative (daughter) from possessing, even in an passive way, of shares or capital stocks in a company operating within the scope of activity of corresponding regulatory agency. Thus, official’s daughter sold her capital stocks she owned in the company within 45 days and the official presented the documentation to the responsible authority of the institution.

*Interest 3:* Official EN, who holds the function of “Light” cultural association governing body member, is not subject to continuing conflict of interest.

*Interest 4:* Article 30 prohibits official EN, in the capacity of Telecommunication Regulatory Agency member, and any of his family members down to second degree from making any contract with an operator, which runs its activity in the Telecommunication Regulatory Agency jurisdiction scope. His son’s employment in the cellular company constitutes a prohibited contract, which is explicitly prohibited by this article. Therefore, the official’s son chose to end working with the relevant cellular operator.

*Topics for discussion:*

- *Make a comparison between example 16 and 17. What is the difference between them? What do they have in common from the point of view of the factors and prohibitions? If example 16 contained the fact that official AB had his son employed in a retail trade company instead of interest relations with his father-in-law, could that be prohibited as it is the case with official EN in example 17?*
- *If in the case of interest no. 1 of the official EN, instead of carrying out the activity as physical person, there is the case that he owns some shares in a company, which deals with telecommunication antenna repairs, would it be allowed to this official to enjoy an active or passive ownership of shares?*

- *Try to develop other examples through modifying key factors and then solve these cases.*

## **Example 18**

Official DL is a customs officer, who is directly involved in collection of customs revenues, and the result is that he enjoys the following private interests:

- His mother-in-law is a partner and owns 25% of capital shares in “Beta” Ltd with import-export scope of activity.
- His brother owns 10 % of shares in “AR” Ltd with an import-export scope of activity (this fact is not known at the beginning of the event but it is revealed at a latter stage).

### *Interests’ identification and reporting*

The official himself has made a declaration of his private interest, which is related to his mother-in-law. As to his brother’s activity, there is not any declaration made him, because articles 14 and 15 of the law on Prevention of Conflict of Interest do not define any obligation on customs officer’s brother (and on the customs officer himself) to declare these interests in the annual declaration.

### *Way of addressing and resolving conflict of interest*

*Interest 1:* Point 1, Article 32 and Points 1, 2, Article 35, prohibit the customs officer in the capacity of the official directly assigned to collect revenues and persons related to him (including his mother-in-law) from having an active ownership of shares or capital stocks in commercial companies operating in the import-export sphere. Customs General Directorate analyzed the case, notified the customs officer and his mother-in-law in writing about the aforementioned situation of conflict of interest, and informed them about the possible ways of resolving the conflict in compliance with Article 38 of the Law on Conflict of Interest. Customs officer’s mother-in-law DL decided to sell her shares within the legal deadlines.

Based on this case, Customs General Directorate sent a control team to check the customs officer’s activity and to see whether the customs officer had become subject to conflict of interest or not, due to this cause. The control result was that his mother’s-in-law import-export company had not carried out any customs clearance at the customs office where the official in question performed his duty.

*Interest 2:* However, the control team found out that another company, named “AR”, had carried out considerable customs clearance transactions at this customs office and it came out from the documentation checking that customs

officer's brother was the owner of that company. It was not found that customs officer DL had participated in any of these customs clearances. The control team concluded that customs officer had not become subject to case-by-case conflict of interest. Nevertheless, the control team, seeing that customs officer's brother company had carried out a frequent customs clearance activity at this customs office, concluded, through construing the key principle of continuing conflict of interest that, at least apparently, this official was subject to continuing conflict of interest, although his brother is not included in the category of related persons, as defined in Article 35 of the Law on Prevention of Conflict of Interest. In fact, control team members judged that prohibitions of persons related to the official, according to Article 35 of the Law on Prevention of Conflict of Interest are peremptory and they are solved according to Article 38, whereas, in this concrete case, the issue is a relative one and the solution was sought in Point 4 of Article 37. As a conclusion, the control team, after hearing the customs officer's explanations as well, recommended the following measures to the Customs General Directorate:

- Transfer of customs officer DL to another customs office, where his brother's company had never carried out any customs clearance and, which was something least likely to happen in the future
- Taking a disciplinary "reprimand with admonition" measure against customs officer DL for the reason that he had never provided any information or conducted any consultation with his superiors on the situation at issue.

The control team concluded that the customs office director, being just only for a couple of weeks in that position, and, as he was not objectively aware of facts, had failed to act because of reasonable causes. Customs General Directorate applied the recommended measures and advised the customs officer that if his brother's company was going to start carrying out clearance activities at the customs office, where he was transferred and if the customs officer would fail again to inform about this fact, he was going to be immediately dismissed from his position.

*Topics for discussion:*

- *Deepen the analysis of factors/causes, which led the control team to determine the existence of apparent continuing conflict of interest in the case of the customs officer's brother activity.*
- *Determine how should the customs officer himself have behaved in this case (refer to Article 37 of the law)?*
- *Is there any room to deepen any further the control over customs clearances carried out by "AR" company"? Is it possible that, even though customs officer was never involved in any of the customs clearances of this company, he might have influenced his colleagues to favor this company? How could such an administrative inspection be conducted?*

# CHAPTER IV – Conflict of interest in relation to official's employment and career

## 1. Introduction

This chapter addresses conflict of interest and its prevention in relation to official's recruitment, appointment, and career.

This subject is addressed from both the case-by-case conflict of interest perspective and the continuing conflict of interest perspective.

Explanations will be provided through the analysis of concepts, legal references and through some examples developed for didactic purposes.

## 2. General principles and issues

As stressed above, the fundamental goal of the Law on Prevention of Conflict of Interest is to prevent officials from falling into a conflict of interest and to avoid this conflict. Article 37 is the key article of this law, which regulates the management and the avoidance of conflict of interest situations.

The prevention and avoidance of conflict of interest in relation to official's recruitment and career must be viewed from three principal aspects:

9. Conflict of interest in the decision-making process by persons responsible for the concrete acts of *selection, appointment, career promotion and dismissal* (or other acts that are included in the scope of work relations) of an official in view of conflict between private interests of these person and their performance of public duty
10. Avoidance of continuing conflict of interest, which may emerge upon the designation or appointment of a person in a given position due to:
  - k) The continuing conflict between private interest of this person, who gets appointed, and the public duty or function, to which he will get designated or appointed, or;
  - l) The continuing conflict, which may emerge between private interests of the superiors and the person who is designated or appointed to a position (due to relations that they may have with this person) and their public position.
11. Relations between regulations of the Law on Prevention of Conflict of

Interest and the legislation that regulates the procedures of appointment, career and working relations for different categories of officials.

### **3. Conflict of interest in decision-making of the concrete acts of selection, assessment, appointment, career promotion and dismissal process**

As regards the first case of conflict of interest in decision-making of the concrete acts of selection, appraisal, appointment, career promotion and dismissal, *conflict of interest will occur normally as a case-by-case conflict of interest* in one of its three subtypes (actual, potential, apparent). As to the management of this case, judgment mechanism is explained with the general case-by-case conflict of interest, along with the relevant methodological steps in point 2 of chapter II of this Manual. All methodological steps must be applied by referring to concrete applicable procedures for selection, assessment, appointment, career promotion, dismissal etc.

To achieve success in carrying out the analysis and pursuing the relevant methodological steps, it must be born in mind that the decision-making and the procedures for it *vary across different public officials' categories and that are many responsible persons involved for the same act.*

To have an orientation as accurate as we can on the applicable legislation for every case, we must keep in mind that there are at least four different categories of officials, whose work relations and, consequently, criteria and procedures of recruitment, career, discipline, or dismissal are regulated in other different laws and acts:

- Civil servants<sup>22</sup> - procedures are described in the Law “On Public Servant Status” (Law on PSS) and in sub legal acts pursuant to it.
- *Political officials and others equivalent to them* – their appointment, career, or dismissal does not follow, as a rule, specified and strict procedures. However the basic legislation for them is Law No. 8095, March 21, 1996 “On Civil; Service in the Republic of Albania”, some provisions of other specific laws, which regulate the status of the institution/function where they perform their duty and some other provisions set forth in different legal or sub legal acts. Here we have to keep in mind that the Constitution itself regulates the issues related to some functions and the corresponding officials.

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<sup>22</sup> For this category, we must also keep in mind that there are some provisions in specific laws, which stipulate derogatory (excluding) rules from the Law on Public Servant Status, (see end part of laws list provided in Annex No. III of the Manual) regarding some components of work relations for its employees, who are, however, public servants. For example, Customs Code and its applicable provisions, Law “On the Bank of Albania”, etc.

- *Special status officials* – relevant procedures are described in specific laws, which regulate their status. For example, police force, army force, customs and tax officers, bailiffs, etc.
- *Common employees* (who are not included in any of the above categories) – their labor relations are regulated by the Labor Code.

The application of methodological steps to identify conflict of interest and the way of addressing it must be based on criteria, standards, limitations, prohibitions, and the relevant procedures provided by legislation for every official's category.

This aspect is very important. For while the existence of conflict of interest based on some factors may or may not be true in each of the four above categories, there may be cases of conflict of interest based on some other factors. For example, the same circumstances under which a "civil servant" may be in a conflict of interest situation do not give rise to a conflict of interest situation for a political official.

#### **4. Avoidance of continuing conflict because of appointment of a person to a given duty**

Apart from case-by-case conflict avoidance in a concrete decision-making process related to employees' appointment and career, as explained above, a concrete decision made on a person's designation or appointment to a certain position may lead to continuing conflict emergence in one of the two forms ("a" and "b"), as explained above in 2 a and b.

