CONFLICT OF INTEREST

THROUGH THE LOOKING GLASS:

Feasible approaches to defining the concept in statutory and regulatory legislation

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ABSTRACT

The paper addresses possible approaches to and challenges with providing statutory definition of "conflict of interest". Based on the analysis of legislation in more than 20 countries as well as relevant documents of international organizations, three widely used models for defining conflict of interest are identified and their comparative advantages and disadvantages are considered. In addition, certain elements of the conflict of interest definition that can have a significant impact on law enforcement practice are discussed in detail. Special attention is paid to the history of the development of relevant legislation in Russia, the problems of the existing definition as well as feasible directions for its improvement.

Key words: conflict of interest, private interests, related persons, corruption, Russia

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Introduction

REGULATION OF CONFLICTS OF INTEREST IS WIDELY REGARDED AS ONE OF THE CRUCIAL ELEMENTS OF ANTI-CORRUPTION POLICY:

it is important for preventing corruption, maintaining transparency in public domain and, consequently, building public trust in authorities' decisions. Also, rarely mentioned, it helps to more effectively detect committed offences of corruption and bring to account those responsible.

The need for appropriate measures to be taken is stressed in all major anti-corruption conventions and numerous other documents of international organizations. Most of the countries have introduced and continue to develop various relevant policy instruments. However, under closer scrutiny, it comes to light that the strategies employed to regulate conflict of interest differ significantly. This applies not only to methods of identification or resolution, but also to the very fundamentals, including the approaches used to define conflict of interest.

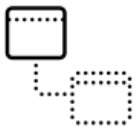
What makes the issue of statutory definition of conflict of interest so important? The general answer is obvious. In case any additional restrictions and obligations are imposed, the affected parties, as well as those in charge of enforcement, need to understand what these measures entail. As noted by some authors (e.g. Di Carlo, p.885), a lack of understanding of what constitutes a conflict of interest is one of the main reasons for the failure to implement measures to its resolution, along with direct intent and human tendency to exonerate self.

This aspect acquires yet greater significance when the legislative penalties are provided for certain actions in a conflict of interest situation. It is especially relevant in a legalistic culture when, in one respect, the legislation is extensively challenged: loopholes are constantly looked for and exploited in an attempt to justify certain conduct as complying with the

letter of the law, even if inconsistent with the spirit. In another respect, the law enforcement authorities tend to interpret statutes of anti-corruption legislation formally, non-withstanding the purpose of adoption. Thus, the problem of correct definition goes beyond being merely theoretical and starts exercising significant impact on law enforcement practice.

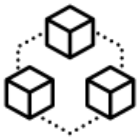
Attempts to introduce a conflict of interest regulation system struggle with an additional complicating factor. The anti-corruption legislation framework usually formulates most of the statutes in the "prohibition - punishment" paradigm. Lists of prohibitions and restrictions are drawn up for certain categories of officials with various sanctions applied for the breach thereof. This approach is common practice both for public officials and law enforcement authorities. By contrast, a conflict of interest, as will be shown in more detail below, is not a violation per se. Nevertheless conflict of interest needs to be addressed with certain measures, which are sometimes quite onerous: by no means ordinary situations arise where a public official without committing any wrongdoing is bound to submit to the adoption of measures, which occasionally closely resemble punishment, since they entail adverse consequences. When introducing such unorthodox measures, the significance of proper clarification, including by means of the clearest possible definition, becomes particularly important.

WITHIN THE SCOPE OF THIS WORK, WE PURSUE THE FOLLOWING KEYNOTE OBJECTIVES:



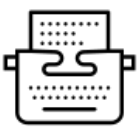
BASIC MODELS

Identify the basic models for the statutory definition of "conflict of interest" and outline their main strengths and weaknesses;



CERTAIN ELEMENTS

Study in detail certain elements of the definition, which in our opinion require special attention, primarily in terms of law enforcement considerations, and examine alternative ways of formulating them into statutory legislation;



DISCUSSION AND PROPOSALS

Discuss how the existing alternatives shape the definition of conflict of interest used in the current Russian legislation and develop proposals for improvement.

We will consider the regulation of conflict of interest only in relation to the executive branch, with the main emphasis placed on the relevant legislation covering the public service. The paper is also going to address some aspects of the definition of conflict of interest in relation to public office holders and SOE employees. Regulation, including the definition of conflict of interest, for the legislative and judicial branches, is quite specific, being context-driven and needs to be discussed separately.[1]

In our work, we were guided primarily by the results of research of national legislation as well as official guidance papers and documents of international organizations. In some cases when relevant information was available, we also analysed draft bills and documents related to parliamentary proceedings. Equally, the authors extensively studied the literature on of conflicts of interest regulation. Unfortunately, there are very few publications that specifically focus on possible approaches to defining conflicts of interest in anti-corruption legislation. However, various aspects of this issue are often addressed in scientific articles and analytical publications of a more general nature.

1/ The only exception in this work will be made for certain pieces of U.S. states legislation that also covers the legislative branch. Notably, this body of law provides a series of interesting statutory solutions.

01

FIRST STEPS

1.1. IS IT POSSIBLE TO DISPENSE WITH THE DEFINITION?

When introducing conflict of interest regulation, one of the first issues that the legislator has to address is whether it is necessary to develop and include the definition of conflict of interest in any regulatory legal act.

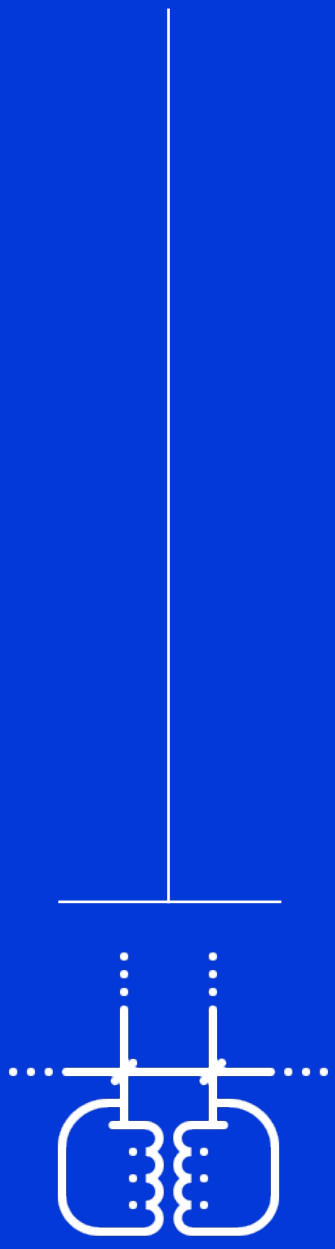
At first glance, the answer seems obvious. However, there are a large number of countries, including those with a long history of regulating conflict of interest, which use the term "conflict of interest" in their legislation without providing a formal definition thereof and take alternative measures to clarifying its meaning. Here, two main approaches are possible: a "definition" through prohibition and a "definition" through a list of COI situations.

1.1.1. "DEFINITION" THROUGH PROHIBITION

This approach provides that a statutory legal act should include a certain formulation of prohibition of the actions impacting personal interest of public officials. In such case, the term "conflict of interest" is included in the title of the relevant article or section of a regulatory legal act. The elements of such a prohibition may vary, some of them will be discussed further in more detail in Section 3.

Therefore, it is implied that a conflict of interest arises in a situation where a public official may commit certain actions concerning their personal interest, where these very acts constitute a violation. The legislation, in which such a prohibition is stipulated, varies.

THE STRICTEST OPTION IS PROVIDED IN CRIMINAL LAW, WITH THE MOST WELL-KNOWN EXAMPLE PROVIDED BY THE US. THUS, ACCORDING TO ARTICLE 208 OF THE U.S. CODE OF LAWS, IT CONSTITUTES AN OFFENCE PUNISHABLE WITH NOT MORE THAN 5 YEARS IMPRISONMENT,



5 YEARS

“

when a person "participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest".

”

In the US, this norm has historically evolved from certain anticorruption restrictions and prohibitions that were generally known as conflict of interest laws, though, the term "conflict of interest" in their title or wording was seldom used (for more details see, e.g. Association of the Bar of the City of New York, 27-72). Other – milder – versions of the prohibition are also possible. Incidentally, some countries include this prohibition in a "framework/ blanket" anti-corruption or ethics law, a conflict of interest law, a civil service law, etc., where non-compliance results in disciplinary sanctions.

Ultimately, this prohibition is the quintessence of conflict of interest management: all regulative measures are taken solely to prevent abuse of official powers where personal gain overshadows the public interest. With such a prohibition in place, the State clearly indicates, and perhaps with greater clarity than by using a specific term, that it considers unacceptable for public officials to freely continue performing their duties in certain situations.

This prohibition is essential for making the conflict of interest regulation system complete. Omitting the prohibition, or rather the penalties for non-compliance leads to certain complications, occasionally quite significant, in bringing someone to account for typical actions when official powers are used purely for personal interest. Some examples will be provided when discussing the Russian regulatory enforcement. Therefore, regardless of whether or not a conflict of interest is defined in regulatory legal acts, the legislator will need to create and enact a respective prohibition.

Such a prohibition and sanctions for non-compliance allow us to properly address many aspects of the fundamentally important issue in regulating conflict of interest: differentiating between being and acting in a conflict of interest situation. Enacting this prohibition, and especially the clarifications on what exactly constitutes disciplinary cases and particularly statutory offences, demonstrates that the presence of conflict of interest does not constitute an offence in and of itself, and only actions performed within official powers, in case when such actions involve personal interests are subject to penalties. It is also possible to draw a distinction between the identification and actions for the case when a regulatory legal act contains the definition of a conflict of interest, but, as the experience of some countries, including Russia, shows, substantial risks exist that the line is not going to be clearly defined. This, in turn, may lead to the imposition of penalties based on hardly legitimate grounds.

In countries using case law, "definition" through prohibition enjoys another advantage: it is possible to actually amend the definition using the relevant court decisions without altering the statutes. This is important, given that any country usually changes its views on conflict of interest along with the accumulation of regulatory enforcement experience and the growing number of real-life cases examined. Besides, even a well-conceived definition may become outdated, for example, due to new forms of interaction between the public and private sectors, or changing public expectations of appropriate conduct of public officials, etc.

Finally, "definition" through prohibition is in a sense more familiar to public officials. As previously noted, anti-corruption legislation is usually formulated through obligations and prohibitions. Therefore, in case the legislator begins adopting the conflict of interest regulation starting with the formulation of explicit prohibition and a system of sanctions, and only thereafter builds a set of preventive measures to ensure compliance, such approach may prove to be more instrumental than the approach that focuses on regulation of situations, not constituting offences but nevertheless requiring restrictive measures.

Would it be sufficient to insert a prohibition, without the definition of a conflict of interest to be introduced into regulatory legal acts?

In our viewpoint, it is quite possible. But this approach requires that the substantive aspects, which we endeavour to explore hereinafter, should be taken into account when formulating the prohibition.

Admittedly, a separate definition deserves at least a few arguments in favour. Firstly, the definition of key terms used in legislation is common to many legal systems, including Russian. The introduction of new concepts without proper definitions may be negatively perceived by persons subject to the those changes, creating the impression of non-completion and ambiguity of regulations. Secondly, the emergence of a new sphere of regulation, if accompanied by a specific conceptual framework introduced to the legislation, attracts additional attention and emphasizes the importance of new developments. Thirdly, the existence of a regulatory definition of conflict of interest provides the opportunity to use the term, which may prove convenient for the purpose of formulating measures for preventing and regulating conflicts of interest. A typical case in point are the regulations prohibiting managers from putting their subordinates in a conflict of interest or the rules establishing a procedure for disclosing possible conflict of interest. Certainly, such rules could also be formulated through the reference to the prohibition, but the usage of the term "conflict of interest" appears more appropriate.

Having considered the arguments above, we believe that the legislator should essentially understand the importance of a correctly formulated prohibition on public officials' actions affecting their personal interests. For better practical functionality of the conflict of interest regulation system, the prohibition takes precedence over definition. At the same time, being legally introduced, such prohibition does not contradict with the inclusion of the conflict of interest definition in the regulatory legal act. In our opinion, the best solution, at least for countries lacking a long tradition of regulating conflicts of interest, is the combination of the definition and prohibition.

1.1.2. "DEFINITION" THROUGH A LIST OF SITUATIONS

Another way to clarify what a conflict of interest is, without introducing a legal definition of the concept, is to incorporate into legislation a list of typical situations related to conflict of interest. This approach in its pure form is relatively rare, one relevant example is set out in Box 1.

