

The policies of identifying and managing conflicts of interest of civil servants in the civil service

MSc. Julejda Gërxi (PhD Candidate)
University "Pavarësia" Vlorë, Albania

Ma. Afet Mamuti (PhD Candidate)
State University of Tetovo, Tetovë, FYROM

Abstract

At the core of preventing and managing conflicts of interest are a set of principles that underlie the functioning of a democratic state and service of its citizens. Thus, principles such as transparency and impartiality in decision-making, the integrity of officials and keeping in mind the best interest of potential public during the decision-making, public confidence and increase his confidence in the government, form the basis of identifying policies and management of conflicts of interest or civil servants.

Albanian law to prevent conflicts of interest is a law in its entirety, permeated by a spirit of somewhat stringent restrictions on civil servants. Such limitations have been given as the need to secure a decision as fair and impartial in the public interest, and the current state of the low level of public trust and confidence in the integrity of government institutions.

The policy followed for identifying and managing conflicts of interest can be analyzed by doing, at first, a distinction between direct action policies in the field of conflict of interest (which are intended to prevent potential situations of conflict of interest through the specific regulatory provisions as laws and regulations) - and indirect action policies (aimed at preventing these situations by organizing public administration reform).

In the context of direct action policies should distinguish between: cases in which the legislator has aimed to identify the ex - ante (before that happens) situations which could lead to conflicts of interest and cases or decisions designed to determine the important rules and non-specific prevention clause requiring verification on a case by case ex - post (as is) in order to decide whether an individual case is inconsistent with the general framework legislative described above (ie the ex-ante). Indirect action policies intended to prevent situations of conflict of interest by reforming the organizational structure of Public Administration and designed to create favorable conditions to prevent civil servants, recruited by the political institutions "to invade" the area in which administrative discretion is exercised.

Key words: civil servants, conflicts of interest, the policy, law, prevention and management.

Introduction

Government Public Integrity is a fundamental premise which is reflected in many constitutions around the globe. The importance of this premise is discussed in the excellent manner in the Code of Official Conduct Senate USA:

«Ideal concept of public office, expressed by the words» A public office is a public trust ‘, meaning that the officer was given a public trust of the people, the officer must exercise this power only for the benefit of people and never for the benefit of his or some other person and the officer should not lead it never works in such a way as to undermine public confidence. «

An officer without integrity cannot fulfill his duties fairly and impartially. I started by his personal interests or being under the pressure of other individuals or groups as a result of lack of integrity, he will not be able to perform his duties in the interest of the whole society. Such actions of individuals vested with the power of the governed will lead to loss of public integrity of all government and, therefore, in violation of public trust.

But since all civil servants have a legitimate interest arising from their being of ordinary citizens, conflicts of interest cannot simply be avoided or stopped, but it is very important to be defined, identified and managed.

Law no. 9367, dated 07.04.2005 «On prevention of conflicts of interest in the exercise of public functions» in Article 3 / 1 his gives this definition of conflict of interest:

«Conflict of interest is a situation of conflict between public duty and private interests of an officer, in which he has private interests, directly or indirectly, to influence, affect or may affect the performance seems so unfair to tasks and his public responsibilities.»

This is a pretty accurate definition of conflict of interest which comprises in itself the three types of conflicts of interest:

*“actual conflict of interest” is a situation in which the private interests of official influence, **have influenced or may have affected** the performance of duties unfairly and his official responsibilities.*

*“apparent conflict of interest” is a situation in which the private interests of the official look, in face or form, **if they have affected, affect or may affect** unfairly carrying duties and responsibilities of his official but, in fact, the effect has not happened, this is not or cannot occur.*

*“potential conflict of interest” is a situation in which the private interests of the officer may cause, **in the future**, the emergence of actual or apparent conflict of interest, if the official would be involved in certain tasks or responsibilities.*

Also, this article gives definitions of conflicts on a case by case and continuous interest:

d) “case by case conflict of interest” is the situation with a conflict of interest, in one of three kinds of the above, that appears a case by case and relates to a particular decision-making;

e) “continuing conflict of interest” is a situation in which a conflict of interest may occur **repeatedly and or frequent** in the future.

It is obvious that **an actual conflict of interest** is treated as a matter of fact. Private interests, in this case affect, have affected or might have affected the performance of duties unfairly by the public official.

While, in the case of **an apparent conflict of interest**, we are not dealing only with issues fact, in this case, it is sufficient for the public to have valid reasons to think that a civil servant has acted in a state of conflict of interest is therefore we are dealing with a subjective assessment of the situation of conflict of interest.

The phrase «look, in face or form, if they have affected, affect or might affect» represents an unspecified statement objectively that in many cases can lead to difficulties in applying the rules specifically for the management of conflicts of interest. In some cases, situations of apparent conflict of interest can be quite noticeable, but the problem lies in those cases for which there can be a full conviction (or a reasonable perception) of the public that there has been or may have a influence of private interests of civil servants in carrying out unfairly duties and responsibilities of it.