The reasoning mechanism for identifying this conflict is the one explained in Chapter III of this manual with the relevant methodological steps in relation to continuing conflict of interest. On the other hand, Article 37 of Law on Prevention of Conflict of Interest and the legislation in force specifies a *key principle* that regulates the management and avoidance of conflict of interest in this case. Based on this principle, *the possibility of falling into a conflict of interest must be considered, addressed, and avoided in advance of an official's designation or appointment to a given position.* (Article 4/4 of Law No. 9131 "On the Rules of Ethics in Public Administration" and Letter "dh", Point 1, Article 4 of the Law on Prevention of Conflict of Interest)

This implies that, in advance of making a final decision on the appointment of a person to a given position, the person who decides on his appointment (who, as a rule, in the civil service legislation is the "direct superior official" and, in other cases, the head of institution) and the personnel unit of the institution must request of the chosen candidate his declaration of interest and then proceed with the reasoning mechanism involving all methodological steps to consider the possibility of falling into a continuing conflict of interest for the official, who will be



appointed. If the conclusion is positive, that is, if the possibility of a continuing conflict between public position, to which the appointment will be made, and the official's private interests exists, then the act of appointment to that position must not be carried out (if conflict avoidance is not ensured in advance, for example, through interest conveyance, transfer to passive possession, etc), otherwise, the opposite conduct will lead to violation of the Law on Prevention of Conflict of Interest.

The same reasoning is valid for other decisions on official's career, such as promotion, transfer through parallel change of position to another equivalent position or, transfer to another position.

Conflict of interest avoidance in advance of appointment stage (or other actions) is more possible with civil servants and other officials, whose labor relations are subject to regulation by Labor Code as well as with officials of a specific status. As regards political officials, in many cases, release from interests in advance may be impossible, because appointments to these positions are often subject to predetermined procedural timelines.

If conflict of interest cannot be resolved at the appointment stage, for purposes of compliance it must be resolved as soon as possible thereafter, applying the general rules specified articles 37, 38 of the Law on Prevention of Conflict of Interest.

International practice applies the so-called "ethical contracts", which, in essence, impose an obligation on the official to rid himself of conflicts as for the timeline determined at the appointment moment, where failure to adhere to them makes up a reasonable cause to dismiss him from this position.

## *5. Relation to legislation that regulates work relations*

Where conflicts avoidance or resolution contemplated in article 37 of the Law on Prevention of Conflict of Interest is used, other legal provisions such as the Law on Public Civil Service status must be considered before procedures such as transfer to other position, modification of duties, or dismissal from position are applied.

## 6. Conflict of interest examples of official's recruitment and career

### Example 19

Under the provisions of the government constitution, AB is appointed to the position of Minister X, while his father-in-law is the Director of Internal Audit Directorate in the same ministry.

*Issue:* Does this case involve any kind of conflict of interest and, which of two officials might be in a conflict of interest situation? How would you address and resolve this conflict?

#### *Management of conflict of interest*

In the minister's case, conflict of interest may occur in a number of cases of his direct decision-makings. Minister, because of his family relation, may make preferential official decisions on the director, for example involving his father's-in-law in working groups with payment, in undeserved tours abroad, etc. These are all cases of conflict of interest in duties of the minister if they would really happen and they must be avoided by he himself or by his superior– that is, the Prime Minister. Even if they do not happen, the minister would be, at least, apparently in a conflict of interest situation.

On the other hand, although his father-in-law is less likely to fall into a factual case-by-case conflict of interest, he is not released from this risk due to his family relation to the minister. For example, the official, feeling protected, even though without minister's knowledge or his real action, may start failing to perform his duties in a fair manner. The possibility of falling into a factual or potential case-by-case conflict of interest just because of his being the minister's father-in-law, although significant, is smaller as compared to the case of the minister himself. On the other hand, his relation as a family member is more likely to result in the emergence of at least an apparent conflict of interest.<sup>23</sup>

Because of this relation, other officials in this ministry or outside it risk falling into a case-by-case conflict of interest, even though this conflict may be an apparent in nature.

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<sup>23</sup> Remember how often such persons, whose relatives get appointed to a high position, are stigmatized with such expression like: "You are not the person you used to be before your brother became minister"..."

Thus, family relationships have multiple effects in creating a case-by-case conflict of interest and they must be resolved according to methods described in Article 37 of the Law on Prevention of Conflict of Interest.

As regards factual or potential case-by-case conflict of interest, those officials themselves must avoid them case by case according to the key method of addressing and resolving conflict of interest.

In this situation and under the conditions of the frequency of an apparent case-by-case conflict of interest, the apparent continuing conflict of interest also emerges, which must be addressed as well in compliance with article 37 of the Law on Prevention of Conflict of Interest.

As a conclusion, both officials must make all efforts in compliance with civil servant status rules to enable transfer of the director to an equivalent position to another ministry or central institution. At the same time, officials must notify their own superiors about efforts they are making and must request their support.

Even if the transfer to an equivalent position is impossible due to circumstances, which do not depend on the officials themselves, they, at least, have done everything they could.

*Topics for discussion:*

- *What is the judgment mechanism for identifying the existence or nonexistence of conflict of interest in the minister's case? What about the case of his father-in-law?*
- *Analyze reasons why an apparent conflict of interest emergence can be tolerated? Why does not transfer of minister's father-in-law from the ministry become immediate? Consider for a while that practice has demonstrated there has been a high frequency of replacing ministers (for example, a new minister every 6 months).*
- *As described above, but with the scenario where, instead of the minister, there was an official with predetermined office term (for example, a five-year office term), how could officials act in this case?*

## Example 20

Continuing with example 19, would there be any conflict of interest situation if the director were employed after minister's appointment?

*Issue:* Is there any conflict of interest situation in the concrete decision-making related to the appointment act?

In this concrete case, civil service legislation is the applicable procedure for recruitment in the ministry. According to this legislation, minister does not enjoy any direct role in appointment procedures or in any other element of work relations following the appointment stage. On the other hand, his indirect role might be considerable.

In the concrete case, there is at least an apparent case-by-case conflict of interest situation in the appointment moment and failure to avoid this conflict at the appointment moment may lead to a continuing apparent conflict of interest situation of both officials (see the above example).

Therefore, this person should not be employed in the ministry for the time that his son-in-law is in a minister's position.

Pursuant to Letter "dh," Point 4, Article 37, and to Point 4, Article 4 of the Law No. 9131, September 08, 2003 "On Rules of Ethics in Public Administration", conflict of interest must be avoided in advance of the appointment moment to a position.

To this end, family relation between certain officials (not in every case, but only when the analysis leads to the conclusion of emergence of even an apparent continuing conflict of interest) must be defined in internal regulations as an unacceptable relation for that institution. On the other hand, in the requests for information, which candidates must provide, there must be information to indicate whether they have any family relations down to the second degree to the existing officials in that institution or not, and they must be notified that in case they fail to declare the truth, this would be a sufficient reason for their disqualification or dismissal after they get appointed in good faith.

*Topics for discussion:*

- *What could be the concrete legal mechanism to ensure the necessary information for avoiding conflict of interests ahead of the appointment moment? Discuss the idea of ethic contracts between institution and its new appointees.*
- *Pursuant to the civil servant status law, the direct superior official is entitled to the right of choosing one out of three candidates selected by the testing commission.*

*How would you judge the case when one of the three candidates happens to be the superior's uncle's son?*

## **Example 21**

The Director of Social Services Directorate, which is a Ministry of Labor, Social Affairs, and Equal Opportunities subsidiary institution, is on the point of retirement. Organization X is one of NGO-s, which provided social services for orphan kids in Tirana city in a residence and, according to law on social services, this organization has made, a year ago, a 3-year contract with the Directorate of Social Services in the Ministry of Labor. NGO X will provide by means of public funds certain services for orphan kids. Two months ahead of his retirement, this NGO offers to the Director of Social Services the position of NGO X Executive Director.

*Issue:* Is the director, according to the Law on Prevention of Conflict of Interest, obliged to refuse this job position?

### *Management of conflict of interest*

According to Article 5 of the Law on Prevention of Conflict of Interest, private interests are defined to include all possible promises for a future employment that the official has received when exercising his official functions.

In this concrete case, there is a situation of at least an apparent conflict of interest. Conflict of interest, which may emerge in such situation, is an apparent one as long as the director holds this position, and accepts such an offer, which can give the impression that it affects or, that has already affected this director's decision-making about the contract and execution of obligations stemming from it by NGO X.

In practice, it is quite likely that this recruitment promise remains confidential between two parties. However, if recruitment in this organization happens following his retirement, then, everybody has the right to raise reasonable doubts about the manner of how this official has carried out his duties.

Therefore, the official must not accept the offer, and, in addition, he must notify his superior about this fact.

### *Topics for discussion:*

- *Following his superior's official notification, what actions must the official and his superior carry out in order to rule out every doubt on the possibility of a conflict in the past?*

- *What conditions should be met so that this official can, some days following his retirement, work in this organization without causing an apparent conflict of interest emergence?*
- *How could this case be addressed if the director would accept the offer, would not inform his superior and, after his retirement, would start working for NGO X? What could the superior official or the ministry do in such case?*

# CHAPTER V – Invalidity of acts under conflict of interest

## 1. Introduction

Chapter V of the Law on Prevention of Conflict of Interest defines invalidity of acts, which are carried out under conflict of interest conditions, and the effects resulting from it. The message of this law chapter is that every act, which is an output of a decision-making under conflict of interest, is or, becomes, for that reason, invalid.

This chapter will address different types of invalidities according to the categories of acts performed or judgments made, as well as the effects, which result from that, and the actions that must be carried out by public institutions focused mainly on administrative acts and contracts.

## 2. Invalidity of administrative acts and contracts

According to Article 115 of the Code of Administrative Procedures (CAP), there are two types of acts invalidity: absolute and relative invalidity.

### *Article 115 (of CAP) Invalid Acts*

*Invalidity of administrative acts, in the sense of this Code, occurs in the following forms:*

- a) Absolutely invalid administrative acts (acts issued in flagrant violation of the law)*
- b) Relatively invalid administrative acts (acts issued in violation of law)*

Existence of absolute or relative invalidity, according to the Code of Administrative Procedures provisions, does not depend on the motive, which leads to invalidity, but on the violation that has been committed. An act is absolutely invalid when there is an assessment of the existence of cases defined in Article 116 of the Code of Administrative Procedures combined with the substance of the meaning of this type of invalidity according to its Article 115. In addition, a relatively invalid act is such when it is issued in violation of the law, but which, anyhow, is not absolutely invalid (Articles 115 and 118 of Code of Administrative Procedures). Invalidity may result from any cause, including conflict of interest.