The main advantage of the list-of-situations approach is clarity. A general definition, even well-conceived, can be perceived by public officials and employees as abstract, far removed from their daily activities, while a description of typical situations can bring the law closer to the specific real-life circumstances they are facing. This is a very important aspect in terms of perception, understanding and interiorization of regulations related to conflict of interest. It is particularly relevant in countries where the conflict of interest regulation is relatively new and where public officials have not yet developed the habit of assessing their everyday circumstances in terms of presence of conflict of interest.

The main disadvantage of this approach is that it is impossible to draw up an exhaustive list of conflict of interest situations. Consequently, there exists a high probability of occurrences of real or possible use of official powers for personal benefit, not described in the law. This would hinder the enforcement of both the regulations and penalties.

A possible solution here is the simultaneous introduction of both the definition and an explanatory list of typical situations. This would allow, for one, to go beyond the general wording and provide specific examples that are easy-to-understand for public officials, and, by contrast, to enjoy broad application, that would cover situations that were not included in the list for various reasons. Nevertheless, various approaches are possible regarding regulatory implementation of the concept.

Box 1

DEFINITION THROUGH A LIST OF SITUATIONS: STATE OF MAINE (USA)

A conflict of interest includes:

A. When a Legislator or a member of the Legislator's immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise that would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation;

B. When a Legislator or a member of the Legislator's immediate family accepts gifts, other than campaign contributions duly recorded as required by law, from persons affected by legislation or who have an interest in an entity affected by proposed legislation and the Legislator knows or reasonably should know that the purpose of the donor in making the gift is to influence the Legislator in the performance of the Legislator's official duties or vote or is intended as a reward for action on the Legislator's part;

C. Receiving compensation or reimbursement not authorized by law for services, advice or assistance as a Legislator;

Box 1 (CONT'D)

D. Appearing for, representing or advocating on behalf of another before the Legislature, unless without compensation and for the benefit of a citizen;

E. When a Legislator or a member of the Legislator's immediate family accepts or engages in employment that could impair the Legislator's judgment, or when the Legislator knows that there is a substantial possibility that an opportunity for employment is being afforded the Legislator or a member of the Legislator's immediate family with intent to influence the performance of the Legislator's official duties, or when the Legislator or a member of his immediate family stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or losses of other employees or the general community; and

F. When a Legislator or a member of the Legislator's immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of the Legislator's immediate family is engaged and the benefit derived by the Legislator or a member of the Legislator's immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

This would allow, for one, to go beyond the general wording and provide specific examples that are easy-to-understand for civil servants, and, by contrast, to enjoy broad application, that would cover situations that were not included in the list for various reasons. Nevertheless, various approaches are possible regarding regulatory implementation of the concept.

The list of typical situations may be presented in the same regulatory legal act that contains the definition of a conflict of interest. For example, Brazil's Law No. 12.813 of 16 May 2013, “On the regulation of conflicts of interest in the federal executive branch and subsequent restrictions in holding the office or exercising the powers” establishes the concept of "conflict of interest" in Article 3 and sets out a list of situations that create a conflict of interest: in Article 5 during the period of public office and in Article 6 - after that period. This makes it possible to immediately clarify, at least partially, the general definition, without having to spend time on preparing additional documents. Besides, the list included in a legislation stresses the importance of regulating some of the most common or the most important current types of conflict of interest.

By the same token, there are certain risks. Most likely, especially speaking of the framework anti-corruption law, the law will only be able to incorporate a very short list of typical situations, otherwise the relevant article will be too voluminous. Notably, updates to the list would also be difficult to introduce as they require amendments to the law. Moreover, such a short list may give public officials the false impression that only a few situations listed fall under the general definition of conflict of interest. It may also provide wrong guidance to conflict-of-interest regulators by inadvertently focusing them primarily on situations explicitly listed in the law. For example, these are exactly the consequences seen after an attempt to use this approach when introducing conflict of interest regulations into Romanian procurement legislation (Farca, p. 4).

A possible alternative would be to list typical conflict-of-interest situations in documents of lesser legal status or in relevant guidelines. Such lists are still at risk to be regarded as exhaustive, in any case, such documents would allow far more extensive initial scope, while the updating procedure is far more straightforward. This approach makes it important to introduce the list of typical situations either simultaneously or shortly after the normative definition

of conflict of interest. Any delays increase the likelihood that a general definition, especially the large and complex one, will not be understood by public officials and will be perceived as far removed from real life, resulting in improper application or even disregard.

It should be mentioned that a great variety of conflict of interest situations makes the traditional methodological tool – written guidelines – somewhat difficult to use in this area. The more problem situations are taken into consideration, the deeper they are examined, the more real-life cases are provided, the greater appears the volume of what has to be learnt, making this task rather difficult.

To solve this problem, some countries are developing and gradually beginning to use innovative tools, including electronic expert systems. Such systems ask the user questions about the characteristics of the problem situation and, based on the answers, may help to identify whether or not the situation in question constitutes a conflict of interest as well as offer possible remedies. As of today, there are very few such systems in use, and their functionality is still very simple. One example is a conflict of interest simulator launched by the Anti-Corruption Office of Argentina. In our judgement, however, this approach has considerable potential. If properly developed, it can transform lengthy methodological recommendations into a compact and convenient tool, exercising a wide range of functions: from analyzing situations to selecting relevant case law.

1.2. CONFLICT OF INTEREST AND A SYSTEM OF RESTRICTIONS AND PROHIBITIONS

Along with the issue of whether or not a separate definition of conflict of interest is needed and how it should be combined with the prohibition of actions involving personal interest or with the list of typical conflict of interest situations, the legislator should consider another related aspect. This is the place of the definition and measures to regulate conflict of interest within the system of anti-corruption restrictions and prohibitions. The key restrictions and prohibitions recommended by the UNCAC and other international agreements and enacted in one form or another by most countries are closely linked to the regulation of conflicts of interest. They are mainly aimed at preventing conflicts of interest: deterring a situation where a public official can, within his or her official authority, perform actions that involve his or her personal interest.

A typical example here is the restrictions related to receiving gifts. General rule (although the prohibition can be formulated very differently in different countries) is that a public official is prohibited from accepting gifts from persons in respect of whom he or she is authorized to perform actions and/or make decisions.

Some countries (e.g. Latvia) additionally prohibit, for a certain period of time, a public official from taking decisions or performing certain functions in respect of persons from whom he or she has received gifts. The logic of such a prohibition is obvious: even the prospect of receiving a gift may influence a public official's decisions and affect his or her impartiality. If a public official accepts a gift from a regulated organization, the situation becomes even more aggravated – thus he or she enters into property relations with this organization and may treat it more favourably. The prohibition, in the first place,

deters the public official from a compromised situation by explicitly instructing him or her not to accept gifts under certain circumstances and/or from certain persons; it also demotivates a public official in providing any informal services in expectation of future gifts, as it would be illegal to receive them. Eventually, if a public official has already received some gifts from certain persons, it prevents the conflict of interest from materializing and turning into an offence by prohibiting actions in respect of persons already involved in property relations with the public official.

Thus, the prohibition on receiving gifts hinders the development of a conflict of interest, preventing either the emergence of a property relationship with persons subject to public officials' official duties or the performance of official duties in respect of those already engaged in property relations with the public official. Similar considerations also provide the basis for the introduction of other most common anticorruption restrictions and prohibitions: on being subordinate to relatives, moonligting and outside contracts, possession of securities, representation of third parties before the state body where a public official holds a position, revolving door, etc.

Many countries emphasize the close link between conflict of interest regulation measures and anti-corruption restrictions and prohibitions by compiling them in the same section of a framework law or even a separate statutory legal act.

Indeed, the conflict of interest legislation often essentially boils down to a system of restrictions and prohibitions. Such approach has been used e.g. in the Law of Georgia "On Conflict of Interest and Corruption in Public Institutions" and in the Law of Latvia "On Prevention of Conflict of Interest in Activities of Public Officials", etc. There are even regulatory legal acts with restrictions and prohibitions set out in great detail while the definition of conflict of interest is formulated in a concise and generalized manner: on this occasion, the approach is similar to the definition through a list of typical situations – the concept of "conflict of interest" is explored entirely or in part through a list of specific, in this instance adverse, real life situations.

As previously noted, we find a detailed and elaborate definition is preferable choice for countries that have only recently begun to introduce conflict of interest regulation. However, combining this definition, as well as measures to identify and regulate conflicts of interest, with anticorruption restrictions and prohibitions within a separate conflict of interest law or at least within one section of a more general regulatory legal act, appears rather useful.

First, such a combination is justified by their similar content. Anti-corruption restrictions and prohibitions, even when formulated before the "conflict of interest" category was introduced to national legislation, are largely aimed at preventing situations where certain personal interests may induce a public official to behave improperly, i.e., in essence, such restrictions and prohibitions prevent a conflict of interest.

Secondly, understanding the relationship between the main anticorruption restrictions and prohibitions on the one side, and the conflicts of interest regulation on the other is important in terms of developing their correct, workable formulation. In some cases, multiple legislative changes and amendments cloud their original purpose and result in development of guidelines that are ineffective in terms of fighting real misconduct and (or) impose excessive restrictions on public officials. Including the regulations in the same section with the measures used in conflict of interest regulation will encourage the legislator to adjust the restrictions and prohibitions to the general goals and objectives of the relevant piece of legislation.

Thirdly, the presentation of anti-corruption restrictions and prohibitions as part of the conflict of interest regulation system will prevent public officials from perceiving any given prohibition as detached and excessive. In a situation where restrictions and prohibitions are not directly linked to the subject of conflict of interest, public officials may form an idea that compliance with these restrictions and prohibitions alone is sufficient to fully comply with the requirements of anticorruption legislation. Nonetheless, often this is not the case: compliance with restrictions and prohibitions is in many cases a necessary but not sufficient measure. In many situations, the effective prevention and/or resolution of conflicts of interest requires not only compliance with a specific prohibition, but also additional measures, including those not always explicitly mentioned in the legislation.

1.3. RUSSIAN EXPERIENCE

In Russia, it was only in the early 2000s that the definition of a conflict of interest in public service was normatively established. It first appeared in the Decree of the President of the Russian Federation of 12.08.2002 No. 885 "On the establishment of the general principles of official conduct of civil servants". The concept of "conflict of interest" had been used in Russian legislation earlier, though it covered only employees of certain types of organizations, not extending to the civil service.[2]

The corresponding norm of Decree No. 885 provided the basis for the establishment of a separate article "Regulation of Conflict of Interest in the Civil Service" in the Federal Law of 27.07.2004 No. 79-FZ "On the State Civil Service of the Russian Federation". And it was the definition of conflict of interest contained in this Federal Law that was later adopted in the Federal Law of 25.12.2008 No. 273-FZ "On Combating Corruption" and the Labor Code of the Russian Federation.

When preparing and reviewing the draft Federal Law "On the State Civil Service", other attempts were made to establish the definition of conflict of interest in normative legal acts. In particular, in 2002, the bill No. 85554-3 on "The Code of Conduct for Civil Servants of the Russian Federation" was submitted to the State Duma.[3] This bill was rejected on the second reading. Nevertheless, it merits attention as it proposed a number of solutions that differ from the approach being used in defining and regulating conflict of interest in mainstream Russian legislation.

For several years, two definitions of conflict of interest have been used simultaneously: the definition provided by Art. 10 of the Federal Law "On Combating Corruption" – for state and municipal servants, the definition provided by Art. 349.1 of the Labor Code of the Russian Federation – for employees of state corporations and state companies. Their wording was almost identical, the only difference was in the categories of persons to whom a public official or employee in a conflict of interest situation causes or is likely to cause harm through his or her actions. In October 2015, a uniform approach was introduced: the reference to real or potential harm was removed from the definition, and a number of other important changes and additions were adopted. The definition was established exclusively in the Federal Law "On Combating Corruption", and the Labor Code of the Russian Federation received a regulation referring to the 273-FZ. The definition, adopted in October 2015, is currently in force (it is shown in Box 2).

2/ See, e.g., Resolution of the FCSM of Russia No. 44 dated November 5, 1998 "On Prevention of Conflict of Interest in Performance of Professional Activities in the Securities Market".

3/ https://sozd.duma.gov.ru/bill/85554-3 *(In Russian)*

Box 2

RUSSIAN DEFINITION OF CONFLICT OF INTEREST

Article 10 of the Federal Law "On Combating Corruption"

1. This Federal Law identifies a conflict of interest as a situation in which a personal interest (direct or indirect) of an individual holding an office that is linked with the obligation to take measures to prevent and resolve a conflict of interest, affects or may affect the proper, objective and impartial performance of his or her official duties (exercise of powers).