Doctrine on conflicts of interest, in this case, addresses the reasons reliable criteria that make the public think rationally - that decision is influenced by certain private interests. What would have considered «valid reasons»? And what we mean by «to think rationally»?

The same dilemmas arise about **potential conflicts of interest**. In this case, the probability that refer to private interests of a civil servant, can do it in the future, be in actual conflict situations or out of interest, then added another criterion more difficult to determined objectively: **probability**.

The more important the powers of a civil servant the higher is the probability that he, in future, face or actual conflicts of interest noted, but the definition of conflict

of interest is a problematic issue. One such difficulty is inevitable to the nature of the conflict of interest.

At this point, Kernighan and Langford have been completely correct in alleging that: **«It is important to recognize the conflicts in appearance and potential conflicts of interest, which make the definition of conflict of interest very large (unspecified) and perhaps even unfair.»**¹

Although the definition of conflict of interest may be too broad and unfair to a certain extent (the practical implementation of the rules of avoiding and resolving conflicts of interest, there may be cases of violations of individual rights of civil servants), the consequences of such conflicts are more severe and direct impact on public trust and confidence in the integrity of civil servants and in governing the country.

Are exactly such consequences which necessitate the definition of conflict out of interest and potential to avoid or minimize such situations in the activity of civil servants in public administration.

Identification and management policies of conflict interests

At the core of preventing and managing conflicts of interest are a set of principles that underlie the functioning of a democratic state and service of its citizens. Thus, principles such as transparency and impartiality in decision-making, the integrity of officials and keeping in mind the best interest of potential public during the decision-making, public confidence and increase his confidence in the government etc., form the basis of identifying policies and management of conflicts of interest.

Peter Eigen, Chairman of Transparency International said:

«Across the world people have a growing anger in ways with which public power is manipulated for private gain. The message we receive from various national examples from every corner of the globe is that they want to see the rules clear and understandable set of conflicts of interest and conflicts of interest involving public servants, such a thing be achieved through open monitoring of assets and their obligations. «

Albanian law to prevent conflicts of interest is a law in its entirety, permeated by a spirit of somewhat stringent restrictions on civil servants. Such an assertion comes not only from the analysis of definitions of conflicts of interest, but also the analysis of the definition of private interests, regional entities subject to regulation by this law and the mechanisms that the law in question provides for the identification, prevention, resolution and punishment of conflict of interest situations. Such limitations have been given as the need to secure a decision as fair and impartial in the public interest,

¹ Kernighan & Langford, "The Responsible Public Servant", page 138

and the current state of the low level of public trust and confidence in the integrity of government institutions.

In efforts to prevent, manage and resolve conflicts of interest situations, care in finding the proper balance between concrete measures to achieve such purpose and potential violations that may be made to individual rights of civil servants (And these are rights that derive from their being on citizens like everyone else).

It is clear now that the range of situations of conflict of interests is quite wide. Consequently, the measures to be taken to manage and resolve such situations are varied because, in contrast, cannot be accomplished.

In restrictive measures against the private interests of civil servants there is the danger that their rights are violated. Such a thing is «justified» in the name of public interest lies in increasing the public's trust and confidence in state institutions, ensuring an impartial and transparent decision-making and in maintaining the integrity of civil servants.

Ideally the best way to cope is to avoid conflict of interest his comprehensive. But one thing is very difficult, if not impossible, practically.

Civil servants are individuals who have interests of their property or not property like all other individuals in society. These interests vary depending on the particular officers and to economic, social and political of the country. In most cases, it is impossible to anticipate and avoid all situations in which the private interests of civil servants may influence their decision-making while performing official duties.

Given the above claim, unable to avoid conflict of interest overall, today sought ways and means to achieve **the minimization** of conflict of interest situations. Such an identification is realized through policy and management of these situations.

The policy followed for identifying and managing conflicts of interest can be analyzed by doing, at first, a distinction between **direct action policies** in the field of conflict of interest (which are intended to prevent potential situations of conflict of interest through the specific regulatory provisions as laws and regulations) - and **indirect action policies** (aimed at preventing these situations by organizing public administration reform).

In **the context of direct action policies** should distinguish between:

(i) cases in which the legislator has aimed to identify the **ex - ante** (before that happens) situations which could lead to conflicts of interest and

(ii) cases or decisions designed to determine the important rules and non-specific prevention clause requiring verification on a case by case **ex - post** (as is) in order

to decide whether an individual case is inconsistent with the general framework legislative described above (ie the ex-ante).