Therefore, a conflict of interest, which leads to the invalidity of an act, may constitute a cause either for absolute invalidity or for relative invalidity.

When conflict of interest causes absolute invalidity of an act, the request to ascertain its invalidity can be filed at any time; the competent administrative body, upon its initiative, may ascertain an absolutely invalid administrative act at

any time and take measures to remedy the effects it may have caused from the moment of its issuance. In absence of a competent administrative body, the court, upon an interested party's request, initiates ascertaining of the absolute invalidity of a given act.

In the case of relative invalidity, abrogation or revocation of the act, upon interested party's request or, upon the initiative of the competent body itself, is conducted in compliance with timeline stipulated by the Code of Administrative Procedures itself. Abrogation or revocation effects commence and are remedied as per definitions of the Code of Administrative Procedures.

In both cases of invalidity, the public institution takes any possible measure to minimize or eliminate the consequences inflicted by the act issued under conflict of interest and starts the relevant procedures of administrative, disciplinary, civil, or penal responsibility against the liable official as per Point 6, Article 40, of the Law on Conflict of Interest.

It is important to stress that it is not just only the factual conflict of interest, but also the apparent one, which may become the cause of any sort of invalidity, being it either an absolute or a relative one. It is possible that factual conflict of interest may constitute a stronger cause for absolute invalidity, but that does not hold true in every case. In practice, there may be cases when absolute invalidity can be linked more strongly with the case of apparent conflict of interest than with the factual conflict of interest. Point 5, Article 40, of the Law on Conflict of Interest defines only one circumstance when the apparent conflict does not cause invalidity due to lack of possibility to avoid it, as per Point 6, Article 37.

To judge whether there is, in a given case, an absolute, or a relative invalidity caused by a conflict of interest, there is a need to take into account that, in general, legislation sets forth a limited number of explicit and unquestionable prohibitions. This is for the fact that legal formulations have, as rule, a certain construing margin in practice. Nevertheless, it is possible to apply a logical judgment mechanism, which leads to a logical conclusion of the incompatibility type. Incompatibility type depends on case-by-case fundamental factors and circumstances.

In the case of administrative acts, the following methodological steps are recommended:

## **2.1. Starting from the act itself:**

If it is assessed that:

- The act has been issued by an unidentified administrative body, or
- It has been issued by an administrative body that is beyond its legal



- competences, or
- The act has been issued in violation of the legal form (when the latter is very evident that it is in flagrant violation to the form established by law) or of the procedure, on condition that this procedural violation is flagrantly against the procedures established by law<sup>24</sup>

Then, the act, according to its nature, is absolutely invalid and, in such a case, the official's drive, who had a role in issuing this act, might have been the conflict of interest or, in other words, the unfair performing of duty for personal benefit purposes. In this case, ascertainment of the absolute invalidity of an act does not necessarily require confirmation of conflict of interest existence. In addition, there may not be an opportunity in place to be able to confirm the relation between private interest and unfair duty performance by this official, although it suffices to analyze the output, that is, the act itself. This does not imply that the need to confirm conflict of interest and to punish it must be ignored, although this is another issue.

## 2.2 Starting from conflict of interest

When the first method does not provide any reasonable answer, then, invalidity can be analyzed starting from conflict of interest. Law on Conflict of interest has defined some essential and decisive procedural actions as a part of a decision-making procedure in every case. These procedural actions can be classified under two groups:

- Identification in advance of an official's private interest in a decision-making
- Management and avoidance in advance of conflict of interest

These two moments are an important and essential part of the decision-making procedure defined by the Law on Prevention of Conflict of Interest in every sphere of public decision-making and, a flagrant violation of them would make a sufficient cause to meet criterion set forth in Letter "c," Article 117, combined with the term "flagrance" of Article 115 of the Code of Administrative Procedures.

Anyone, who may be assigned to confirm absolute invalidity of an act, must make an assessment and come to a convincing judgment holding that, at least, one out of these two procedural actions has been flagrantly violated.

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<sup>24</sup> As regards these issues, users are recommended to utilize commentaries, which are published for the Code of Administrative Procedures by well-known lawyers in this domain like: *Code of Administrative Procedures Commentary* (Ibrahimi, Sadushi, etc.), Institute for Public & Legal Studies, Toena 2004; *Administrative Law: Theory of Administrative Act* (Sokol Sadushi), Botimpex 2000, V.2; Training Module "Administrative Procedures" (Aurela Anastasi) in [www.itap.gov.al](http://www.itap.gov.al); etc.

Sections 1, 2, Chapter II, of the Law on Prevention of Conflict of Interest define the rules of the process of interest identification. First, this part of the law defines the obligation of the official to declare his interests by himself, case by case, as well as, on a periodical basis. Case-by-case declaring bears an essential and decisive importance. In absence of it, existence of annual declaration of the same interest does not play any role to replace case-by-case declaration necessity regarding this interest. Rights and duties of the superior official, as well as, rights of interested parties are also defined by the same part of the law.

Article 37, Chapter IV, of the Law on Prevention of Conflict of Interest specifies the ways of addressing and resolving conflict of interest. This article defines the obligations of the official himself and of his/her superior to apply the most effective method of avoiding conflict in advance. Other specific laws define also specific and explicit obligations on nonparticipation in decision-making according to conditions set forth in these laws, which must also be taken into consideration and they, as a rule, prevail if they define a stricter obligation/restriction compared to that of the Law on Prevention of Conflict of Interest.

To conclude that there is a flagrant procedure violation, caused by conflict of interest, the following assessment must be made:

- General case:
  - For the official himself/herself
    - i) Interest is known and clear, and
    - ii) Its impact on the unfair performance of duty by the official, even if apparent, is also clear, and
    - iii) Method of addressing in this case is also clear; therefore, the official can have no doubt about this cause-effect relation.Therefore, he/she ought to have declared this interest and ought to have taken measures to prevent the conflict.
  - For the superior:
    - i) He/she already knows or he/she will be timely notified by the official himself/herself or by the legal sources, including complaint/notification of an interested party, on the official's interest and
    - ii) Interest is clear, and
    - iii) Impact of this interest on the unfair performance of duty by the official, even if apparent, is also clear, and
    - iv) Method of addressing in this case is also clear; therefore, the official cannot claim any lack of information regarding the clear interest and he/she can have no doubt about this cause-effect relation.Therefore, he/she ought to have taken measures to prevent the conflict. This conclusion is valid also for the superior institution.

- The most specific case: in the same situations of the general case regarding interest identification and when the prohibition of an act according to a law prohibition (a specific law or the Law on Prevention of Conflict of Interest) is clear.<sup>25</sup>

In the above analysis, reference must not be based only on the definition of the Law on Prevention of Conflict of Interest, but also on other laws regulating a given area and necessarily on the Code of Administrative Procedures definitions, especially on the part of this Code defining “disqualification”, which is nothing but the part where conflict of interest is addressed (Articles 37-43 of the Code of Administrative Procedures).

### **2.3. Civil and administrative contracts**

The above analysis method also serves for administrative and civil contracts.

In fact, every contract (even if civil) made by a public administration institution derives and is based, at least, on an administrative act (decision, order, etc). Additionally, a civil contract is, at the same time, an administrative contract if it meets the conditions provided in the Code of Administrative Procedures as regards definitions of these contracts. On the other hand, an administrative contract is always a civil contract.

As a conclusion, in the case of administrative contracts, definitions made by points 1, 2, article 40, of the Law on Prevention of Conflict of Interest apply altogether.

Reasoning is similar even in the case of civil contracts that are not administrative ones, which “when made in violation of a rule set by law do not cause any juridical effect” or, in other words, they are absolutely invalid.<sup>26</sup>

## **3. Effects of conflict of interest on other types of acts**

Logical mechanism of assessing violation and ascertaining the effects on other acts (judicial bodies’ acts, notary acts, prosecution office acts, normative acts,

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<sup>25</sup> For example, prohibitions in points 1, 2, Article 21, of the Law on Prevention of Conflict of Interest on contraction in most cases is likely to result in absolute invalidity due to interests clarity and a very clear prohibition of contraction under clearly predetermined duty and interest circumstances. Meanwhile, situations, which may be linked to definitions provided by points 3, 6, Article 21, as a rule, take more analysis to reach to the conclusion on the type of invalidity.

<sup>26</sup> Article 92 of Civil Code defines cases when a civil action does not cause any juridical effect (such as actions, which run against a bidding provision of the law, which are conducted to cheat the law, simulated or fictitious actions, which are conducted upon parties’ agreements with the intention of causing no juridical effects, etc.).

etc., as per paragraph “ii,” “iii”, letter “a”, point 1, article 4) taken under conflict of interest, is essentially the same as that of administrative acts, but its application is carried out through other procedural instruments and definitions provided in the relevant codes and other specific laws that regulate the juridical regime of these acts.<sup>27</sup>

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<sup>27</sup> See Annex No. III of the Manual

## **4. Invalidity examples**

This part of the Manual provides three examples of invalidity, but each of these examples, which are also provided in chapter II and III of this manual, may be utilized as a case to judge the type of invalidity, to which conflict of interest in a given case could lead.

### **Example 22**

Competing procedure for a specialist's position in the subsidiary directorate is conducted in ministry Y. Three candidates are selected at the end of competing process. Institution personnel directorate asks questions to each of them to see whether they have any family relations with any of the officials in this ministry and none of them declares any such relation. Director of the directorate at issue, who is the direct superior to the specialist's position, chooses the candidate, who is positioned the third, and he officially asks Department of Public Administration to announce the winning candidate and his appointment at the end of legal timeline.

About one month following selected candidate's appointment to the position, one of national newspapers announced the existence of a second-degree family relation (brother and sister) between the director and the appointee. Based on this information, HIDAA and Civil Service Commission (CSC) carried out a joint inspection in this ministry and in the Department of Public Administration. At the end of the inspection, they found undisputable facts about the existence of this relation. Moreover, two testing commission members, when asked by HIDAA, admitted that the director had told them that he preferred the candidate in question without saying anything about this family relation. Nevertheless, both commission members admitted that they were not influenced by the suggestion.