2. In paragraph 1 of this article, personal interest is understood to mean the possibility of obtaining benefits in the form of money, other property, including property rights, monetized services, the results of work performed or any benefits (advantages) by an individual referred to in Part 1 of this article, and (or) by his or her close relatives or relatives-in-law (parents, spouses, children, brothers, sisters, as well as brothers, sisters, parents, children of their spouses and spouses of their children); by citizens or organizations with whom an individual referred to in Part 1 of this article and (or) his or her close relatives or relatives-in-law, are related by property, corporate or other close relations.

In our opinion, the introduction into the legislation of the definition of conflict of interest, which is uniform for state and municipal servants and for employees of state corporations and other SOEs, is an appropriate step. Employees of the above mentioned organizations often perform essentially public functions, so the principle of public interest precedence is no less important for them than for civil servants, and therefore they require a similar institutional approach to defining a conflict of interest.

Notably, such organizations are obviously not public bodies: they exhibit certain traits resembling those of private companies, and their employees in performing their activities may face certain ethically controversial situations that are not inherent to public service, including those that require careful interpretation regarding potential conflict of interest. A typical case in point here is the situations emerging from widespread approach to corporate governance, when an employee of a state corporation supervising, as part of his or her job duties, the activities of some legal entities controlled by the state corporation, at the same time is, by decision of the state corporation's management bodies, a board member of these controlled entities, also on paid basis. Similar situations should be taken into account when implementing the conflicts of interest regulation measures.

Still, in our view, it is an insufficient reason for establishing a separate statutory definition of conflict of interest. Rather, in regards to employees of certain types of organizations specific exclusions from the general definition and/or respective amendments are required, as well as possible use of special measures for conflict of interest resolution, including those similar in nature to the mechanism used in interested party transactions.

1.3.1. PROHIBITION OF ACTIONS INVOLVING PERSONAL INTERESTS

To date, a prohibition of actions in conflict of interest situations has not been introduced to Russian legislation. However, some attempts have been made to formulate such a prohibition. In particular, the above-mentioned bill No. 85554-3 contained a provision whereby "a public official is prohibited to make decisions and perform actions (inaction), resulting in legal consequences, with respect to an interested person." Unfortunately, such approaches have not seen statutory enactment. Instead of prohibiting, the Federal Law "On Combating Corruption" obligates a certain range of public officials to take measures to prevent and resolve conflicts of interest. Accordingly, the most severe disciplinary sanction – dismissal due to loss of trust – results not from actions involving personal interests, but from the failure to take measures to prevent and resolve a conflict of interest.

We are of the view that this approach is ineffective due to several reasons.

First, it is more process-oriented rather than result-oriented, while the state is primarily interested in ensuring that temptation does not lead to actions and thereby conflict of interest does not escalete into an offence, rather than in keeping public officials busy preventing and managing conflicts of interest. Therefore, public officials who decide to take actions out of the personal interest should be punished *most severely* regardless of whether or not they have taken any preventive or regulatory measures.

Second, this approach gives public officials the wrong idea that any conflict of interest must be prevented or resolved, that the very presence of a conflict of interest situation is inherently detrimental. Quite often this is not the case. A public official may be faced with a "simmering" conflict of interest setting, for lengthy periods at times, not leading to offences. This situation could be acceptable as long as the employer is aware of it and the public official refrains from actions that serve personal benefit.

In summary, the implementation of this approach in practice raises multiple questions, many of which remain without unambiguous answers in the Russian legislation. The present study does not focus on the use of sanctions in conflict of interest situations, but it seems reasonable to outline at least some of these points of concern. What exactly are the conflict of interest prevention measures that a public official should take? Should a public official be dismissed for loss of trust in a case when no measures were undertaken to prevent and resolve a conflict of interest, even if a controversial situation has been resolved independently? What is recommended in case a public official had taken measures to resolve a conflict of interest, but they proved far from sufficient? Should a public official be penalized if he or she has found himself or herself in a conflict of interest situation due to employer's actions and the latter does not indicate willingness to resolve caused conflict of interest?

Seemingly, a properly worded prohibition on public official's actions (inaction) that involve personal interests would make it possible to establish more transparent and unambiguous grounds for imposition of sanctions.

To a certain extent, the role of prohibition could be assumed by Article 285 of the Criminal Code of the Russian Federation. It establishes penalties for exercising official powers contrary to the interests of the service, in cases when such action is motivated by a vested or other personal interest. Here, the use by a public official of his or her official powers contrary to the interests of the service means the performance of such actions, which, although directly related to the exercise by such a public official of his or her official rights and duties, were not exigency of office and objectively contradicted both the general objectives and requirements of a state machinery and local self-government machinery, as well as those objectives for which the public official was vested with his or her official powers.[4] Consequently, it is essentially an issue of improper performance of duties for personal gain, which is very similar to constituting a conflict of interest as it is understood in by Russian anti-corruption legislation.

4/ Clause 15 Resolutions of the Full Supreme Court of the Russian Federation No.19 of 16.10.2009 "On Judicial Practice in Cases of Abuse of Office and Exceeding Official Powers."

Nevertheless, Article 285 of the Russian Criminal Code contains certain characteristics that preclude clear links with the current definition of a conflict of interest. First and foremost, a material violation of the rights and legitimate interests of citizens or organizations or the legally protected interests of society or the state, falls under Article 285 of the Criminal Code. Simply put, it is not the abuse of official authority for personal gain that is considered a crime, but only the specific instances that caused certain types of harm. This aspect makes Russian approach significantly differ from the previously considered prohibition provided under 18 U.S. Code §208, whereby penalties are stipulated for the very performance of actions involving personal interests, regardless of whether or not they caused any harm.

In practical terms, reference to a violation, especially significant one, of rights and legitimate interests creates, in our view, significant complications in the imposition of criminal sanctions for actions in certain typical situations of conflict of interest. For instance, if a public servant systematically causes state contracts to be awarded to organizations where his or her relatives are employed (i.e. actually ensures they capture a certain segment of a market), but the initial maximum price of the relevant contracts is not inflated and contractual works are properly performed, it would appear difficult to prove corpus delicti as constituting an offence under Art. 285 of the Russian Criminal Code. We believe that the need to amend Article 285 of the Russian Criminal Code in order to extend its coverage to hold accountable persons, intentionally abusing their powers for personal benefit, requires additional extensive examination.

In the meanwhile, a prohibition of actions involving personal interests and sanctions in the form of dismissal from office for loss of trust, could be a useful interim solution if incorporated into the legislation.

1.3.2. LIST OF TYPICAL CONFLICT OF INTEREST SITUATIONS

The Russian anti-corruption legislation does not provide examples of typical conflict of interest situations. The only official list of such situations was adopted in the form of a guidance document: in 2012, the Russian Ministry of Labor prepared a "Review of typical conflict of interest situations in the public service of the Russian Federation and the procedure for their resolution" (hereinafter - the Review). At the time of introduction, the document was greatly in demand: the definition of a conflict of interest and the obligation to take measures to prevent and resolve it had been included in federal laws for 8 years, and not a single document had come out ever since to explain how this very complex definition could be applicable to real life settings. As a result, there had been very few conflict of interest declarations submitted, while the subject of conflict of interest was rarely brought up for discussion by Conflict of Interest Regulations Commissions.

The Review has played an important role in clarifying the provisions of anti-corruption legislation and has been one of the instrumental factors in compelling public officials to gradually take the matter of conflict of interest regulation seriously.

At the same time, the Review is currently substantially outdated. First, as we have already noted, the definition of conflict of interest saw important amendments in October 2015, while the Review has not been updated accordingly. Also the past years have seen significant increase in the volume of law enforcement practice in the sphere of conflict of interest regulation, with noticeable increase in the number of relevant court decisions: a very brief overview of thirty typical situations no longer meets the needs of both public officials and anti-corruption authorities, and requires updates and deeper detail. To some extent, this goal is being met with the aid of law enforcement practice reviews in the sphere of conflict of interest, being issued by the Russian Ministry of Labor since 2018. Nevertheless, we find that these reviews do not replace the need for a generalized structured and regularly updated list of typical COI situations.

Besides, as previously indicated, the traditional text format does not prove very convenient when it comes to compiling a list of typical conflict of interest situations. Conflict of interest may occur in multiple forms, where descriptions, in order to be practically useful, should be very detailed and, if possible, accompanied by realistic examples - all this leads to the risk of excessive growth in volume of such materials, deterring public officials from perusal. It seems advisable to consider the possibility of developing Digital Assistants in Russia designed to resolve conflicts of interest, with functionality similar or superior to the previously described tools used in Argentina, and other foreign countries.

1.3.3. CONFLICT OF INTEREST AND SYSTEM OF ANTI-CORRUPTION RESTRICTIONS AND PROHIBITIONS

In Russia, unlike many foreign countries, measures to resolve conflicts of interest and anticorruption restrictions and prohibitions are incorporated in different regulatory legal acts and even when part of same law, are usually placed in different sections. For example, the definition of a conflict of interest for public officials is set forth in Article 10 of the Federal Law "On Combating Corruption", while the prohibition on accepting gifts is set forth in Article 17 of the Federal Law "On the Public Service of the Russian Federation", and the regulations, in fact limiting public officials' opportunities to perform other paid activities and at the same time directly referring to the conflict of interest are set forth in Article 14 of the same Federal Law. Even more fragmented appear the regulations established for employees of state corporations (companies) and other SOEs.

The fact that the substantive connection between measures to regulate conflicts of interest and anticorruption restrictions and prohibitions is not expressed at the level of regulatory legal acts in Russia, and in our viewpoint, is not always understood, leads to a number of adverse consequences.

Foremost, formulation of restrictions and prohibitions often disregards their particularly important functions such as preventing a public servant from a conflict of interest situation and preventing a public official from performing actions resulting in his or her personal gain.

For example, Russian civil servants are prohibited from accepting gifts in connection with the performance of their official duties. Exceptions are made for gifts received during protocol events, official trips and other official events: gifts are allowed in these cases, but the civil servant must notify the employer of the fact and surrender the gifts to a state body with the option of subsequent redemption.

It appears likely that this prohibition, as formerly mentioned, was mostly intended to prevent public officials from accepting gifts from persons subject to their actions and/or decisions. At any rate, the wording used does not fully achieve this goal: the concept of "a gift received in connection with the performance of official duties" lacks statutory definition and allows for different interpretations; the admissibility of gifts received on official trips, which, among other things, may be related to control and supervision activities, also raises serious doubts. Understanding the relationship of this prohibition to conflict of interest regulation measures would allow considering other approaches to its formulation, such as by reference to conflict of interest or by prohibiting gifts from certain types of persons.[5]

Equally disturbing is fact that the approach implicitly directs civil servants, in the first place, to formally observe the restrictions and prohibitions without prompting them to assess a respective situation in terms of conflict of interest. In many cases, however, compliance with prohibitions appears insufficient to prevent or resolve conflicts of interest. For example, even the precise execution by a public servant of the obligation to transfer securities under trust management, provided in Part 7 Article 11 of the Federal Law "On Combating Corruption", in most cases does not allow resolving a conflict of interest.

5/ Similar problems arise out of the use of other restrictions and prohibitions, e.g. prohibitions on being subordinate to relatives or on entrepreneurship as well as restrictions on outside paid activities or acquisition of securities, etc.

Another concern is that separationg conflicts of interest regulations from anticorruption restrictions and prohibitions makes it hard to clearly define precisely which conflict of interest prevention measures the Russian civil servants are obliged to undertake.

As previously noted, conflict of interest prevention is mainly focused on creating a system of restrictions and prohibitions, thereby removing the public official out of ethically controversial situations. Of course, other measures are also possible, such as notifying an employer that its decision would give rise to a conflict of interest, but it is compliance with restrictions and prohibitions that plays a major role. Where conflict of interest regulation measures and anticorruption restrictions and prohibitions are not statutorily linked, the concept of "conflict of interest prevention measures" should be elaborately explored in the legislation.

Last but not least, the lack of referencing between anti-corruption restrictions and prohibitions on the one side and the regulation of conflict of interest on the other, renders it difficult to clarify and augment the definition of conflict of interest.

The authors will endeavour to explore this topic hereinafter when discussing the issue of significance of personal gain. But for now, let us briefly state that many countries use restrictions and prohibitions to define more distinctly, down to the use of quantitative criteria, the boundaries for applying measures aimed at identifying and resolving conflicts of interest, e.g. by indicating where a public official obtains or has a possibility to obtain benefits below a prescribed amount, no declaration of interest is required and no conflict of interest regulation measures need to be taken.