- **Direct action policies**

One of the first category of policies related to identifying **ex-ante**, includes all those provisions that address the conflict between public interest (implicit in the functions assigned to officers) and subsequent private interest in participating in political activities and especially in political elections. In accordance with this policy are defined in the Constitution and other laws of precise definitions of **«ineligibility»** and **«incompatibility»**.

«Incompatibility» relates to situations in which, for some reason, the law does not permit the employee to stay on a post in which he was elected in a valid manner. If the situation of non-compliance continues, he should be disqualified from the post in which he is elected.

The principle of «incompatibility» is designed to prevent situations in which, according to a priori estimate of the legislator, would conflict with the above mentioned principles of impartiality and fair functioning of the administration and appropriate.

While the principle of «ineligibility»² is designed to exclude from the election campaigns of all public officials who are in a position from which they can exert improper pressure in an election at the expense of the principle of freedom of voting³ and the principle operation of fair and impartial public administration⁴.

A series of laws passed in our country precisely defined in ineligibility situations (including the prohibition of membership in political parties for the category of officials) and discrepancies In the context of direct action policies related to **ex-ante** definition of situations of potential conflict of interest, it is necessary to bear in mind the provisions governing the various possible situations of conflict between public interest in the exercise of public functions by officials, and their private interest.

² **Article 69 of the Constitution of the Albanian Republic:**

"1. Cannot stand or be elected deputies, without giving up the duties:

- a) judges, prosecutors
- b) Active military service
- c) police and national security employee
- d) diplomatic representatives
- e) chairmen of municipalities and communes as well as prefects in the places where they carry out their duties
- f) chairmen and members of election commission
- g) The President of the Republic and the high officials of state administration in accordance with law.

2. A mandate/ warrant gained in objection to paragraph 1 of this article is invalid. "

³ **Article 45 / 4 of the Constitution: "The vote is personal, equal, free and secret."**

⁴ **Article 12 of Law Nr.8485, date 05.12.1999 "Administrative Procedural Code of the Republic of Albania"** stipulates that "Public Administration, while practicing its functions, deals all entities with which enters in the relationship, in an honest and impartial way "

Such prohibitions are provided in a series of laws and legal acts. In this regard we must say that it is accepted that some activities such as teaching, writing, and consultations are exempt from such obligation.

A major role in the policies of **ex-ante** identification of situations of conflict of interests have played especially law no. 9131, dated 08.09.2003 «On rules of ethics in public administration» and the law 9367, dated 07.04.2005 «On prevention of conflicts of interest in the exercise of public functions.»

Regarding **ex-post** identification of situations of conflict of interest, the concrete existence of a conflict of interest situation is assessed on a case by case basis by reference to the conditions and criteria established by the general provisions. So we have to do with the examination in any particular case, if provisions are violated. In the context of these policies would be appropriate to the Criminal Code of a special provision which criminally punish cases of abuse public office in situations of conflict of interest.

Article 248 of the Criminal Code (abuse of office) is very wide, while a special provision would strengthen the effect as well as the preventive punishment of conflict of interest. In the context of these policies are a set of rules established by legal acts of legislation which oblige civil servant to withdraw from the concrete decision-making, in all cases when they noticed that are in situation of conflict of interest.

- ***Policies indirect action***

Indirect action policies intended to prevent situations of conflict of interest by reforming the organizational structure of Public Administration. But this poses a problem as executive officers exercise a broad discretionary power. They play also a major role in the allocation (distribution) of goods and services and influence (if not determining), the politics of governance. It is an undisputed principle already proposed that any administrative reform needs to identify solutions regarding effective prevention of situations in which the interest of the civil administration interact with that which he belongs and makes the administrative decision-making be influenced in unfairly by private interests of the employee.

These policies can be classified as follows:

Policies designed to prevent the civil servants are under the influence of pressure or undue interference from political power.

Policies and rules applied to give transparency to simplify the system and external control of the actions of civil servants.

Policies and rules applied to reinforce the responsibilities of civil servants.

Policies adopted to provide the regulatory certainty.

Applied policies and measures to strengthen the awareness of staff particularly sensitive to these issues the importance of ethical factors through effective training programs.

1. Referring to the first aspect, the policies applied to reform the organizational structure are designed to create favorable conditions to prevent officers recruited by the political institutions «to invade» the area in which administrative discretion is exercised.

So these key policy aim depoliticize the administration and finding ways and means which enable policy not unfairly influence administrative decision.⁵ It is known that the fastest way to achieve this kind of «occupation» of the Administration's de-appointment of management personnel (and others).

Special attention should be paid to policies that ensure the selection of civil servants with the competition, for the acceptance of civil servants, and for further continuation of his career and to limit political appointments to senior administrative executives.⁶

These policies are based on a more radical distinction between policy-makers and administration, between government action (which connects to a political force that has the majority) and administrative action that, in implementing the policies of the majority (which must always be in accordance with the principle of legality) is forced to act only in the interest of the law without political assessments of any kind.