Inspectors observed that the director, fully aware of the family relation existence, had not declared it and he had not resigned from participation in the relevant decision-making. HIDAA and CSC assessed that director had acted in a flagrant way against Law on Prevention of Conflict of Interest, Code of Administrative Procedures, Law on Civil Servant Status and Law on Rules of Ethics in Public Administration, and, indeed, even in violation of the regulation of that ministry recognized by him, thus clearly violating the procedure stipulated by law for that purpose.

Experts of both institutions were of the opinion that the administrative act of choosing the candidate issued by the director was absolutely invalid and they recommended to the respective ministry to ascertain absolute invalidity and remedy the effects caused by this act. Pursuant to these recommendations, the General Secretary of the ministry, after ascertainment of the absolute invalidity of the act of choosing the candidate, made a decision to interrupt work relations

with the specialist. He informed the Department of Public Administration and took measures to reorganize the final choosing process. General Secretary of the ministry, after having pursued the legal procedure, made a decision, based on which he took the disciplinary measure of dismissing the director from civil service.

*Topics for discussion:*

- *Why was the conclusion of conflict of interest existence reached?*
- *Why was the conclusion of absolute invalidity of director's act of choosing in the capacity of direct superior reached?*
- *Modify circumstances or interests in the same event so that invalidity transforms from absolute into a relative one. How could the event develop in this case?*

### **Example 23**

Municipal council decides to sell some land parcels, which are municipality property. "Alfa" Company Ltd can get entitled, through a council decision, to the right to buy one land parcel. All selling procedures for these land parcels are conducted in compliance with the law through open bidding procedure and "Alfa" Company Ltd has proposed the highest price for purchasing the land parcel at issue. Council member AB used to be a minority shareholder, but he has sold his shares some time ago.

In his discussion at the council meeting, this official spoke against awarding the propriety right to "Alfa" Company Ltd pretending that it was not a company of good reputation. At the end of the council voting, half of other council members, possibly affected also by council member AB, voted against selling it to "Alfa" Company Ltd and thus bidding was canceled due to one vote plus.

After this decision, "Alfa" Company Ltd administrator, who was a single partner presented a complaint to the municipal council, in which he claimed that the voting had been affected by the contrary vote of council member AB with whom he used to have a strong conflict at the time when they were co-owners and he supported his claim by providing evidence in writing, which confirmed the existence of that conflict. This information was also presented to the prefect of the region, who, after having considered the facts, asked the municipal council to review the corresponding decision, based on the argument that the decision was made under conflict of interest conditions, something that, according to him, was going to lead to a relative invalidity of the act.

The municipal council made an interim decision for excluding council member AB from decision-making and decided to revoke the prior act along with selling of the land parcel to "Alfa" Company Ltd. In fact, some council members, who had voted

against at the prior meeting, stated, at the second meeting that their voting had been influenced by council member AB discussion and that they had no knowledge about his conflict with the company owner.

*Topics for discussion:*

- *Why did they conclude that there was a conflict of interest involved?*
- *Why did they conclude that the act was subject to invalidity? Why was this invalidity judged as relative?*
- *Would the act have been invalid if canceling of bidding had occurred because majority of council members were going to vote against it, were aware of all facts and, were not going to be influenced by council member AB speech and vote, just because of this official's conflict of interest?*
- *Modify the case, without affecting its substance, in a way that invalidity turns into an absolute one.*

## **Example 24**

Mayor of a municipality, makes a contract, at the end of a procurement procedure, for the city sanitation with "A" Company Ltd, where he is the only shareholder. Company "B" Ltd, who also participated in bidding, makes, after 6 months, a complaint in writing to the municipal council asking it to render bidding procedure invalid and to cancel the relevant contract based on the motive that the contract was made by the mayor under conflict of interest circumstances. The municipal council provides an official answer holding that it can not address that request because, according to Code of Administrative Procedures, the municipal council is not the superior body to the mayor and, secondly, because 30 day deadline of filing a complaint had expired.

The representative of company B went to court and presented his claims. Court accepted company B complaint and ascertained the absolute invalidity of this contract. Even after this decision, mayor went on with execution of this contract and this fact was announced in the media. Based on the information already publicly disclosed, the district prosecutor started a criminal investigation against the mayor and ordered his arrest. Meanwhile, Council of Ministers decided to dismiss the mayor for serious violation of the law. Due to municipality lack of possibility to take action, State Attorney-at-law Office, upon HIDA request, filed a civil suit for the damage caused by the ex-mayor.

*Topics for discussion:*

- *Is this example correctly solved? WHY? Which article of the Law on Prevention of Conflict of Interest does mayor's action violate?*

- *Is there any possibility that, by means of modifying any of mayor's interests, it can be changed from an absolute invalidity into a relative one? How could the case be developed in this case?*
- *Identify cases of other officials whose conflict of interest might lead to an absolute invalidity of contracts in the same circumstances as those of the mayor, in relation to the prohibition of contracts according to definitions set forth in Article 21, points 1, 2, 3 and 6.*



## ANNEX I – Group of Experts

Name	Institution or Activity
Artan Hoxha	Institute for Contemporary Studies
Zhani Shapo	Institute for Contemporary Studies
Andi Memi	Lawyer
Edmond Dunga	Department of Internal Administrative Audit and Anticorruption, Council of Ministers
Agata Nasti	High Inspectorate for Declaration and Audit of Assets
Flori Karaj	High Inspectorate for Declaration and Audit of Assets
Rahela Reçi	High Inspectorate for Declaration and Audit of Assets
Hektor Muçaj	High Inspectorate for Declaration and Audit of Assets
Dhimitrula Spiro	High Inspectorate for Declaration and Audit of Assets
Blerta Selenica	Training Institute of Public Administration
Arta Vorpsi	Lawyer
Heralda Methasani	Lawyer
Brikena Kasmi	Lawyer
Ilirjana Nano	Public law lecturer, “Luarasi” University
Valbona Pajo	Lawyer
Enea Hoti	Lawyer, Association of Albanian Municipalities
Admir Drago	Lawyer

Ansi Shundi	Public Administration Department
Michael Sears	Rule of Law Program USAID/CASALS
Gary Davis	Rule of Law Program USAID/CASALS

## **ANNEX II – CATEGORIES OF OFFICIALS DESCRIBED IN ARTICLES 30, 31 AND 32 OF THE LAW ON CONFLICT OF INTEREST PREVENTION**

**Officials subject to legal obligations regarding avoidance of specific cases of continuing conflict of interest defined in articles 30, 31, 32, Section 2, Chapter II of the Law on the Conflict of Interest Prevention.**

**Civil servants of high leading position:**

1. General Secretary
2. Department Director
3. General directorate director
4. Positions equivalent to the first three ones in the central or local public administration institutions.

**Civil servants of medium leading position:**

5. Director of Directorate
6. The official, who receives fringe benefits for his position to an amount of 74,000 Albanian Leks as per Council of Ministers' Decision No. 711, date Dec 27, 2001, Annex 1, is included in the equivalent positions to them.

**Officials of State Police:**

7. General Director of State Police
8. Vice-Director of State Police
9. Directors of Directorates in the General Directorate of State Police
10. Directors of Regions Police
11. Chiefs of Police Commissariats

**Officials of Armed Forces:**

12. Directors of Directorates
13. Commanders of Armed Forces up to Brigade Commander function or, functions equivalent to them.

**Officials of General Tax Directorate:**

14. General Tax Director
15. General Tax Vice-Director
16. Directors of Directorates in the General Tax Directorate
17. Heads of District Tax Offices
18. Tax administration officials directly involved in tax revenue collection:
  - a. Tax registering inspectors
  - b. Tax estimating inspectors
  - c. Tax control inspectors.

**Officials of General Customs Directorate:**

19. General Customs Director
20. General Customs Vice-Directors
21. Directors of Directorates in General Customs Directorate
22. Head of District Customs Offices
23. Customs administration officials who are directly involved in customs revenue collection:
  - a. Acceptance customs officers
  - b. Assessment customs officers
  - c. Physical control customs officers
  - d. Anti-smuggling customs officers
  - e. Chiefs of sectors directly involved in revenue collection.

## **ANNEX III – LAWS AND DECISIONS ABOUT CONFLICT OF INTEREST PREVENTION**

### **I. CASE BY CASE CONFLICT OF INTEREST**

1. LAW No. 7850, date July 29, 1994, "CIVIL CODE"  
[Articles 46, 92]
2. LAW No. 8116, date March 29, 1996, "CODE OF CIVIL PROCEDURES"  
[Articles 72, 73]
3. LAW No. 7905, date March 21, 1995, "CODE OF CRIMINAL PROCEDURES"  
[Articles 15-18]
4. LAW No. 8485, date May 12, 1999, "CODE OF ADMINISTRATIVE PROCEDURES"  
[Articles 37-43, 115-119, 121-128, 135-146, 151]
5. LAW No. 8577, date Feb 10, 2000, "ON THE ORGANIZATION AND FUNCTIONING OF CONSTITUTIONAL COURT"  
[Articles 36-37, 64, 66-67]
6. LAW No. 8730, date Jan 18, 2001, "ON THE ORGANIZATION AND FUNCTIONING OF BAILIFF'S SERVICE"  
[Article 18]
7. LAW No. 9205, date March 15, 2004, "ON THE PROTECTION OF JUSTICE WITNESSES AND COLLABORATORS"  
[Article 6]
8. LAW No. 7829, date June 01, 1994, "ON NOTARY"  
[Articles 42, 67]
9. LAW No. 9109, date July 17, 2003, "ON LAWYER'S PROFESSION"  
[Article 9]
10. LAW No. 9062, date May 08, 2003, "FAMILY CODE"  
[Articles 270, 274, 278]
11. LAW No. 9121, date July 28, 2003, "ON COMPETITION PROTECTION"  
[Article 23]
12. LAW No. 8652, date July 31, 2000, "ON THE ORGANIZATION AND FUNCTIONING OF LOCAL GOVERNMENT"  
[Articles 30, 57]
13. LAW No. 8449, date Jan 27, 1999, "CUSTOMS CODE"  
[Article 16]
14. LAW No. 8560, date Dec 22, 1999, "ON TAX PROCEDURES"  
[Article 25]
15. LAW No. 7971, date July 26, 1995, "ON PUBLIC PROCUREMENT"  
[Article 39]
16. LAW No. 8365, date July 02, 1998, "ON BANKS"  
[Articles 21, 23, 25, 35-37, 44-45, 62]
17. LAW No. 8080, date March 01, 1996, "ON SECURITIES"  
[Articles 10, 43-44]
18. LAW No. 8267, date Dec 19, 1997, "ON ALBANIAN AGENCY OF GUARANTEE"  
[Articles 16, 19]
19. LAW No. 8873, date March 03, 2002, "ON DEPOSITS INSURANCE"