In our assessment, the definition of a conflict of interest should be statutorily integrated with key anticorruption restrictions and prohibitions - on being subordinate to or under control by relatives, on accepting gifts, on outside paid activities, including entrepreneurial, on owning securities, on revolving door, and possibly others.

This can be ensured within a separate section of the Federal Law "On Combating Corruption", but it seems more appropriate to adopt a separate federal law on prevention, identification and resolution of conflicts of interest. In addition to defining a conflict of interest and key anti-corruption restrictions and prohibitions, such a law could contain procedures for conflicts of interest disclosure, both ad hoc and regular, detailed procedures for reviewing identified cases of conflict of interest, a broader list of possible resolution measures, etc. It is important, however, to revise the existing restrictions and prohibitions and to adjust their content in terms of their application to prevent conflicts of interest.

02

BASE MODEL SELECTION

2.1. THE CONCEPT OF CONFLICT OF INTEREST AND THREE MODELS OF DEFINITION

The decision to put the definition of conflict of interest into legal acts raises many questions regarding the content of that term. Before examining those questions in detail, it appears practicable to discuss, if only briefly, the main premises underlying the concept of conflict of interest.

As noted by some authors[6],the term "conflict of interest" has been formed within the framework of the rational bureaucracy theory and is based on the same fundamental assumptions. Of these, the most significant for the purposes of this work are the following:

1) A person performs many social roles (or exercizes different "life orders"), each inherently inferring intrinsic interests and obligations towards oneself and also to others;

2) Interests and obligations immanent to various social roles performed by same person may contradict each other ipso facto, to the extent, when fulfilling obligations inherent to one social role may consequently prevent the realization of interests and fulfilment of obligations in another;

3) We are not able to determine to any degree of certainty which of the social roles will take precedence. At times when interests and obligations inherent in various social roles performed begin conflicting, a person tends to behave unpredictably in cases when left to own devices and in absence of externally established rules. In a situation where personal interest and interests of unconnected persons overlap– a person will likely choose own personal interest. Some authors (e.gl. Anechiarico & Jacobs) call this rationale a "presumption of guilt" and claim that it largely underlies the entire anticorruption regulation;

6/ E.g., Du Gay, Paul. (2000). In praise of bureaucracy: Weber, organization, ethics. London; Thousand Oaks, Calif: SAGE. Among other it says that to Max Weber, one of the founders of the rational bureaucracy theory, "the office itself is a vocation (Beruf), a focus of individual moral commitment and ethical action which is separate from and privileged over the bureaucrats extra-official ties to kith, kin, class and individual inner conscience" - p. 43-44.

4) The role of a public officials is one of the social roles. Like other social roles, it entails certain obligations, of which the duty to protect public interest is paramount;

5) Ideally, the decisions of elected public office holders, including legal acts they adopt, are aimed at protecting public interest. Therefore, by strictly observing such decisions and legal provisions, other public officials also protect public interest;

6) The requirement to prioritize public interest for an individual performing the social role of a public official is very stringent in relation to the interests and duties generated by other social roles: in essence, it means that when making decisions or acting as a public official, an individual must "leave behind" all his or her other interests and obligations, disregard them and be guided solely by legal requirements or, where such requirements do not exist, arrange his or her actions in such a way as to best promote the public interest. For this exact reason objectivity and impartiality are considered basic principles of public service;

7) In the event when in the course of exercising his or her official duties a public official finds himself or herself in a situation where his personal interest, including obligations within other social roles, necessitates a line of conduct divergent from that expected of a public official impartially protecting public interest, a subsequent conflict of interest emerges. Again, just as in the case of any other contradiction between interests and obligations inherent in different social roles, it is difficult to ascertain as to which of his or her interests and obligations will enjoy precedence. Moreover, we can assume based on the "presumption of guilt" that in most cases the choice will be made precisely in favour of personal interest;

8) Therefore, in order to protect public interest, the State should seek to identify, as early as possible, situations with potential and real conflicts of interest and to regulate, as thoroughly as possible, the conduct of a public official in such situations. All contradictions between the interests and obligations generated within the role of public official and other interests and duties of an individual can hardly be traced, while the legal establishment of rules of conduct does not at all guarantee that a public official's choice will favor public interest. Nevertheless, such measures reduce the scope for ethical choice and, coupled with sanctions for non-compliance, additionally stimulate the choice toward the public interest.

Based on the above basic assumptions, any conflict of interest situation contains four key elements:

an individual's personal interests, including obligations embedded in other social roles; these personal interests and obligations largely involve the attainment by such individual or related persons of certain benefits (gains, advantages) and/or are harmful to persons at cross purposes with the above individual or associated persons;

official powers and real opportunities to make decisions or take actions that affect the interests of a certain circle of persons, arising from individual's social role of a public official;

public interest protected by the state, also through regulatory enactment, while presuming that the duties of public officials are also formulated so as to uphold public interest;

duties imposed on an individual in connection with the performance by him/ her of the public official social role, including the obligation to be objective and impartial when making decisions or performing actions, i.e. to disregard personal interests and obligations emerging within other social roles.

Depending on which of these elements see precedence, a number of most common models for defining conflict of interest can be identified.

MODEL NO 1

On the one side, personal interest is brought to the fore, contrariwise to the duties of a public official on the other. Conflict of interest then is understood as a situation when the possibility for a public official to realize his or her personal interests or the interests of persons connected with him or her (or, if defined more specifically, the possibility for a public official or persons connected with him or her to obtain advantages) may lead to improper performance of his or her official duties.

This model has become very popular largely owing to international organizations frequently using it in their documents. E.g., according to the widely quoted definition proposed by the OECD, a conflict of interest involves a conflict between the public duty and the private interest of a public official, in which the official's private-capacity interest could improperly influence the performance of their official duties and responsibilities. Virtually identical definition is included in the Council of Europe Model Code of Conduct for Public Officials: a conflict of interest is the situation in which the public official has a private interest which is such as to influence, the impartial and objective performance of his or her official duties. Similar definitions are used in G20 and APEC documents. One example of the implementation of this model at country level is the definition used in Mexico: conflict of interest is understood as possible adverse impact on the impartial and objective performance of a public official's functions arising out of personal, family-related or commercial interests.

MODEL NO 2

On the one side, personal interest is brought to the fore, contrariwise to the public interest on the other. Conflict of interest is understood as a situation when a personal interest of a public official and/or that of persons associated with him or her (or, if defined more specifically, the possibility for a public official or persons associated with him or her to obtain advantages) is at least contradictory or even potentially harmful to public interest.

This approach is rarely used especially when legally establishing the conflict of interest definition. Much more often it is used in documents of various NGO's specializing in combating corruption. Nevertheless, some examples can be found at the national level as well. Thus, in Georgia conflict of interest in a public institution is the conflict of property or other private interests of a public servant with the interests of a public institution.

MODEL NO 3

On the one side, official powers and opportunities are brought to the fore, contrariwise to the interests of a public official on the other. Conflict of interest in this case is perceived as a situation when a public official, in the exercise of his or her official powers, has an opportunity to perform actions (inaction) that affect his or her personal interests and (or) the interests of persons associated with him or her (or, if defined more specifically, which may bring benefit or harm to the public official himself or herself or persons associated with him or her).

Definitions that follow this model are used in many countries. For instance, in Canada, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests. In Latvia, a conflict of interest is a situation where, in performing the duties of office of the public official, the public official must take a decision or participate in taking of a decision or perform other activities related to the office of the public official which affect or may affect the personal or financial interests of this public official, his or her relatives or counterparties. In Armenia, a conflict of interest situation is defined as taking an action or adopting a decision (in exercising his or her liabilities) that can reasonably be interpreted as being led by his or her personal interests or the personal interests of his or her related persons.

In certain cases, combined solutions are observed where the conflict of interest definition contains elements of several models. The most widespread option – once more, adopted due to its extensive use by international organizations, as well as most prominent NGOs – is the combination of Model No.1 and Model No.2. In France, a conflict of interest is regarded to be any situation of conflict between public and private interests that affect or may affect the independent, impartial and objective performance of functions. In Croatia, a conflict of interest arises when personal interests of a public official come into conflict with public interests, in particular when a personal interest of a public official affects, may affect or may reasonably be considered as affecting his or her impartiality in the performance of his or her official duties.

The three models are closely aligned in their purposes and, in fact, expand on the same subject. Indeed, it would be reasonable to assume that, at least in a number of cases, the authors of the definitions, although omitting some of the four key elements presented above, implicitly referred to them. Notably, Model No.1 provides the definition which implies that the way a public official performs his or her official duties, becomes the determining factor in ability to realize his or her personal interest. This in turn means that responsibilities of public officials include some elements – actions or decisions – affecting his or her personal interests, which is fully consistent with the logic of Model No.3. The same can be said of Model No.2. It suggests that a public official, in the exercise of his or her powers, may harm public interest, especially when motivated toward such a line of conduct by personal advantage. Accordingly, these powers include actions or decisions that enable the official to obtain personal gain, which is again in line with the logic of the Model No.3 definition.

However, the three models are not interoperable. The way a definition is formulated; the words used to describe the general purpose – can be rather pertinent for the practical implementation of the relevant legislation.

Here, a legislator should keep two factors in mind. Firstly, after being legally established, the definition of a conflict of interest often starts to be interpreted strictly literally, and even formally, by both public officials themselves and authorities overseeing the implementation of anti-corruption legislation. Instances of certain elements of conflict of interest inartistically implied in the definition, but not addressed directly, raise serious risks of being disregarded in real life. Secondly, the approaches, while being very close in terms of content, may vary in terms of opportunities presented in developing an effective system for preventing, identifying and resolving conflicts of interest.

Prime drawback of Model No.1 definition is in leaving room for subjective interpretation. It defines a conflict of interest not as any situation where a public official has an opportunity for obtaining personal gain, but only as a situation where such opportunity may lead to improper performance of duties. As a result, a public official may get a misleading impression that no conflict of interest is deemed to arise and no measures of resolution are required in case when an objective possibility exists for him or her to obtain personal gain, but for some reasons – such as intent in the diligent and lawful exercise of his or her duties, or the fear of being exposed, or the insignificance of gain – he or she does not plan for the sake of this gain to breach his or her official duties. One of the additional drivers of such interpretation is the use in the definition of words that indicate a change in a public official's internal attitude towards certain actions, such as "affects and may affect", "induces and may induce", etc.

From one angle, such interpretation is justified in its own right. Indeed, as long as a public official a priori rejects the possibility of deriving personal gain from abuse of official powers, then he or she fully complies with the requirement to "check personal interests at the door" of public service, and no conflict of interest ensues. Alternately, we have already noted that the regulation of conflict of interest largely stems from the assumption that we cannot be sure about which interests and obligations would be chosen to pursue by an individual in case of inherent contradictions. The state introduces conflict of interest regulation precisely because it considers impossible to always rely on the free ethical choice of a public official thus aiming to increase awareness of all situations where this choice is being made. In developing anti-corruption legislation, the state relies more on a "presumption of guilt" than on the assumption that many public officials, when faced with temptation or other ethically controversial situation, will perform their duties diligently. From this viewpoint, the regulator is motivated in providing a definition of a conflict of interest that is based on most objective criteria possible and does not involve any analysis of values, attitudes or mindsets of public officials.

This definition is neither overly convenient in terms of further practical application. One of the most widespread elements of a conflict of interest management system is the obligation of public officials to declare the existence (or possibility of occurrence) of conflict of interest. Model No.1 does not elaborate whether a public official is to disclose any possibility of personal gain in the performance of his or her duties or only such as may induce improper performance thereof. In case the latter is true, the legislator directs a public official not only to report certain objective circumstances, but also to "admit"

allowing at least hypothetical possibility of improper performance of duties due to personal interests. Such an approach can hardly be considered appropriate: it may be assumed that public officials will avoid reporting implicating information and will not disclose data of interest to the State under the pretext that the existing interests have no influence over, and cannot make them breach, their official activities.

As for Model No.2, both its strength and main failure is in the reference to the public interest. In one respect, such definition is a reminder of the key purpose in introducing conflict of interest regulation and anti-corruption regulation at large – protection of the public interest. It serves as an additional explanation for public officials about the reasons for imposing restrictions on them. In other respect, the term "public interest" – as well as similar terms such as "legally protected interests of citizens, organizations, society and the State" – is overly ambiguous. Which, in turn, makes it difficult to understand the definition of conflict of interest and allows for different interpretations.