2. Also, care should be made to the policies undertaken to reform the organizational structure and procedures to provide transparency in administration and to facilitate control of foreign civil servants.

This order is determined by provisions which stipulate the obligation of the administration to explain the reasons for its decisions⁷ and to provide interested

⁵ **Article 107 / 1 of the Constitution:** "Public employees execute the law and they are at people service. " formulated this way it clearly shows that Public Administration should act only in the public interest, which is exemplified in the laws approved by the lawmaker (legislator), and should never act under political considerations or whatever else.

⁶ **Article 107 / 2 of the Constitution stipulates that :** "Employees in public administration are assigned through competition, except the cases provided by law."

⁷ **Article 108 / 1 of the Code of Administrative Procedure:** "exalt" the cases law itself provides giving the reasons, should necessarily be given reasons for all those acts which are partially or totally:

- a) deny, extinguish, limit or otherwise affect the rights and legitimate interests or impose obligations or penalties, or burden;
- b) make a decision on requests for review or appeal;
- c) make a decision contrary to the claims of the interested parties or contrary to an official information or proposal;
- d) constitute a deviation from the followed practice for the resolution of similar cases;
- d). cause revocation, modification, revocation or suspension of a previous act "

Whereas, Article 109 / 1 of this Law provides that "the reasoning should be clear and include an explanation of legal and factual basis of the act...."

citizens an opportunity to participate in the decision-making by allowing them to have access to the transparency of documents possessed by the administration.

If these procedural guarantees are ignored by the public authority will be what the court will quash the administrative decision⁸ for not respecting the decision-making procedure regulated by law.

3. Also play an important role in the policies adopted to reinforce the accountability of civil servants versus private citizen.⁹ Such a responsibility of civil servants leads them to be more cautious in their decision-making in situations of conflict of interest. A major role has to play at this point the responsibility of the employee against the administration for all damages caused to third parties in case of an unlawful decision-making.¹⁰

4. Policies and actions designed to give contribution ongoing safety and regulatory system (legal framework). Here we should mention:

First: efforts to simplify the legal framework through codification, but also reduce the ambiguities and contradictions in different laws.

Secondly, it should be referred to initiatives designed to reform domestic regulations in sectors with a high risk of corruption (especially in sectors dealing with public works contracts and on those taxes and customs).

5. Policies that contribute indirectly to prevent situations of conflict of interest, should also consist of training programs for civil servants on issues dealing with conflicts of interest. Given the wide range of situations of conflict of interest and often insurmountable difficulties of legal regulation of all those situations, is more than necessary that civil servants be subject to effective training programs on these issues. Such a thing will serve:

⁸ **Article 18 of the Code of Administrative Procedure:** "In order to protect the constitutional and legal rights of private persons, administrative activities is subjected: a) internal administrative control..., b) control by the courts in accordance with the provisions of the Code of Civil Procedure.

⁹ **Article 14 of the Code of Administrative Procedure provides that:**

"The organs of public administration and their employees are responsible for the damages that they cause to the private individuals:

- unlawful decisions; - unlawful refusal to make decisions, and
- providing inaccurate information written to private persons, and for any other cause or event prescribed by law. "

¹⁰ **Article 40 / 6 of law no. 9367, dated 7.4.2005:** "On prevention of conflicts of interest while performing their public functions " defines: "When an act of a public institution becomes invalid, pursuant to paragraphs 1, 2, 3 and 4 of this article:

a) public institution, when it judges that the officer acted in bad faith:

i) undertake procedures for disciplinary punishment against the official cause of the invalidity of the act;

ii) use all legal means to pass the burden of compensation to such officer;

iii) requires the competent court to order compensation in favor of the institution for the moral damage caused;

iv) filing criminal charges against the officer, if he deems that the violation of it constitutes a criminal act.... "

The new law brings this about the responsibility of public officials in cases of unlawful decisions in the exercise of official duties is forecast clearly the responsibility of the institution against the administration officer for the damage caused to third parties without allowing no room for interpretation.

First: to create a clear idea of all civil servants in connection with situations of conflict of interest (often civil servants can act in situations of conflict of interest because of ignorance objective to them that they are in such situations) and:

Secondly: to aware them of the consequences of decisions taken in that situation. Although we have a very good legal framework regulating the conflict of interest (our law on conflict of interest is a bill which, in its entirety, makes a very good coverage of the conflict of interest situations and contains restrictions somewhat strict about these situations), still remains a very important factor is awareness of all civil servants to the serious consequences of decisions made in situations of conflict of interest. Without such awareness would hardly have expected results in efforts to prevent and avoid conflicts of interest situations.

All the policies discussed above the main aim of public administration reform affecting, indirectly, in the prevention and avoidance of situations of conflict of interest and influence of these situations in administrative decision making.

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