[Article 18]

20. LAW No. 8164, date Nov 21, 1996, "ON TRANSPARENCY ASSURANCE REGARDING BORROWING ACTIVITY WITH MASSIVE INVOLVEMENT OF INDIVIDUALS IN REPUBLIC OF ALBANIA"  
[Article 6]
21. LAW No. 8102, date March 28, 1996, "ON THE REGULATORY FRAME OF WATER SUPPLY AND WASTEWATER TREATMENT SECTOR"  
[Article 4]
22. LAW No. 8618, date June 14, 2000, "ON TELECOMMUNICATIONS"  
[Article 85]
23. LAW No. 8410, date Sept 30, 1998, "ON PUBLIC AND PRIVATE RADIO AND TELEVISION"  
[Articles 93, 109]
24. LAW No. 9000, date Jan 30, 2003, "ON ORGANIZATION AND FUNCTIONING OF COUNCIL OF MINISTERS"  
[Article 18]
25. LAW No. 8095, date March 21, 1996, "ON CIVIL SERVICE"  
[Article 11]
26. LAW No. 9131, date Sept 08, 2003, "ON RULES OF ETHICS IN PUBLIC ADMINISTRATION"  
[Articles 3-11, 16-19]
27. DECISION No.714, date Oct 22, 2004, "ON OUTSIDE ACTIVITY AND MAKING GIFTS DURING THE ACTIVITY OF PUBLIC ADMINISTRATION SERVANT"
28. INSTRUCTION No. 2, date Jan 27, 2006, "ON AN ADDITION TO INSTRUCTION NO.1, DATE Jan 01, 1996 OF THE COUNCIL OF MINISTERS "ON PUBLIC PROCUREMENT", AMENDED" (concerning nepotism in public procurements)
29. LAW No. 8549, date Nov 11, 1999, "ON THE STATUS OF CIVIL SERVANT"  
[Articles 7, 19-20]
30. LAW No. 8551, date Nov 18, 1999, "ON STATE ATTORNEY-AT-LAW OFFICE"  
[Articles 16, 19-20]
31. LAW No. 8950, date Oct 10, 2002, "ON CIVIL REGISTRY"  
[Article 7]
32. LAW No. 9009, date Feb 13, 2003, "ON INTERNAL AUDITING IN PUBLIC SECTOR"  
[Article 15]
33. LAW No, date April 10, .2003, "ON THE DECLARATION AND ASSETS AND FINANCIAL OBLIGATIONS AUDIT OF ELECTED OFFICIALS AND OF SOME PUBLIC SERVANTS"  
[Article 14]
34. LAW No. 9072, date May 22, 2003, "ON POWER SECTOR"  
[Article 6]
35. LAW No. 8788, date May 07, .2001, "ON NONPROFIT ORGANIZATIONS"  
[Articles 26-27]

## **II. CONTINUING CONFLICT OF INTEREST INCOMPATIBILITY**

1. CONSTITUTION (LAW No. 8417, date Nov 21, 1998)  
[Articles 61, 69-71, 89, 103, 130, 131, 143, 154]

2. LAW No. 8436, date Dec 28, 1998, "ON THE JUDICIAL POWER ORGANIZATION"  
[Articles 30-31, 41]
3. LAW No. 8811, date May 17, 2001, "ON THE ORGANIZATION AND FUNCTIONING OF HIGH COUNCIL OF JUSTICE"  
[Articles 5, 7, 10]
4. LAW No. 8737, date Feb 12, 2001, "ON THE ORGANIZATION AND FUNCTIONING OF PROSECUTION"  
[Articles 32, 38-39]
5. LAW No. 8730, date January 18, 2001, "ON THE ORGANIZATION AND FUNCTIONING OF BAILIFF'S SERVICE"  
[Article 17]
6. LAW No. 7829, date June 01, 1994, "ON NOTARY"  
[Article 5]
7. LAW No. 9109, date July 17, 2003, "ON LAWYER'S PROFESSION"  
[Article 25]
8. LAW No. 8550, date November 18, 1999, "ON MEMBER OF PARLIAMENT STATUS"  
[Article 3]
9. LAW No. 8270, date December 23, 1997, "ON SUPREME STATE AUDIT"  
[Articles 13-14, 20]
10. LAW No. 8454, date February 04, 1999, "ON OMBUDSMAN"  
[Articles 3, 10]
11. LAW No. 9121, date July 28, 2003, "ON COMPETITION PROTECTION"  
[Article 22]
12. LAW No. 9235, date July 29, 2004, "ON PROPERTY RESTITUTION AND COMPENSATION"  
[Articles 15, 17]
13. LAW No. 8652, date July 31, 2000, "ON THE ORGANIZATION AND FUNCTIONING OF LOCAL GOVERNMENT"  
[Articles 25, 27, 49, 58]
14. LAW No. 8548, date November 11, 1999, "ON RATIFICATION OF EUROPEAN CHARTER OF SELF-GOVERNMENT"  
[Article 7]
15. LAW No. 8449, date January 27, 1999, "CUSTOMS CODE OF THE REPUBLIC OF ALBANIA"  
[Article 16]
16. LAW No. 8560, date December 22, 1999, "ON TAX PROCEDURES IN REPUBLIC OF ALBANIA"  
[Article 25]
17. LAW No. 8269, date December 23, 1997, "ON BANK OF ALBANIA"  
[Article 46]
18. LAW No. 8365, date July 02, 1998, "ON BANKS"  
[Article 21]
19. LAW No. 8267, date December 19, 1997, "ON ALBANIAN AGENCY OF GUARANTEE"  
[Articles 8, 12]
20. LAW No. 8873, date March 29, 2002, "ON DEPOSITS INSURANCE"  
[Article 17]
21. LAW No. 8894, date May 14, 2002, "ON OUTSTANDING LOANS ADDRESSING AGENCY"  
[Articles 11-12, 15, 18]

22. LAW No. 8102, date March 28, 1996, "ON THE REGULATORY FRAME OF WATER SUPPLY AND WASTEWATER TREATMENT SECTOR"  
[Article 4]
23. LAW No. 8618, date June 14, 2000, "ON TELECOMMUNICATIONS IN REPUBLIC OF ALBANIA"  
[Articles 84, 86]
24. LAW No. 8410, date September 30, 1998, "ON PUBLIC AND PRIVATE RADIO AND TELEVISION"  
[Articles 14, 90, 108]
25. LAW No. 8549, date November 11, 1999, "ON CIVIL SERVANT STATUS"  
[Articles 7, 19-20]
26. LAW No. 8551, date November 18, 1999, "ON STATE ATTORNEY-AT-LAW OFFICE"  
[Article 18]
27. LAW No. 8927, date July 25, 2002, "ON PREFECT"  
[Article 5]
28. LAW No. 9009, date February 13, 2003, "ON INTERNAL AUDITING IN PUBLIC SECTOR"  
[Articles 15-16]
29. LAW No. 9049, date April 10, 2003, "ON THE DECLARATION AND ASSETS AND FINANCIAL OBLIGATIONS AUDIT OF ELECTED OFFICIALS AND OF SOME PUBLIC SERVANTS"  
[Articles 13-14]
30. LAW No. 9072, date May 22, 2003, "ON POWER SECTOR"  
[Article 5]
31. LAW No. 9095, date July 03, 2003, "ON FOREIGN SERVICE"  
[Article 40]
32. LAW No. 9154, date November 06, 2003, "ON ARCHIVES"  
[Article 90]
33. LAW No. 9130, date September 08, 2003, "ON HARBOR AUTHORITY"  
[Article 13]
34. LAW No. 9106, date July 17, 2003, "ON HOSPITAL SERVICE"  
[Articles 13, 16, 18]

### **III. EMPLOYMENT**

1. LAW No. 8549, date November 11, 1999, "ON CIVIL SERVANT STATUS"  
[Articles 5, 9, 10, 12, 13, 15, 21, 25]
  - (1) Council of Ministers Decision No. 231, date May 11, 2000, "ON ADMISSION IN CIVIL SERVICE AND THE PROBATION PERIOD", amended by Council of Ministers Decision No.196, date April 0,6, 2001, Council of Ministers Decision No.221, date may 16, 2002
  - (2) Council of Ministers Decision No. 342, date July 14, 2000, "ON PARALLEL TRANSFER AND PROMOTION OF PUBLIC SERVANT"
  - (3) Council of Ministers Decision No. 306, date June 13, 2000, "ON DISCIPLINE IN CIVIL SERVICE"
  - (4) Council of Ministers Decision No. 355, date July 07, 2000, "ON ORGANIZATION OF PERSONNEL FILE AND REGISTER"
  - (5) Council of Ministers Decision No. 360, date July 14, 2000, "ON RELEASE FROM CIVIL SERVICE"

- (6) INSTRUCTION No. 1, date June 13, 2000, "ON JOBS POSITIONS CLASSIFICATION IN CIVIL SERVICE, THE CORRESPONDING METHODOLOGY AND GENERALIZING DESCRIPTION OF THE GENERAL SECRETARY'S ROLE IN THIS SERVICE"
- (7) INSTRUCTION No. 2, date July 07, 2000, "ON THE APPRAISAL SYSTEM OF ANNUAL INDIVIDUAL PERFORMANCE OF PUBLIC SERVANTS"
  
- 2. LAW No. 8449, date January 27, 1999, "CUSTOMS CODE"  
[Articles 13-14, 16]
- 3. LAW No. 8560, date December 22, 1999, "ON TAX PROCEDURES"  
[Articles 16, 18, 20, 26]
- 4. LAW No. 8553, date November 25, 1999, "ON STATE POLICE"  
[Articles 9-10, 15-16, 19-20, 29-33]
- 5. LAW No. 8730, date January 18, 2001, "ON THE ORGANIZATION AND FUNCTIONING OF BAILIFF'S SERVICE"  
[Articles 10, 13-16, 31-35]
- 6. LAW No. 9171, date January 22, 2004, "ON MILITARY RANKS AND CAREER IN ARMED FORCES"
- 7. LAW No. 8095, date 21.03.1996, "ON CIVIL SERVICE"  
[Articles 7-9, 13-15]
- 8. LAW No. 7961, date July 12, 1995, "LABOR CODE"



## ANNEX IV – ANSWERS TO QUESTIONS DISCUSSED IN EVERY EXAMPLE

### Examples of prohibition of contraction

#### Example 1

- ***Would prohibition instantly apply if key variables of the example are modified (official's position, related persons to the official, percentage of shares owned by the municipality)?***

#### Answer:

Yes, prohibition depends on these conditions. Prohibition does not apply when:

- The official does not hold a high leading position
- The related person is not husband or wife, major child and official or husband/wife's parent.
- Shares percentage is such that the entity is not subject to city's<sup>28</sup> control any more.