From a practical point of view, difficulties also emerge here, similar to the ones considered in relation to Model No.1. The obligation for a public official to report situations where the realization of a personal interest may harm public interest is once again the obligation to provide information about himself or herself that has obviously negative connotations. In addition, a public official is forced to assess the public danger of own possible actions. Such an assessment, especially in the absence of an unambiguous definition of a public interest, is not only highly subjective, but also requires special training, which most public officials are lacking. These factors, as in the case of Model No.1, may hamper conflicts of interest declaration mechanism.

The definition under Model No.3, in our view, is free from the disadvantages inherent in the other two approaches. It does not use terms that are difficult to define in the legislation. It is built on a specific combination of objective circumstances and has no allusions to the mental state of a public official. It also appears preferable from a practical point of view. This approach does not require a public official to analyse what violations of official duties he or she may commit or what damage he or she may cause to public interest. Rather, a public official will be required to report specific facts: existence or occurrence of personal interests that fall within the circle of official powers, and any changes in work duties, consequently driving public official's personal interests into the scope of their official powers.

Incidentally among the weaknesses of Model No.3, appears a certain terminological remoteness from the concept of "conflict of interest". When based on this approach, the definition uses neither the term "public interest", nor any wording indicating the existence of a conflict, contradiction or negative impact of some interests on others. Nonetheless, in our view, these weaknesses are not so significant vs. the convenience of practical application of given definition.

2.2. RUSSIAN EXPERIENCE

In Russia, the statutory definition of the conflict of interests was formed largely based on Model No.1.

This approach was first applied in Presidential Decree No. 885 and has been in use to date. One of the reasons for that, in our opinion, was the focus on the documentation of international organizations, particularly the Council of Europe and the OECD.

For many years Russian legislation used a combination of Model No.1 and Model No.2, i.e. the negative impact of personal gain on the performance of official duties was brought to the fore, with one of the indications being a conflict between personal interest of a public official and public interest, potentially harmful to public interest.

Thus, the Federal Law "On Combating Corruption" at the time of its adoption provided the following definition:

> "Conflict of interests in the state and municipal service – a situation when personal interest (direct or indirect) of a state or municipal servant influences or may influence the objective performance of his or her official duties and when a conflict arises or may arise between the personal interest of a state or municipal servant and the legitimate interests of citizens, organizations, society or the state that may result in harm to the legitimate interests of citizens, organizations, society or the state".

The amendments of October 2015 to the Article 10 of the Federal Law "On Combating Corruption" removed from the definition of conflict of interest references to both harm and contradiction of personal and public interests. Owing to this fact, current definition is a typical example of Model No.1 implementation.

The only attempt to propose a definition based on another model, which was brought to the stage of draft law considered by the State Duma of the Russian Federation, was made by the authors of the above mentioned draft Code of Conduct for Public Servants of the Russian Federation. The draft prepared for the second reading contained the following definition of conflict of interest: "a situation where a list of issues on which a public official is empowered or obliged to make individual decisions or to participate in the preparation of draft regulatory acts… or management decisions, includes those decisions (actions) which entail legal consequences for an interested person…". Thus, notably creating a precedent in Russian legislative practice, the authors proposed to develop the definition based on Model No.3.[7]

The main weaknesses inherent in Model No.1, began to manifest themselves in Russia almost immediately after the definition of conflict of interest was put in law. Conflict of Interest Resolution Commissions established in every government agency have constantly faced attempts by public officials to appeal to the absence of intentions to obtain personal gain from improper performance of official duties. Public officials repeatedly claimed that they did not declare their personal interest and did not take measures to prevent and resolve conflicts of interest, because before the Commission meeting they either had not understood how they could abuse the powers given to them for personal gain, or had ruled out the very possibility of improper performance of duties and thereby had no internal conflict between their duty and personal interests.

7/ It is interesting to note that the text of the draft law initially submitted to the State Duma of the Russian Federation used typical for Russia Model No.2, while an alternative approach was proposed only in preparation for the second reading.

Also, certain difficulties have arisen§ in determining *when* to submit a conflict of interest declaration. According to Part 2 of Article 11 of the Federal Law "On Combating Corruption" a public official is obliged to report any existing or potential conflict of interests, **as soon as the official becomes aware of that fact.** Taken literally, this regulation means that a public official should become aware that obtaining or potentially obtaining gain, influences or may influence due performance of their duties. Referring to this, some public officials claimed that they did not provide the declaration at a time when they had an objective opportunity to obtain gain, but rather did so when they realized (i.e. it became known to them) that this possibility could affect the proper performance of their duties. Regardless of how well-grounded and relevant the above arguments were, we note again that Model No.1 provokes their appearance to a certain degree.

These shortcomings can be counterbalanced, up to a point, through the provision of guidance and training for public officials. Nevertheless, they are unlikely ever to be completely eliminated, as they are inherent in Model No.1. In our judgement, to make the definition of conflict of interest more practical, it would make sense to switch to Model No.3, which generally views a conflict of interest as a situation where actions of a public official in the exercise of official powers may result in personal gain.

As for the refusal to recognise potential harm as a characteristic feature of conflict of interest, it appears reasonable, although not without own shortcomings. In certain respect, the definition legally implemented in October 2015 was primarily driven by practical considerations. Anti-Corruption Units within government agencies, as well as the prosecution authorities overseeing compliance with anti-corruption legislation, often had difficulties in identifying and especially proving actual or potential harm. This led to longer lead times for relevant checks and oversight activities and hampered the imposition of sanctions. Alternatively, the absence of a reference to potential harm forces an employer to take measures to resolve conflict of interest, which is often burdensome for public officials and requires resources, in any case, including situations formally falling under the definition of conflict of interest but where no harm can actually be caused. This tougher approach provokes criticism, especially from SOEs that have become accustomed to the mechanisms of interested party transactions, when the supreme governing body takes responsibility for making a decision, which, it considers necessary for the organization, even if it may result in personal gain for some employees.

03

ELEMENTS OF DEFINITION

Regardless of which basic model is adopted by the legislator, it is obvious that a conflict of interest definition compiled in one way or another, based only on the four basic elements and with no further clarification, is likely to become overly broad. It would cover an enormous amount of life situations, which offer possibilities for public official's actions, different in nature and content, to result in different types of gains obtained by persons related to said public official through a wide variety of relationships. It would fall to a public official himself, employer or supervising authority to check, analyze and come up with ways to resolve an almost limitless range of specific cases which may emerge. Such an extensive large-scale activity may face obvious difficulties, especially in the early stages of introduction of conflict of interest regulation mechanisms, while public officials have not yet developed the appropriate skills to assess life situations in terms of conflict of interest, and competent anti-corruption staff is limited. So, when a conflict of interest definition is being developed it is important to understand which types of situations the government is primarily interested to regulate and which can be at least temporarily sacrificed. Therefore, the broader definition of conflict of interest requires appropriate clarifications.

3.1. OPPORTUNITY AND ACTION

The first of such clarifications is aimed not only at narrowing down the definition of conflict of interest, but also at distinguishing as clearly as possible between conflict of interest and associated offences, including corrupt practices.

It calls for legal differentiation between conflict of interest as an *opportunity* to obtain personal gain through the use of official authority and the actual *exercise* of such opportunity. In the case of Model No.3, this means that a conflict of interest will be defined as a situation where a public official, in the course of performance of his or her official duties (exercise of powers), may (but does not!) perform actions impacting his or her personal interests. In the case of Model No.1 this means that the opportunity to obtain or actual attainment by a public official of personal benefit may (but does not!) result in improper performance of official duties or may (but does not!) affect his or her objectivity and impartiality.

We attach great importance to the matter of a clear legal distinction between the potential for wrongdoing inherent to a conflict of interest and the actual offences. By its very nature, a conflict of interest is a situation of ethical choice, where a public official may see an opportunity for personal gain, but for one reason or another has not yet taken steps to realize such opportunity. That is why conflict of interest does not constitute an offence per se, and when identified should result in regulatory measures rather than punishment. If a public official has taken such steps and allowed this personal gain or a prospect thereof to actually affect the performance of his or her official duties, it could then be argued that the ethical choice has been made, and the situation of conflict of interest has thereby been resolved in favor of personal interest and is transformed into an offence, including, in certain cases, into a corruption offence.

The vast majority of the definitions of conflict of interest we have examined, including those addressed in the basic models section, are based on the possibility of use of official powers for personal gain.

Therefore, in our opinion, the definition of conflict of interest should only deal with the possibility of use of official powers for personal gain, while the realization of such possibility should be the subject of prohibition imposed on actions in a conflict of interest situation and constitute one of the elements of the relevant offence.

The vast majority of the definitions of conflict of interest we have examined, including those addressed in the basic models section, are based on the possibility of use of official powers for personal gain.

There are, however, some exceptions, e.g.:

- real conflict of interest – a conflict between the personal interests of an individual and his or her official or representative powers, which **affects** the objectivity or impartiality of the decision-making, or the act or omission of actions during the exercise of these powers (**Ukraine**);

- a conflict of interest situation exists when [public official's participation in the adoption of] a deed or omission [of duty] **has** a specific and preferential **impact** on the assets of the owner, spouse or relatives within the second degree, or of the companies or companies controlled by them (**Italy**);

- a conflict of interest in the course of exercise of a public function exists when a private interest of a public official **affects or may affect** the impartiality of the public official in the exercise of public functions (**Montenegro**).

In Russia, a conflict of interest is a situation where a personal interest (direct or indirect) <...> **affects or may affect** the proper, objective and impartial performance of official duties (exercise of powers). Here, the possibility of personal interests influencing the proper performance of official duties is not separated from their real improper performance for the sake of personal gain. As we have already noted, this is lame wording. It distorts the essence of the concept of conflict of interest as a situation arising prior to the commission of offence, and in fact allows identifying as a conflict of interest an already existing violation of the law, committed in pursuit of gain or other personal interest.

This can also lead to certain undesirable consequences in practice. In one respect, negative connotations of the concept of conflict of interest are excessively stressed. Conflict of Interest Resolution Commissions and employers seem to be pushed towards the idea that mere existence of conflict of

interest is in and of itself an intolerable situation, and they should lean towards to the issue of sanctions rather than that of conflict resolution with the minimal possible harm to the interests of both parties. In other respect, such an approach to the definition may bring about a situation when cases of actual offence are interpreted solely as a conflict of interest, which, if not preceded by preventive measures or followed by steps to resolution, should entail disciplinary sanctions, while elements of an administrative offence or crime will be overlooked by employer and respective information will not be submitted to law enforcement authorities.

In view of the above, we are strictly opposed to attempts to strip the definition of conflict of interest of the "or may affect" formula and to reduce it solely to the list of situations where a public official has already made up his or her mind to abuse the office for the sake of personal gain. Such a proposal can be found, e.g., in Bill No.674582-7, submitted to the State Duma in March 2019.[8] In our view, the approach should be the exact opposite: the word "affects" should be taken away from the definition of conflict of interest, and in case the definition is altered, it should be carefully monitored to ensure that cases where a public official has already opted for inappropriate conduct for the sake of personal gain are not included.

8/ https://sozd.duma.gov.ru/bill/674582-7 (in Russian)

3.2.OFFICIAL POWERS

One of the most common and important clarifications is that the capacity of a public official to perform certain actions affecting his or her personal interests arises *within the scope or in the course of the performance of his or her official duties (exercise of official powers).* This clarification is not provided in all the definitions of conflict of interest that we have examined, but nonetheless, in our opinion deserves extreme scrutiny.

3.2.1. KEY ASPECT: AUTHORITY AND REAL CAPABILITIES

Usually, reference to official powers is used to address two purposes.

First, it allows to remove from the coverage of conflict of interests definition the situations when actions benefitting a public official are undertaken by him or her during unofficial hours, off-duty, without use of the status and powers of a public official, that is, in essence, undertaken in another social role, but which nevertheless can lead to abuse of his or her office. A typical example of this is the so-called "conflict of commitment" – a situation where a public official, during his or her unofficial hours, performs other paid work, and this work consumes so much of his or her energy that he or she is no longer able to properly perform his public duties, and/or it results in him or her being frequently late to official duties. Such situations have been repeatedly reported in studies dedicated to the operations of law enforcement agencies.[9]

On the one hand, this situation features more or less the same elements as does the broad definition of a conflict of interest: there are actions (performing other work), there is a personal interest (payment for this work), there are public duties and the possibility of negative influence on the exercise of public duties from actions aimed at realization of personal interest. On the other hand, it lacks an important component of the concept of conflict of interest: the intention to prevent the use for improper personal benefit of exactly those powers and capabilities which were vested in a person together with the social role

9/ See e.g. De La Torre, F. (2007) The New Hired Guns: Who Should Be Responsible for the Conduct of Off-Duty Law Enforcement Public officials

of a public official and intended to protect public interest. So, if the above mentioned clarification is not included in the definition of conflict of interest, the legislator risks to extend this concept to those situations, which were not initially targeted by the conflict of interest regulation.

From a practical point of view, extending a conflict of interest to cover any actions of a public official that may potentially benefit him or her or lead to the abuse of his or her office would mean that anticorruption controls should regularly reach beyond the public domain and analyze actions and decisions taken by a person not only in the role of public official but also as a private person. This would lead to much greater workload for regulatory authorities, would require a fundamental expansion of their powers and would still fall short in many cases.

Second, along with the social role of a public official, an individual receives *not only official powers, but also real capabilities* to perform certain actions. At the same time, the scope of real capabilities usually appears wider than the range of official powers. In this regard, the legislator is faced with an important task, which is to determine whether a conflict of interest should be recognized in situations where a public official for the purpose of personal gain may take advantage of capabilities which, although related to his or her office, e.g. actual access to certain resources and information, etc., but still lie outside his or her official authority.

Various types of such situations exist.

• A public official who is not entitled to input data into a public register of persons claiming certain benefits (e.g., a subsidy), obtains the password to the relevant information database; then he/she begins contemplating to enter his or her kinsmen or other related persons into the register.

• Or public official who is not entitled to access certain confidential information, by some chance actually learns it in the course of exercise of his or her duties; and now he or she possesses the information which is of commercial interest to organizations related to his or her kinsmen.

• Or a public official and his or her subordinates lack authority to perform actions which will benefit persons connected with this public official; however, during an informal socializing, this public official has an opportunity to sway other colleagues with necessary powers to perform such actions.

At first glance, classifying these and similar situations as conflict of interest seems reasonable from both theoretical and law enforcement points of view. Indeed, real capabilities are as much an element of the social role of a public official as official powers, and the State is interested in preventing offences arising from real opportunities as much as those arising from use of official powers. Yet, we believe that the definition of a conflict of interest should, at least in the initial stage, be limited only to the possibility of taking actions and/or obtaining gain *in the course of performance by a public official of his or her duties (exercise of powers).*

The main argument in favor of such a narrower approach is as follows. If we classify as a conflict of interest the potential use by a public official for personal benefit of any opportunities arising in connection with the performance of the role of a public official, while basing our judgment only on objective criteria, without taking into account the mental state of a public official, then we will have to accept that he or she is in a situation of permanent conflict of interest. E.g., a public official usually has the *theoretical* possibility to steal and use for personal purposes office equipment, paper, etc. Attempts to regulate such situations with the use of standard tools for prevention and resolution of conflicts of interest seem obviously redundant and even absurd: for instance, public officials cannot and should not submit declarations of personal interest every day.

Equally important is the fact that, in contrast to official powers, the real capabilities of public officials are very difficult to be proactively identified by anti-corruption units. They are occasional and depend on specific, often fast-changing particulars of the routine process, work-places, individual qualities of public officials, relations between them, etc.

Summarizing the above, it should be noted that the reference to official authority is used so as not to classify as a conflict of interest any situation where a public official, either "in the outside world" or at office, comes across an opportunity to obtain personal gain through abuse of office. Such restrictions are important for at least two reasons. If they are not in place, the definition of a conflict of interest extends to a virtually limitless scope of life situations, including those where identification and resolution is beyond real capabilities of anti-corruption agencies. In addition, the broad definition allows the employer to extend the definition of conflict of interest to virtually any situation that precedes an offence committed out of vested interest and to use unresolved conflict of interest as convenient universal grounds for imposition of sanctions.

In legislation, the reference to official powers in the definition of conflict of interest can be provided in different ways. In most cases, some general formula are used:

CANADA

a public official is in a situation of conflict of interest **when he or she exercises an official power, duty or function** that provides opportunity to futher his or her private interests <…>;

LATVIA

conflict of interest is a situation where **in performing the duties of office of the public official**, the public official must take a decision or participate in taking of a decision or perform other activities **related to the office of the public official** <…>;

APEC

a situation where **in performing the duties of office of the public official**, the public official must take a decision or participate in taking of a decision or perform other activities **related to the office of the public official.**

In some cases, the specific types of powers or functions are listed in the exercise of which a public official may pursue personal gain:

USA

whoever, being a public official or employee of the executive branch of the United States Government, <…> participates personally and substantially as a Government officer or employee, **through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter**, in which he, to his knowledge,<…> has a financial interest.

3.2.2. ADDITIONAL ASPECTS: ILLEGAL ACTIONS AND "PERFORMER'S DILEMMA"

The inclusion of some reference to official powers in the definition of conflict of interest seems a necessary, however insufficient step. One of the next important issues is what exactly do we mean when we recognize as being the subject of conflict of interest not just any action by a public official, but only the actions related to his or her official powers? Do we consider the subject of a conflict of interest only to be actions strictly within the scope of official powers, i.e. actions that are absolutely lawful and in accordance with the established official duties? Or are we rather considering actions undertaken within the exercise of official powers, including unlawful actions?

The second approach appears more appropriate. Situations, where a public official may obtain personal gain from fully lawful actions within the scope of official powers, are possible in principle, despite being rather limited in numbers. For the purpose of corruption prevention, no less, but rather even more important are numerous situations where a public official, in the exercise of his or her powers, has an ability to perform unlawful actions and so benefit himself or herself or related persons. Examples of such situations are various: a public official, exercising his or her powers of inspection, may unlawfully "turn a blind eye" to the revealed violations and not report them, pursuing through such actions own personal interest; or a public official, in the exercise of his or her official duties related to the preparation of requirements for public procurement, may deliberately include certain provisions facilitating the award of a tender to an organization related with him or her, etc.

We have provided as a case in point, the above mentioned situation, when a public official deems possible for him or her to record an unauthorized entry into the public register about himself or herself or related persons. We examined the case when a public official has no official right of access to the register.

But what if he or she has such a right, and, moreover, his or her official duties include entering data into the register following decisions of a certain government agency? Does a situation of conflict of interest arise, when a public official in such situation, is contemplating false system entry into a database without sufficient grounds, for the purpose of obtaining personal gain?

The answer to this question depends largely on what we consider to be the official powers of a public official: general input of data into a database or input of data into a database in accordance with a decision of a state body. And if a public official does enter data about himself or herself or related persons into a database without having legal grounds for it, does this action constitute overstepping his or her authority or an improper exercise of powers? If the official powers are recognized as input of data into a database, then conflict of interest is likely in place. But in case the official powers are recognised as database entry of only the data approved by the decision of a government agency, then only the potentiality exists of use of a public official's real capability. Unfortunately, this question does not often have an unequivocal answer.

From this point of view, of great importance is the way in which the reference to official powers is formulated.

Thus, if conflict of interest is identified in a situation where a public official's actions, which are *within the scope of official powers or included in official powers*, may involve his or her personal interests, then it will prompt the interpretation of such actions as exclusively legal and will require an accurate delimitation of public official's powers. More practical appears the formula "actions in the exercise of official powers" or "actions alongside the exercise of official powers". It is broader and allows in many cases to see an element of conflict of interest also in violations of the exercise of powers procedure that may be committed by a public official.

The situation when a public official, in the course of exercise of his or her official powers, has the opportunity to input certain data into the database without appropriate authority and thereby attempt to obtain personal gain for himself or herself or persons related to him or her, allows to illustrate other complex aspects of the definition of a conflict of interest. For the convenience of analysis, we will call this situation the "performer's dilemma".

The most common subject of conflict of interest regulation is found in situations where a public official legitimately has certain discretionary powers (e.g. right of choice between several potential suppliers or grant recipients; right to determine the amount of a premium; right to decide presence or absence of an offence, its nature, degree of severity, etc.). The reason for regulation here lies, first of all, in the uncertainty whether or not a public official will be guided by proper criteria, will remain objective and impartial if his or her personal gain is at stake. The performer's dilemma differs from typical conflicts

of interest: here, a public official's choice is extremely narrow: he or she is reduced to either proper exercise of his or her duties or obvious abuse (or, in many cases, a crime).

In one respect, this does not remove a conflict of interest from the discussed situation: a public official still faces an ethical choice, although the range is narrowed, and the right decision is more strictly regulated by the legislator and looks more obvious from the point of view of a neutral observer. More typical conflict of interest situations often offer the same choice between compliance and violation of law.

In other respect, the above mentioned peculiarities of the performer's dilemma significantly impede the usage of standard tools for conflicts of interest regulation. Thus, complications arise early, in the stage of declaring a conflict of interest. In typical situations, the appropriate moment for declaration is more or less obvious: declaration is to be submitted when the scope of a public official's discretionary powers begins to include the public official himself or herself or persons related to him or her, or when a person, in whose respect a public official has already exercised the discretionary powers, becomes related to the public official. Within the performer's dilemma, the possibility of abuse comes to a public official at the same time as he or she becomes vested with the respective authority (obligation); therefore, the right moment for declaration is when the public official becomes appointed to the post or when there comes a change in his/her official duties.

Also, in typical situations, a public official is required, first of all, to determine what interests he or she has, as well as persons related to him or her have, i.e. to identify certain characteristics particular to him or her, and to match them with the sphere of his or her possible influence in the exercise of official powers. As for the controversial situation under discussion, the possibility of deriving personal gain from such situation does not come from any characteristics of a public official, it is embedded in the very nature of the powers to be exercised. Any public official, regardless of the specificity of his or her interests, social connections and social roles performed, will be able to derive similar benefits by performing the same unlawful actions. Therefore, in order to come up with meaningful declaration, a public official must rather analyze his or her future powers and identify all possible situations in which abuse and violations in the exercise of those powers may benefit a person vested with those powers. Thus, a declaration of a conflict of interest as it relates to personal circumstances of particular public officials turns into an assessment of corruption risks inherent in a certain office, which every public official holding it will encounter. Such transformation of

declaration, although it follows from the logic of the situation under discussion, is obviously redundant and impossible in practice.

The above mentioned difficulties become even further aggravated when attempting to resolve the performer's dilemma. The standard tools again appear inapplicable here. Since the situation under discussion does not arise due to specific life circumstances of a public official (e.g. ownership of certain assets), the conflict of interest proves impossible to be resolved by influencing these circumstances (e.g. by disposing of such assets). Reassignment of the public official to another position won't be a solution as well, because possible abuse is inextricably linked to the very nature of the respective official powers and everyone assigned to exercise them will find themselves in the same situation of conflict of interest. The introduction of additional control in this case is also hardly possible, as it is not clear what it will be "additional" to: the detection of facts of direct abuse of office should be subject to regular control. It can be concluded that in the situation under discussion, special measures to resolve a conflict of interest are actually not applied and are reduced to the proper performance by a public official of his or her duties and refusal of their direct abuse. This problem becomes especially acute if the legislator vests both a public official and an employer with the obligation to take measures to prevent and resolve conflict of interest.

Finally, the performer's dilemma once again poses the question how to formulate the grounds for imposition of sanctions should a public official take advantage of capabilities he or she has and enter unauthorized data into the database. In our view, holding him or her accountable for a failure to take measures to prevent and resolve conflict of interest is not justified, as such measures do not conclusively exist. It seems much more reasonable to use a prohibition, which has previously been often mentioned, on actions involving personal interests and to apply sanctions precisely for non-compliance with such a prohibition.

Accordingly, recognising the performer's dilemma as a conflict of interest, creates the risk of being faced at least with practical impossibility of both fulfilling the obligation of declaring a conflict of interest and taking resolution measures. However, should the legislator find it necessary to remove such situations from the operation of conflict of interest definition, special exceptions need to be proposed that would not involve more obvious typical situations. In the present study, no specific successful solutions to this problem have been found, therefore it needs to be further researched and addressed.

3.2.3. RUSSIAN EXPERIENCE

Prior to October 2015, a personal interest of a public official had been understood as the possibility of him or her receiving income in a certain form **in the course of exercise of official duties (work)**. Thus, for several years the reference to official powers had been included in the legislation. In 2015, with the adoption of the Federal Law No. 285, this element was removed from the definition of personal interest. It is difficult to say how well-thought-out this decision was: the wording of the draft bill proposed for in the first reading did not permit any corresponding changes, for which reason the explanatory note to the bill failed to provide arguments for their introduction.