- ***What is the importance of the fact that the contract making process has been a fair one for defining the application of prohibition?***

#### Answer:

It does not have any importance at all in relation to prohibition application in terms of its activation. However, it may bear importance in official's legal and/or ethic/moral conduct judgment.

- ***What, if the contract was made before the Law on Conflict of Interest Prevention had come into effect, what could be done in this case? Consider the case assuming that the contract is made for a 2-year term and the case when the contract is made for the same term, but with the prescription that, after the first year, parties have the right to make a decision whether to continue or to cancel it due to reasonable causes, and the second year starts after the Law on Prevention of Conflict of Interest has come into effect.***

#### Answer:

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<sup>28</sup> The limit in percentage terms is not necessarily 50%. Concept of control over the entity must be assessed case by case as per the entity's statute. Therefore, there is need to see who owns what is called "controlling interest" in the company.

In the first case, contract continues, because the Law on Prevention of Conflict of Interest is not retroactive, but it will be appropriate if the public institution attempts to terminate this contract in case this is possible and accepted by the other party. In any case, if public benefit from contract termination is assessed to be higher than the financial cost of a potential penalization, the public institution can even partially cancel the contract and it will be willing to pay every cost. Here it must be taken into account that the other party is a high-ranking position official, from whom friendly and constructive behavior is expected, something that facilitates proceeding in this way.

In the second case, the Law on Conflict of Interest prohibits renegotiations of the contract.

## **Example 2**

- ***What could be done if the contract was made before the Law on Conflict of Interest Prevention had come into effect?***

**Answer:**

Idem as in Example 1.

- ***Analyze the case of making a contract before this law comes into effect under the scenario that the official would be Member of Parliament, and:***
  - ***Purchase was carried out by AB Company Ltd.***
  - ***The official himself conducted purchase.***

**Answer:**

When the official himself, who is a Member of Parliament, carries out purchasing prohibition set forth in Point 3, Article 70, of the Constitution applies directly. In the case, when a juridical person carries out purchase, the issue is more complicated and requires interpretation of Constitution. A position could be that rights and restrictions of both entities are separate and independent among them; therefore, prohibition could not be applied to companies. Nevertheless, if this position could be accepted for a moment, the outcome will be that this Constitution prohibition would be applied in a diametrically opposite manner to two Members of Parliament, where one of them directly purchases a site on his name and the other owns 100% of capital stock in AB Ltd., which eventually owns this site indirectly through the company and, therefore, he would not be prohibited from this purchasing. It would be more logical to apply the prohibition, in the same way, also in the case of company's purchase, which is, in fact, the manner defined by the Law on Prevention of Conflict of Interest.

### Example 3

- ***Discuss whether we have to deal here with a conflict of interest, or not? WHY?***

**Answer:**

Yes. Through the application of nine methodological steps set forth in Chapter II. It can be concluded that the official, because of this role, cannot, at least, avoid falling into an apparent, conflict of interest.

- ***What should the ministry have done to prevent this situation?***

**Answer:**

Pursuant to Law on Conflict of Interest Prevention, in order to prevent such situations, the ministry ought to have adopted specific rules on conflict of interest in procurement process in its internal regulation. For example, a rule holding that, it must be requested, in every case, from bidding entities to declare whether they have any interest relations or not, to any of the ministry officials; to define that entities bearing interest, as per Point 3 of Article 21, which are related to officials of this ministry that have a role in procurement, can not bid; the contract must contain a provision that provides the ministry with the possibility of terminating the contract, in a partial manner and without indemnification, in case the entity in question has provided fake information on the interests that relate him to various ministry officials, same as other cases of providing fake information that are subject to sanction by Law “On Public Procurement”.

- ***Reconsider the example through modifying the official's role by changing it into the position of head of sector in the procurement unit and, in another case, into the position of a director in the statistics directorate of this ministry.***

**Answer:**

In the case of the official in charge of procurement unit, the situation under conflict of interest and prohibition of making the contract is even clearer than in the example, whereas in the case of the official holding the position of director in statistics directorate, as a rule, conflict of interest does not exist.

- ***Reconsider the example when the interest in question is of a different type (for example, a gift, promise for employment in the future, etc.).***

**Answer:**

It must be verified whether the interests are those defined by Point 3 of Article 21 of the Law on Conflict of Interest Prevention and, at the same time, those, which are defined by Article 37 of the Code of Administrative Procedures or not. If yes, the example is developed in the same manner.

**Example 4**

- ***Are the conclusions of Example 4 correct? WHY?***

**Answer:**

Yes, all the addressed conclusions are right.

**Example 5**

- ***Is the group of experts' opinion correct in the case of deposit and of the loan?***

**Answer:**

Since addressing is no preferential, team of experts' conclusions are right.

- ***Discuss about opinions provided by both groups of experts in the case of investment contract. Which of the two groups makes an analysis that is more accurate?***

**Answer:**

Example data are insufficient to reach a single conclusion. Based on these data, team reasoning, which bases the conclusion on lack of preferential treatment, is more accurate.

- ***Modify example conditions in such a manner that one can come to a undoubted conclusion either for the eligibility of the investment contract in one case or even its prohibition in another case.***

**Answer:**

Situations of various types can be considered. For example, i) profit rate promised by the bank to the official to be higher compared to other customers and this difference to be set without providing any reasonable explanation, ii) the official does not meet the requirements to benefit such service by the bank compared to the requirements that the bank normally uses in relation to other customers, but, in this case, an exemption is made for this official and this is due to his position.

- ***Act in a similar way as above with the loan.***

**Answer:**

Same as above.

## **Examples of promises, gifts, favors, preferential treatments, and prohibitions of earning incomes due to special function**

### **Example 6**

- ***What analysis should we make if gift acceptance was directly ascertained by the direct superior of official based on information from outside the institution and after tender?***

**Answer:**

In this case, the official has accepted the gift, and he has not disclosed information concerning the gift and he has participated in setting of bidding procedures where he has had a substantial and determining role. Situation becomes similar to that of example No. 3, it is addressed in the same way, and punishment is stricter than the imposed one on the official in basic example No. 6.

- ***In a similar situation, in the case of an activity organized under the auspices of the City Education Directorate, five most distinguished students (where also official AZ's son is included) of 9-year schools, which participated in the spring Olympiad, were awarded, in a form of prize, five books of "Alfa" publications. Would this situation involve circumstances of an prohibited gift?***

**Answer:**

In this case, there is not a gift involvement in the sense of Law on Conflict of Interest Prevention or, not in the sense of that set forth in the rules of ethics in public administration. Official's son, although he is a related person to the official, accepts a permissible gift, which is not related to the official's position.

- ***How would you judge the same case of the basic example if the official, to whom the gift is delivered, is a specialist in a subsidiary directorate in the Ministry of Education and who has practically nothing to do with school books purchasing?***

**Answer:**

In this case, lack of substantial and determining role of this official in decision-making, which has to do with purchasing of school books, excludes the conflict of interest risk, even if apparent, with regard to the procurement in question. On the other hand, according to ethics rules, the gift is prohibited and, as such, it must not be accepted.

- ***In case the analysis, which is explained in the frame of example 6 addressing, that is, application of 1-9 methodological steps, does not lead to a convincing conclusion regarding the existence of even an apparent conflict of interest, would the question “Had the gift been delivered, if the official were not in that position?” help?***

**Answer:**

Yes, this question is a substantial one and very helpful in relation to complicated situations solution.

- ***Discuss also the following methodic questions:***
  - ***Is the gift made in a sincere way and without any intention?***
  - ***Is it made in a transparent manner?***

**Answer:**

These two questions are also substantial and very helpful ones to solve complicated situations.

## **Example 7**

- ***What could be a proportional sanction for this violation?***

**Answer:**

Imposing of a fine as punishment pursuant to Letter “ç” of Point 1 of Article 44, disciplinary measure pursuant to Point 1 of Article 45 of the Law on Conflict of Interest prevention and invalidation of the contract made under conditions of actual conflict of interest.

- ***How could this case be addressed if the official’s daughter had not received the promised role, because the company owner failed to keep his promise?***

**Answer:**

Nevertheless, here is an involvement of a requested favor, which is prohibited and, as such, it will make the official subject to the above sanctions and it will render the contract invalid.

- ***How could the example be interpreted if this official's daughter was a talented actress and, under the concrete circumstances, there was no doubt that she deserved playing that role and that every theater company would have preferred only her to play the respective role***

**Answer:**

This could represent at the most a mitigating circumstance for the official, but it would not change the basic conclusions of example. Requesting/offering of a favor is enough.

- ***It is practically difficult to find any fact in order to prove this agreement between the official and the theater company. What could be those circumstances, which could enable establishing of a reasonable doubt in relation to unfair performing of the duty by the official?***

**Answer:**

Every circumstance that might help to raise a reasonable doubt, for example, a monitoring by internal auditing or by a ministry working group focused on the progress of projects implementation by the beneficiaries; a potential complaint by the bidding companies or by the candidates competing with the official's daughter.