In our opinion, the current approach appears quite controversial. The Art. 10 of the Federal Law "On Combating Corruption" literally reads that in Russia a conflict of interest may arise from any possibility for a public official to obtain gain specified in the law, even if this possibility has no links or official links to his or her legal status and/or official duties.

These specifics of the definition influence law enforcement practice, increasingly resulting in dubious, in our view, decisions of employers. Essentially, it can be said that lack of reference to official powers is used to regard various actions of public officials as “failure to take measures to prevent and resolve conflicts of interest”, which are not appropriate from the point of view of an employer, but which on their own do not afford grounds for imposition of sanctions, especially in the form of dismissal with loss of trust.

Firstly, in Russia the "conflict of commitment" mentioned earlier is widely interpreted as a conflict of interest. This can be confirmed by the forms of employer's notification about other paid activities used in public bodies. For instance, according to the newsletter of the Russian Federal Tax Service, the model form of notification includes the following declaration: "I believe that the performance of this work will not lead to a conflict of interest. This work will be performed during off-duty hours, on holidays, weekends and vacations".[10] Thus, any income-generating activity during working hours will be deemed as conflict of interest

10/ https://www.nalog.ru/rn77/related_activities/prevention_corruption/norm6/ (in Russian)

even while not linked in any way with official duties of a public official: does not bring income from organizations towards which a public official carries out functions of public administration, does not involve the use of information which has become known during performance of official duties, etc.

Secondly, the following situation is qualified as conflict of interest: when a public official is vested with the authority to perform certain actions (inaction), but considers the possibility to violate the law in the exercise of these powers for personal gain. For example, Russian public officials are increasingly facing sanctions in the form of dismissal with loss of trust for failure to take measures to prevent and resolve conflict of interest in cases where criminal charges are filed against them for bribery (Article 290 of the Criminal Code). An employer in this case presumably follows further logic: when a public official was offered a bribe (illegal gratification), he or she was presented with an opportunity to obtain gain in form of money and/or property, this gain was offered to the public official for the purpose of influencing the execution of his or her official duties, so, the public official found himself or herself in a situation of conflict of interest and was obliged to declare it and take measures to resolve it, failure of the public official to do so provides grounds for dismissal with loss of trust. The same approach is used, although less frequently, when a public official is accused of forgery in office (Article 292 of the RF Criminal Code), certain types of fraud (Article 159 of the RF Criminal Code) and other offences committed out of personal interest (see Box 3 - Example 1). Notice that, the above is applicable to both the cases when a public official is vested with discretionary powers, and persons in respect of whom he or she exercises these powers aim to induce him or her to make a choice in their favor; and to the "performer's dilemma" when the procedure for public official's actions on the exercise of one or another power is unambiguously described in legal acts, and the public official without external influence considers possibility of their direct abuse.

Thirdly, a conflict of interest is considered to be a situation where certain actions which may benefit a public official personally are not part of his or her official duties (powers), but he or she has a real capability to perform them due to his or her status, location in the premises of a public body, access to certain resources and information, etc. (see Box 3 - Example 2). Here, as in the case of alleged bribery, sanctions are often imposed on public officials after they have been charged with an offence, including initiation of criminal proceedings.

Finally, the failure to take measures to prevent and resolve conflicts of interest is sometimes taken as grounds for dismissal with loss of trust in situations where a public official may have committed certain violations, but they do not look like typical forms of conflict of interest, but rather like breaches of work procedure. In these cases, an employer, for one reason or another, may be interested in subjecting a public official to the strictest disciplinary sanction, but has no obvious formal grounds for this. Qualifying such situations as a conflict of interest allows the use of sanctions, but often looks highly controversial. When looking into such employer's decisions, it is sometimes difficult to understand the presumable or actually obtained gain, and/or how it might have affected the performance of official duties by a public official (see Box 3 - Example 3).

Box 3

CONFLICT OF INTEREST AND OFFICIAL POWERS: CASE LAW

Example 1

Case No. 2-4214/2016 of 27 June 2016[11]

Plaintiff – a public official - disputes his dismissal with the loss of trust due to the failure to take measures to prevent and resolve a conflict of interest.

This public official, in his capacity as bailiff, received funds from debtors to pay their debts without issuing a receipt, but promising to enter the relevant information into the program, transfer the money and provide the receipt later. However, no receipts have been given to the debtors afterwards, the funds were not transferred to repay debts and in fact remained in personal use of the public official.

Therefore, the public official obtained income in the form of money that he or she intentioned for personal use, which resulted in the violation of the rights of debtors and, consequently, impaired the authority of the bailiff service. The plaintiff's complaint was dismissed by the court.

Example 2

Case No. 2-4672/2016 of 24 June 2016[12]

The plaintiff – a public official - disputes the dismissal with the loss of trust due to the failure to take measures to prevent and resolve a conflict of interest.

This public official, in her capacity as bailiff, gave the debtor an official certificate with the official stamp stating the absence of enforcement proceedings initiated against him, which was not true. Also, it was outside the plaintiff's authority to issue such a certificate.

Thus, possible non-receipt by the budget of the corresponding sum of money from enforcement proceedings, and also the fact that the certificate containing false data was given out to the debtor for further submission to a state body as part of the procedure for acceptance to a public office, damaged the authority of Directorate of the Federal Bailiffs Service of Russia as the state body.

The plaintiff's complaint was dismissed by the court.

Example 3

Case No. 2-263/2016[13]

The plaintiff – a public official - disputes the dismissal with the loss of trust due to the failure to take measures to prevent and resolve a conflict of interest.

This public official, in his capacity as bailiff, presented the employer with a temporary disability leave, according to which he was temporarily released from work and received 7,526.20 rubles on sick leave. The following internal investigation found out that during the disability leave the plaintiff was traveling outside the Russian Federation on a tourist trip to Egypt.

Thus, the plaintiff caused property damage to Directorate of the Federal Bailiffs Service of Russia in the form of illegal receipt of money for days during which he was neither at work nor on sick leave.

11/ https://sudact.ru/regular/doc/u6kidC8F6rH8/ *(*In Russian*)*

12/ https://sudact.ru/regular/doc/rD9AYc49SMu/ *(*In Russian*)*

13/ https://sudact.ru/regular/doc/bZe3OG8zzflQ/ *(*In Russian*)*

The definition of conflict of interest currently used in Russia is extremely broad: it covers almost any situation where the possibility to obtain personal gain may affect the performance by a public official of their official duties, including multiple situations preceding the offences perpetrated out of vested interests. In our opinion, it would make sense to take a more balanced approach to the issue in question and to consciously decide which of the above categories of situations indeed require to be regulated through the conflict of interest legislation.

In doing so, it is very important to keep in mind the possible negative consequences of the broad approach. As we have previously noted herein, it actually means that a public official is in a permanent situation of conflict of interest, respectively, both he or she and the anti-corruption authorities will have to monitor and assess a boundless circle of life situations. Since it is not practically possible, there is a high risk of selective use of law. Public officials out of favor with their employer stand to be subjected to the full scope of conflict of interest provisions, including sanction rules, strictly in accordance with the letter of law and therefore stringently, while other public officials in situations formally falling under the definition of conflict of interest will escape immediate scrutiny.

In addition, the broad approach is not well aligned with the measures currently established in legislation for prevention and resolution of conflicts of interest. Accordingly, if we believe that a public official being offered a bribe is in a conflict of interest situation, at the very least it means that he or she must submit a declaration of personal interest. At the same time, according to Article 9 of the Federal Law "On Combating Corruption", this situation obligates a public official to notify the employer about him or her being induced to a corruption offence. So, the important question is, whether this public official should submit the two notices or one of them will suffice? And, in order to avoid concerns, should not a public official be required to declare any offers of personal gain received by him or her directly or indirectly from persons towards whom he or she performs functions of public administration?

Even more questionable, even absurd, from the point of view of conflict of interest regulation, is the situation when a public official himself or herself intends to commit an offence for the purpose of personal gain. Can we expect that a public official in such case will declare personal

interest to the employer, and what measures of resolution of the conflict of interest can be recommended to that public official, apart from restraining from illegal actions?

In our view, it would be advisable to include into the Russian legislation at least minimal clarifications that would narrow down the definition of conflict of interest. The first step could be the introduction of a reference to official powers. In the case of Model No.1, this means that an element that allows qualifying a situation as a conflict of interest, is not the presence of any possibility of personal gain, but the possibility of such personal gain as to be obtained in the course of exercise of official duties (exercise of authority). In the case of Model No.3 - not any actions of a public official, but only actions in the course of exercise of official duties (exercise of powers). Such an addition would make it possible to remove from under the operation of the conflict of interest definition at least situations 1) when the proper performance of official duties may be affected by gains that are in no way related to the social role of a public official, and 2) when the social role of a public official gives him or her a real capability to take actions aimed at personal gain, but such actions are outside his or her official powers.

It also makes sense to clarify, by supplementing the relevant guidance, that dismissal due to loss of trust for failure to take measures to prevent and resolve a conflict of interest, in the event a public official becomes charged with criminal offence under Article 290 of the Criminal Code of the Russian Federation, is only allowed if either this public official has been convicted or the offer of the bribe has been proved. This is partly true for other similar cases – dismissals when charged with criminal offences under Art. 159, 160, 285, 286, 292 of the Criminal Code of the Russian Federation. Unless an employer has reliable proof that a public official has really committed an offence he or she is charged with, or he or she was preparing for or attempted at an offence, or a public official was approached and induced to an offence, then there are none or few reliable grounds for a decision that the public official was in a situation of conflict of interest in connection with the alleged criminal offence.

3.3. PERSONAL GAIN

One of the key elements in the definition of conflict of interest is the concept of personal gain (personal interest). The significance of this element stems from the very concept of conflict of interest: personal gain is a backbone in each of the three approaches to the definition previously discussed. Many countries in their legislation develop the definition of conflict of interest by establishing a separate definition of personal gain or personal interest. But the concept of personal gain has inherent problematic aspects, meriting special attention from the legislator.

3.3.1. OBTAINING GAIN AND OPPORTUNITY TO OBTAIN GAIN

One of the traditional objects under conflict of interest regulation is a situation where a public official or his or her relatives have already obtained or are obtaining personal gain from some individual or legal entity, while this public official performs public administration functions in relation to that person. E.g., a public official is involved in control and supervision process over an organization that is headed by his or her relatives. In such situations, a public official may be driven by a sense of gratitude to those who provided benefits to him or her, or persons connected with him or her, as well as the inclination to preserve and enhance such benefits.

At first glance, such situations appear quite obvious. However, there may also be some controversial points in their regulation. There may be cases when a public official exercises his or her official powers in respect of a person from whom he or she obtains certain benefits, but at the same time the actions of the public official objectively cannot either preserve the obtaining benefits or change the amount thereof. For example, a public official is involved in a scheduled inspection of a regional branch of a large bank partly owned by the state. And the public official owns small equity in stock of the inspected bank, which provides him or her income.

On the one hand, such a situation looks like a typical conflict of interest: the public official has external personal tangible interest, which, hypothetically at least, can affect his or her objectivity and impartiality. On the other hand, neither the powers of the public official, who is not even involved in the making of a final decision on the inspection's outcome, nor the subject matter of the inspection itself, affords him or her a real opportunity to influence the market price of his or her stock. To lose the existing asset as a result of certain actions displeasing the inspected organization is also impossible for the public official. In essence, it means that the public official's personal gain does not depend on how – properly or improperly – he or she will perform their duties. It raises the question as to whether the

definition of conflict of interest should include details allowing such situations to be removed from under the regulation.

To some extent – albeit implicitly – the answer to this question can be found in any definition of conflict of interest based on Model No.1. According to this approach, not just any type of gain results in a conflict of interest, but only such gain that may affect the performance of public officials' duties. If a public official is unable, through his or her improper actions, to help preserve or increase obtained gain, then such gain by definition does not provide an incentive for abuse of duties and, therefore, does not lead to a conflict of interest. It should be noted, however, that we cannot be certain that the legislators implementing Model No.1 worldwide intentionally build this meaning into the definition of conflict of interest.

In some cases, the legislator goes a little further and includes in the definition of conflict of interest the language suggesting that the regulation should cover not all actions of a public official towards persons from whom he or she derives gain, but only those actions that somehow facilitate the pursuit of personal interests:

CANADA

e.g., exercises an official power, duty or function that provides an opportunity **to further** his or her private interests;

SPAIN

a decision to be taken <…> may affect personal interests, of an economic or professional nature, **for assuming a benefit or a damage** to them.