## **Example 8**

- ***Could there be any involvement of a prohibited gift condition, as defined by Law on Prevention of Conflict of Interest, if the officials were colleagues and, certainly, without any interdependent relation between them? What could be the judgment approach in that case?***

**Answer:**

No, as a rule, this is not the case of prohibited gifts, but it is hardly possible to find such ideal situations in practice. It must be observed, in every case, to find out if the gift is not related to the function. See also last questions in example 6.

- ***Could there be an involvement of a prohibited gift condition, as defined by Law on Conflict of Interest Prevention, if the officials***

***make their superior, on his retirement, a gift consisting of a set of fishing rod and tackle, for which he is passionate?***

**Answer:**

Same as above.

- ***On traditional end-of-year holidays, the staff of a directorate consisting of six members made gifts to each other. Discuss whether this involves, or not, any of the prohibitions set forth in the law in the two following cases:***
  - ***All of them make presents to each other, except the superior official, who only receives gifts.***
  - ***All of them make presents to each other, including also the superior official and the gifts are traditional ones with a more or less similar value.***

**Answer:**

In the second case, as a rule, there is not any prohibition involved, whereas, in the first one there is prohibition involved.

- ***Compare the above case with the situation, when, instead of presents, all go for a lunch and the boss is the only person who does not pay versus the case when he pays his due like the rest of the others.***

**Answer:**

This case supports, even more clearly, the conclusions drawn in the above case.

## **Example 9**

- ***Is the conclusion, which prohibits the official, who is a state representative in the company, from accepting this preferential treatment, a correct one?***

**Answer:**

Yes, it is accurate, because he is benefiting due to his position.

- ***Consider for a moment that prohibition in Letter “b” of Point 2 of Article 22 was not set forth in law. Could the same conclusion be reached? Why?***

**Answer:**



Yes, the same conclusion could be reached based on the apparent conflict of interest definition.

## Continuing conflict of interest examples

### Example 10

- ***Why the solution through transfer to the complaints sector was not the appropriate one?***

#### **Answer:**

Sanitation service is one of the local government's essential services and it is highly exposed to potential and frequent complaints of citizens. The possibility of this official to frequently fall into a conflict of interest is more than clear.

- ***What other private interests, apart from the wife's employment in the company at issue, could create a continuing conflict of interest situation in the given case?***

#### **Answer:**

Every interest defined by Article 5 of the Law on Conflict of interest may comprise a cause of falling into a continuing conflict of interest. The issue must be seen in every concrete case.

- ***How could we judge another case of an official, who holds the position of specialist in the urban planning directorate and, whose wife is a shareholder in a building company? Compare the two cases when the city is a large one, building companies are numerous and number of constructions is also large versus the diametrically opposite case.***

#### **Answer:**

There are not, in the first situation, sufficient conditions for the existence of a continuing conflict of interest and the issue can be resolved through the case-by-case conflict of interest approach. Circumstances, in the second situation, may lead towards continuing conflict of interest emergence.

- ***Based on the above paragraph, what could be the judgment in both cases if the official was a high position municipality official (for example, the city Mayor in person)?***

**Answer:**

These are circumstances defined by Point 6, Article 37, of the Law on Prevention of Conflict of Interest. According to it, apparent conflict of interest becomes unavoidable and this is only this type of conflict, which is tolerated. Mayor must take all necessary measures to ensure a decision-making, which is transparent, fair and subject to monitoring, to the extent possible, and he must not participate in Territory Planning Council voting when the company at issue has made its application.

**Example 11**

This example is fully addressed in the text.

**Continuing conflict of interest examples  
Group A Officials' case****Example 12**

- ***Discuss about the reasons why Bank X is incompatible as a trusted person. In which moment did this incompatibility occur and why? Try to analyze apparent continuing conflict of interest emergence. Find references in the Law on Conflict of Interest Prevention. Has HIDAA acted correctly?***

**Answer:**

Incompatibility came up when AF Company purchased bank X shares. See Paragraph "ii", Letter "c", Point 1 of Article 38.

- ***Which are the official's superiors according to the meaning of this term in Law on Conflict of Interest Prevention?***

**Answer:**

Collegial body (Constitutional Court) itself; President and the Parliament, but only to the extent that the Constitution allows them in the capacity of "superior officials" or "superior institutions," as stipulated by the Law on Prevention of Conflict of Interest<sup>29</sup>.

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<sup>29</sup> Title "superior official" or "superior institution", in this case, is not in that classic meaning which is used in administration, according to which the superior official gives orders, assigns tasks, delegates administrative authorities and functions to his subordinates. Independent constitutional bodies, by definition, do not have any "superior", but they operate based on the self-regulating principle and they serve as "guards" of constitutionality and legality of other institutions. In the sense of the Law on Prevention of Conflict of Interest, the word "superior official" or "superior

### Example 13

- ***Does the activity of a notary comprise a natural commercial person activity in the sense of Article 35 of the Law on Conflict of Interest Prevention?***

**Answer:**

No, it not a commercial activity, but it is a free profession bearing elements that bring it closer to a public function, in other words, a “delegated” public function.

- ***Is notary act regarded as an official document?***

**Answer:**

Yes, it is an official document and it can be called an official act according to the Law on Conflict of Interest Prevention (distinct from a private act). Sick leave and grades in the register of a school, even if it a private one, have the same characteristics.

- ***Does the official have any possibility to utilize his acts (court decision) in order to use influence in favor of his wife?***

**Answer:**

As a rule, no, but not all possibilities can be excluded, for example, when the notary act itself is subject to judgment (for example, when the claim against it is that it has been issued in an irregular manner due to the notary himself) and, even more, when it has the attributes of a decisive evidence regarding judgment.

### Example 14

- ***Is the Prime Minister right when judging that the minister continues to be subject to continuing conflict of interest even after minister's wife transferred shares into a passive ownership? Provide answers through applying 1-10 methodological steps. Do you notice that, even when minister's wife and her two brothers have a passive ownership of shares, it could seem that, due to this cause, minister frequently risks performing his duty in an unfair manner.***

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institution” must be construed only to that extent that the Constitution assigns and allows these institutions to act in their capacity as appointing, supervising or dismissing bodies or only for causes and only with the means or procedures that the Constitution has defined.

**Answer:**

Yes, he is right. In fact, Law on Prevention of Conflict of Interest addresses restrictions on ministers, irrespective of their scope of authority, but when it is the authority scope itself involved, the Law on Prevention of Conflict of Interest restrictions do not solve the situation completely and a behavior like that one in this example would be commendable. The minister is not subject to any peremptory obligation defined by the Law on Conflict of Interest to sell his shares, but Prime Minister enjoys the right, as the superior, to request from him, and even set this as a condition against his appointment or his being in a minister's position, and it remains in the minister's hands what choice he will make between duty and property.

- ***Under the circumstances of shares passive ownership by minister's wife, has the minister a priory to get rid of the risk of falling into a case-by-case conflict of interest? What should the minister do so that the only conflict, which may potentially emerge, for example, in the moment of renewing the license, will be the apparent conflict of interest?***

**Answer:**

No, he is not *a priori* released and he must be cautious case by case. He must take all necessary measures in terms of maximum transparency and impartiality (See Point 6, Article 37 of the Law).

**Example 15**

- ***What is the local public interest in relation to task to be carried out by OM? Is it in the public interest that the monitoring to be conducted by OM with municipality funds should be fair and impartial?***

**Answer:**

It is, first, the monitoring of fairness, impartiality, and other qualities like professionalism, analysis accuracy, etc.

- ***Would the mayor be, even apparently, interested to have this monitoring conducted in such a way that it could be in favor of the majority, which he represents? If YES, would it be reasonable to think that he would use his relationship with OM head to affect monitoring results?***

**Answer:**

Yes, every person could have a reasonable doubt that the city Mayor would be interested to influence monitoring.

- ***Is this a mayor's conflict of interest? What is the interest, from which the conflict stems or, by which it is caused, is it mayor's political interest or his relationship with OM head? Test your answer through taking a similar example, but with the scenario where that head of OM does not have any relationship with the mayor, apart from being a well-known supporter of his party. Do both cases lead to similar result of prejudicing the monitoring process conducted by this organization? Do both cases lead to the same conclusion?***

**Answer:**

Yes, according to the example data, there is a conflict of interest between the Mayor's public duty and political interest, which is attained through establishing of civil partnership relationship, where the latter serves as a means and not as an end in per se. From this point of view, this makes it similar to the case when the monitor is a political supporter.

Focusing on the civil partnership, the conflict possibility of also favoring (in the frame of contract application assessment, making of payment, etc.) to a related person for the interest of the latter can not be excluded.

## **Continuing conflict of interest examples**

### **Group B officials' case**

#### **Example 16**

- ***Discuss about factors, which led to the conclusion regarding absence of continuing conflict of interest, only in relation to the official's role in issuing normative acts, without taking into account for a moment, his membership in the licenses commission.***

**Answer:**

Some of these factors are as follows:

- Acts drafting process puts into question the official's substantial and determining authority;
- Normative acts, as a rule, do not generate advantages for certain natural or juridical persons;
- Fuel retail trade includes a considerable number of operators.

- ***If we follow the above conditions, could we have the same situation with no conflict of interest if official's father-in-law were a shareholder in wholesale fuel trading company? Assume that wholesale trading is carried out only by a handful of companies and it shows symptoms of an oligopoly market.***

**Answer:**

In such a situation, normative acts, governing a limited number of entities, demonstrate in reality the characteristics of an individual act with direct effects on these entities, enabling continuing conflict, at least in appearance, of interest emergence.

- ***What are the factors that bring closer the officials in a ministry, who perform duties in organization structures that deal with regulation and/or supervision of markets on one hand, and members or officials of specific regulatory entities (telecommunication, competition, financial and banking sector, energy, insurance, water supply, media, etc.) on the other?***

**Answer:**

The more the corresponding trade, which is under the ministry officials' regulatory authority, comes closer to monopoly nature in, terms of competition characteristics, the more situations of continuing conflict of interest emergence involving ministry officials versus those of regulatory entities approach. Therefore, the continuing conflict of interest addressing approach, under such conditions, tends to approximate rules defined by the Law on Conflict of Interest Prevention regarding regulatory officials, but without having equal restrictions to them.

**Example 17**

- ***Make a comparison between example 16 and 17. What is the difference between them and what do they have in common from the viewpoint of the factors and prohibitions. If example 16 contained the fact that official AB had his son employed in a retail trade company instead of the fact consisting of the interest relations with his father-in-law, could that be prohibited as it is the case with official EN in example 17?***

**Answer:**

Two examples are joined by the nature of duty, but they single out by their market features, from which stems a different cause-effect relation and, therefore, a different addressing approach of conflict and of corresponding prohibitions. Employment of official's son in example 17 is permissible and a

nonparticipation of the official in a decision-making related to the consideration of an issue, which has to do with the son in question, suffices. However, in the case of regulatory official, his son's employment is incompatible with his function, as per Point 6 of Article 21 of the Law on Prevention of Conflict of Interest.

- ***If in the case of interest no. 1 of the official EN, instead of carrying out the activity as natural commercial person, there is the case that he owns some shares in a company, which deals with telecommunication antenna repairs, would it be allowed to this official to enjoy an active or passive ownership of shares?***

**Answer:**

No, even shares ownership in a passive manner would be prohibited and he would be obliged to sell them, or the company should not have any contract relation with any of the entities, which are subject to regulatory entity scope of regulation over the entire period that the official would be in that function.

**Example 18**

- ***Determine how should the customs officer himself have behaved in this case (refer to Article 37 of the law)?***

**Answer:**

The customs officer ought to have assessed himself the risk of conflict of interest emergence, he ought to have informed his superior and ought to have asked and tried to provide contribution with regard to finding an appropriate solution.

- ***Is there any room to deepen any further the control over customs clearances carried out by "AR" company"? Is it possible that, even though customs officer was never involved in any of the customs clearances of this company, he will have used his influence over his colleagues in terms of favoring this company? How could such an administrative inspection be conducted?***

**Answer:**

Yes, control can extend to cover customs clearance acts of customs official's brother company to find out if there was any favoring by other customs officers influenced by the customs official in question or just for the sake sentimentalism. Administrative investigation must be based on Code of Administrative procedures; it must be fair and impartial and give a hearing and defense opportunity to the party subject by the inquiry and all documented in a correct manner.

## Examples related to official's recruitment and career

### Example 19

- ***What is the judgment approach to identify the existence or not, of the conflict of interest in the minister's case? What about the case of his father-in-law?***

#### **Answer:**

Apply the approach as recommended in methodological steps 1-10 regarding continuing conflict of interest.

- ***Analyze reasons why can apparent conflict of interest emergence be tolerated, but only its emergence? Why does not transfer of minister's father-in-law from the ministry become immediate? Take into account for a while that practice has demonstrated there has been a high frequency of replacing ministers (for example, a new minister every 6 months).***

#### **Answer:**

Minister's father-in-law holds that position regardless of the minister. Transfer to an equivalent position requires time and coordination between institutions to be accomplished, and, additionally, it does not depend only on these officials. It is likely that it is objectively impossible, at least, for some time. Under these circumstances, the apparent conflict presence is commonly understood, but this does not imply that actual conflict of interest is permissible. In addition, it could be to the detriment of public interest in case public servants' transfer to equivalent positions would follow frequency of political officials' shuffling. However, both officials must make their utmost efforts to resolve the issue.

- ***As described above, but with the scenario where, instead of the minister, there was an official with predetermined office term (for example, a five-year office term), how could officials act in this case?***

#### **Answer:**

Situation, in this example, makes the need for a solution even more imperative, because it is both unacceptable and unjustifiable, to the same extent, for a conflict to remain pending for 5 years in succession.



## Example 20

- ***What could be the concrete legal approach to ensure necessary information in order to avoid conflict of interests ahead of appointment moment? Discuss the idea of ethic contracts between institution and its new appointees.***

### **Answer:**

Same as in Example 3 regarding procurement, whereas, in the case of recruitment, competing candidates must be asked in advance if they have any interest relation, including the family one, to other institution officials. The institution itself may define, in the frame of its internal regulation, some functions where officials, who perform them, must not have any interest relation between them, including family ones. Nevertheless, the employment contract must contain a provision, which in case of inaccurate information provided by one competitor, this could comprise a reasonable cause for terminating the contract or for official's dismissal from his job.

- ***Pursuant to the civil servant status law, the direct senior official is entitled to the right of choosing one out of three candidates selected by the testing commission. How would you judge the case when one of the three candidates happens to be superior's uncle' son?***

### **Answer:**

Uncle's son is a fourth degree relative, so he is not included in the circle of the definition of Article 37 of the Code of Administrative Procedures (and in law on rules of ethics in public administration). However, family relation with the first-degree relative is commonly accepted and, even more, in the case of direct subordinate. This situation must be considered as a conflict, at least in appearance, of interest. Additionally, it is quite likely to have an apparent conflict of interest even if this involves the superior official's uncle's son, at least inside the same institution or in any direct subsidiary institutions.

The Law "On Civil Servant Status" entitles the superior official to the right of choosing one out of three candidates, but that must not be construed as an absolute freedom, out of the context and of the spirit of this law, which defines that recruitment and career must take place on the basis of merits/skills. In this sense, the right, to which the superior official has been directly entitled by the legislator, must be utilized only to identify other three candidates' skills and features, which have not or cannot come out of testing and which are deemed important for the job position. Family relations per se are not like this at all and any choice between 3 candidates, which is based on this information or, that is determined by it, would be unfair. Ideally, between 3 candidates enjoying same

qualities, the one, which has family relations to the superior official, must not be selected.

### **Example 21**

- ***Following his superior's official notification, what actions must the official and his superior carry out in order to rule out every doubt on the possibility of a conflict in the past?***

**Answer:**

Actions like verification of this official's decision-making in relation to this entity, making of these actions transparent, official notification to the entity to refuse the offer and emphasizing that its accomplishment is subject to criticism. This experience must be materialized into concrete rules in the public institution internal regulation and it must be reflected in the contracts with different contractors in order to precede other similar cases. Rules set forth in Articles 16 and 17 of the Law "On Rules of Ethics in Public Administration" must be also taken into account regarding this issue.

- ***What conditions should be met so that this official can, some days following his retirement, work in this organization without causing an apparent conflict of interest emergence?***

**Answer:**

Discuss and identify specific conditions in specific sectors.

- ***How could this case be addressed if the director would accept the offer, would not inform his superior and, after his retirement, would start working for NGO X? What could the superior official or the ministry do in such a case?***

**Answer:**

Starting work, right after going on pension, could be a reasonable cause for doubt and it would require, at least, a consideration of decisions made by this official in relation to this NGO or, also to others, which could be deemed rationale and important to make them subject to judgment. The most important issue, but also the most difficult, is confirmation of the promise, which is made and accepted, about recruitment in exchange of favoritism. In any case, the ex-official and the NGO must be consulted in terms of the obligations that they have according to articles 16 and 17 of the law on ethics.

## Examples on invalidity

### Example 22

- ***Why was the conclusion of conflict of interest existence reached?***

**Answer:**

See example 20 and the answer to its last question.

- ***Why was the conclusion of absolute invalidity of director's act of choosing in the capacity of direct superior reached?***

**Answer:**

Both persons have family relations of second degree (brother and sister). So, it is impossible for them to be unaware of the interest. Failure to declare the interest and even the attempt to influence commission's choice has been carried out in full awareness. Selection between three candidates, although under director's discretion, is made due to the family relation and not due to merit. So, the official has acted against the decision-making procedure of issuing the act of choosing the candidate, thus falling into a flagrant violation of the Law on Conflict of Interest Prevention, the Law on Civil Servant Status and the law on rules of ethics in public administration.

- ***Modify circumstances or interests in the same event so that invalidity transforms from absolute into a relative one. How could the event develop in this case?***

**Answer:**

Discuss and highlight the interest action by focusing on proper ones or on family relationships regarding different categories of officials involved in the recruitment process and in the officials' career. Refer to four categories provided in Chapter IV of the manual.

### Example 23

- ***Why did they conclude that there was a conflict of interest involved?***

**Answer:**

This involves a hostile relationship between the official and the entity, for which he is fully aware. It is disclosed and then documented, in a convincing manner, also by other persons.

- ***Why did they conclude the act was subject to invalidity? Why was this invalidity judged as relative?***

**Answer:**

Officials, who are entitled to the decision-making authority, acted and made a decision without being aware of the facts. In addition, the characteristics of decision-making, in this case, as a collegial body contribute.

- ***Would the act have been invalid if canceling of bidding had occurred because majority of council members were going to vote against it, were aware of all facts and, were not going to be influenced by council member AB speech and vote, just for the cause, but nothing else, of this official's conflict of interest?***

**Answer:**

As a rule, it is not. The act, as a rule, would be valid in this case, since the council has made a decision to cancel bidding for other reasons and not due to hostility, suffice that other causes are legal. Under these conditions, participation, or not, of the official in decision-making is not important regarding the future of the act.

- ***Modify the case, without affecting its substance, in a way that invalidity turns into an absolute one.***

**Answer:**

For example, informed about the hostility by the council member in question, a blocking number of other council members, due to their political and personal relationship to this council member, solidarity with him and penalize the company for that cause.

## **Example 24**

- ***Is this example correctly solved? WHY? Which article of the Law on Conflict of Interest Prevention does mayor's action violate?***

**Answer:**

The example is correctly resolved. Mayor's actions are flagrantly against "absolute" prohibition set forth in Point 2 of Article 21 of the Law on Conflict of Interest Prevention.

- ***Is there any possibility that, by means of modifying any of mayor's interests, it can be changed from absolute into relative invalidity? How could the case be developed in this case?***

**Answer:**

There are such opportunities when types of interests and cause-effect relation are weak. For example, city Mayor is not objectively aware of a private interest of one of his relatives, who is outside the circle of persons with family relations to the official as defined by Article 24 of the Law on Conflict of Interest Prevention. But, when it is announced after the contract is made, and, based on this data, the conclusion is that this constitutes an apparent conflict of interest. Anyhow, this case must not be misunderstood to imply that an apparent conflict of interest, as a rule, does not lead to absolute invalidity, while the opposite actually is true.