We do not think there is an obvious need to include in the statutory definition reservations, which would make it possible not to regard as a conflict of interest the situations where a public official obtains personal gain from regulated persons, but is unable by his or her actions to either preserve or increase this gain. However, it would be useful to discuss this aspect in the guidance so that authorities take it into account when deciding whether or not a conflict of interest is present.

The objectivity and impartiality of a public official may be influenced not only by gain already obtained or being obtained, but also by the possibility of obtaining it. E.g., a public official may act favorably towards an organization that is about to employ a relative of the public official or the public official himself or herself (either a part-time job alongside the public office or a post public employment). Or a public official can make decisions that do not benefit certain persons immediately and directly, but create conditions facilitating attainment of gain, etc. Most of the countries we have examined during this study, in national legislation either address the ways personal interest affects the execution of official duties in general, without distinguishing between the gains obtained, being obtained or with potential to be obtained, or explicitly include the possibility of obtaining gain in the definition of conflict of interest. Thus, in the case of Canada, it is the exercise of official power, duty or function that **provides an opportunity** to further [public office holder's] private interests. In Latvia, the focus is on actions related to the office of the public official which affect **or may affect** the personal or financial interests of this public official. According to Spanish law, a conflict of interest [arises when] the decision to be taken <…> **may affect** personal interests.

A reference to possible gain, if included in the definition of conflict of interest, brings up the main difficulty of how to define the boundaries of that possibility. Does it appear reasonable to discuss of conflict of interest if the attainment of gain is a possible result of a long sequence of hypothetical events, one of them being an action that a public official may take in the course of exercise of official powers? Alternately, if looking at the problem from a slightly different perspective, are we justified in finding a conflict of interest in a situation where certain actions of a public official, if taken, will obviously benefit him or her (or persons related to him or her), but the probability of such actions in real life is extremely low? These questions are by no means purely theoretical and may well arise in practice, especially when public officials interact with anti-corruption authorities. It is not uncommon for supervising agencies to interpret the possibility of obtaining gain rather broadly, finding a conflict of interests in complex, multistage hypothetical situations.

Some countries are trying to solve this problem by adding specific clarifications to the legislation.

USA

E.g., in the United States, sanctions under the 18 U.S. Code §208 Article "Financial Conflicts of Interest" do not apply if "by regulation issued by the Director of the Office of Government Ethics, applicable to all or a portion of all public officials and employees covered by this section, and published in the Federal Register, the financial interest has been exempted from the requirements of subsection (a) as being too remote or too inconsequential to affect the integrity of the services of the Government public officials or employees to which such regulation applies". Currently, the relevant exceptions are set forth in §2640.203, Section 5 of the U.S. Code of Federal Regulations: for instance, "an employee may participate in a hiring decision involving an applicant who is currently employed by a corporation that issues publicly traded securities, if the disqualifying financial interest arises from ownership of publicly traded securities issued by the corporation".

We believe that the relevant experience deserves attention. Clarifications with regard to situations when the possibility of obtaining personal gain is purely hypothetical and/or depends, apart from actions of a public official, on many other factors, would be advisable to include, if not in the legislation, then at least in guidance.

3.3.2. SIGNIFICANCE OF GAIN

It seems obvious that the improper performance of duties and abuse of authority by a public official may be prompted through obtaining, or by the prospect of obtaining gain, being *not just any kind of gain but only that significant* to him or her. The significance of gain may be determined by its size (e.g. the amount of income) or other factors (e.g. career prospects, the possibility to avoid strict sanctions imposed on a public official or persons related to him or her, impact on life and health, etc.). There may be situations when a public official formally obtains or may obtain gain from persons in respect of whom he performs certain functions, but the gain he or she obtains is so small that can hardly be a factor influencing his or her behavior. For example, a public official receives income from an organization in his charge, which represents 1% of main income from public office. Whether such a situation is to be considered as creating a conflict of interest, depends on whether the definition of conflict of interest contains clarifications on how to define the significance of gain.

In one respect, such clarifications seem quite reasonable: regulating situations that do not lead to abuse of office by public officials is redundant. Such regulation is too burdensome for public officials; it forces the government to waste limited financial and human resources, as well as opens up space for a purely formal approach by anti-corruption authorities, which allows them to make their performance look better by reporting insignificant violations.

In other respect, it is very difficult to formulate such restrictions. Ideally, the legislator should establish criteria to define significance of different types of gains. And while financial gain permits such criteria in principle, e.g., in the form of a specific amount of money or a percentage of public official's salary, other property benefits, however, are more difficult to quantify (for example, it would require the specific procedure for determining the value of services of property nature). Even greater difficulties arise when benefits are of a non-property nature. For example, should

a gain be considered significant, if it is presented in the form of relief from responsibility, including disciplinary liability in the form of reprimand? Or should significance be seen in relief from criminal, as well as only some types of civil, administrative and disciplinary liability?

In our view, it is precisely the difficulty of defining the criteria for significance of gain that prevents most countries from introducing appropriate clarifications to the definition of conflict of interest. It is noteworthy that of all the definitions of conflict of interest adopted at the national level that have been analyzed in this work, not a single one provides *an explicit mention of significance* of personal gain.

However, there are examples of this approach. It is applied particularly in U.S. at state level. E.g.,

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ALASKA

under Alaska law, a conflict of interest exists if "the legislator or a member of the legislator's immediate family has a financial interest in a business, investment, real property, lease, or other enterprise **if the interest is substantial** and the effect on that interest of the action to be voted on is greater than the effect on the general public of the state.

LOUISIANA

In Louisiana, a conflict of interest exists if a legislator has a "personal **substantial** economic interest" in a transaction that involves a governmental entity.

Some US legislators go even further and not only by adding the condition of significance of personal interest to the definition, but also by trying to establish criteria of significance. It can be illustrated by the definition of conflict of interest used in the State of Kansas.

KANSAS

Conflict of interest occurs when a legislator is substantially involved in the preparation of or participated in the making of a contract with a person or business in which the legislator, an associated business or a family member has a *substantial interest*. And "substantial interest" includes an ownership interest of $5,000 or 5% of any business, compensation of $2,000 or more from any business or businesses, gifts valued aggregately of $500 or more, holding a position of officer, director, associate, partner or proprietor of any business, or receiving fee-based compensation from a business amounting to $2,000 or more.

A more common model is one in which the criterion of significance of personal interest lies in its ability to influence the proper execution of duties by public official. Interestingly, this solution is, in fact, imbedded in Model No.1 for defining the conflict of interest. Indeed, the definition of a conflict of interest whereby the obtainment or possibility of obtainment of gain may affect the execution of duties by a public official leaves out both situations in which a public official does not (is not able to) obtain personal gain, and situations in which a personal gain is although present or may be obtained but, due to some specifics of this gain, such as its insignificance, cannot affect the proper execution of duties by a public official.

Of course, in the case of the conflict of interest definition under Model No.1, the condition of significance of interest is not as explicit as when it is directly incorporated into the text of a legal act. And it is not always taken for granted that the legislator, by approaching the definition of a conflict of interest in this way, meant it to offer an opportunity to dismiss a conflict of interest in a situation when the personal interest of a public official is insignificant. Some countries put an *extra effort* to stress this nuance in the definition of conflict of interest. For example, if we go back to the definition adopted in France, we can see that conflict of interest is found here in any situation of contradiction between the public interest

and private interest **that affects or may affect** the independent, impartial and objective performance of official functions.

A close but slightly different approach is one whereby the reference to the significance of interest is made not in the definition, but when giving reasons for the use of measures to resolve a conflict of interest or for imposition of sanctions for actions taken in a conflict of interest situation. In Denmark, for example, any person working for the public administration shall be disqualified relative to a specific case if they have a particular personal or financial interest in the outcome of the case, as well as in some other cases. However, no person shall be disqualified **if the nature or strength of his interest**, the nature of the case, or his tasks in connection with the handling of the case are such that the decision on the case is unlikely to be affected by extraneous considerations. In the U.S., the legislator decided that the already discussed severe prohibition on actions that affect personal interests needs to be supplemented with the exception that the breach of the prohibition does not result in sanctions if a public official makes full disclosure of the financial interest and receives in advance a written determination made by such official that **the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee**.

Finally, the need to regulate only those situations where personal interests may actually lead to the abuse of office, can be established, not so explicitly – without the direct mention of the significance of interests – but in rather more detailed manner, in the requirements for the declaration of interests and/or the wording of anti-corruption restrictions and prohibitions. For example, also in the U.S., a public official who participates in any particular matter involving specific parties, his spouse and minor child may own securities issued by one or more entities affected by the matter (i.e., in fact, be in a situation of conflict of interest) if the securities are publicly traded and the aggregate market value of the holdings of the public official, his spouse, and minor child in the securities of all entities does not exceed $15,000.

Regardless of which of the decisions we have examined is applied by the legislator, it is hardly possible to develop precise and exhaustive criteria of significance of personal interest. Categories such as "essential", "significant", "considerable", etc. will always contain an element of legal ambiguity, and the assessment of how capable one or another gain is of influencing a public official's behavior will be left to the discretion of persons authorized to make decisions about the presence of conflict of interest.

Lawmakers in at least some countries who added clarifications on the significance of gain into the definition of conflict of interest were well aware of this, but still found such clarifications necessary. Thus, even back in 1960, experts of Association of the Bar of the City of New York, who were commissioned by the U.S. government to conduct a fundamental study on possible ways to improve the legislation on conflict of interest, noted:

> The difficulty of drawing lines in this field (the significance of personal interests - A.K., N.S.) should not lead the Administrator to yield to the temptation to interpret every economic interest, however trivial, as ground for necessary disqualification. The statutory use of the term "substantial" is important and deliberate".
>
> Association of the Bar of the City of New York, 236

The reason for that is that the total absence of any restrictions with regard to the significance of personal interests may result in even worse outcomes than subjectivism and vague criteria in case of mandatory assessment of significance: including attempts, through utterly insignificant cases, to improve detection and prosecution rates for violations of anti-corruption legislation.

In our view, the most optimal approach would involve establishing the significance of personal gain that a public official obtains or may obtain as one of the elements of a conflict of interest definition. The only criterion of significance to be explicitly set out in the definition may be the ability of personal gain to influence the execution of official duties by a public official. However, in this case, it will not be enough to confine oneself to the wording of the conflict of interest definition under Model No.1; the condition of significance of personal gain should be stated more explicitly. This solution may be supplemented by more specific and detailed exceptions to anticorruption restrictions and prohibitions.

3.3.3. TARGETED GAIN

Often, the actions that a public official may take, or the decisions that he or she may make, affect not only him or her and/or persons related to him or her, but a wider group of individuals and organizations, *including* said public official and/or the related persons. E.g., a public official is involved in the decision making with regard to allocation of additional financial support to agricultural enterprises in a region, while his or her relatives own a large agro-industrial complex within its boundaries. The question of whether this situation creates conflict of interest turns out to be rather complex.

Notably, the public officials's decision targets all agricultural enterprises in the region and if the agricultural complex that has relation to the public official does not get preferences during the allocation of financial resources, it can be assumed that the public official was guided by the intention to develop this sector of the economy and meet the public interest. Contrarily, it is possible to conclude that the public official would not have backed the decision if his or her relatives, even along with other enterprises in the region belonging to the same sector, were not personally benefiting from the decision. It is possible that in this case, guided by objective criteria, the public official would consider it more appropriate to allocate the funds to other socially important purposes.

This is particularly relevant for public officials holding senior positions and authorized to work out policies and make decisions affecting a wide range of persons. On the one hand, such public officials may indeed, under the guise of general decisions targeting certain categories of individuals and organizations, pursue personal interests. In this case, the positive effect for these categories will be a kind of by-product of actions aimed at personal gain. On the other hand, rigid regulation of conflict of interest may significantly limit high-ranking public officials in their ability of to make any decisions, as certain persons related to them may operate in a wide variety of sectors to which the authority of those public officials extends.

Similar to the case with significance of gain, some countries have a long history of debate on the targeted vs. untargeted gain issue.[14] This mostly concerns the common law countries where the issues of targeted gain were ultimately incorporated in the conflict of interest legislation. Thus, Canada has a separate provision in the law that does not recognize as personal interest cases when a public official has an interest **in a decision or matter (a) that is of general application; (b) that affects a public office holder as one of a broad class of persons**. Similar exceptions are also common practice in U.S. state law. In Alabama, a conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated **in a manner different from the manner it affects the other members of the class to which he or she belongs**. Arkansas uses the formula "which is **distinguishable from the effects of the action on the public generally or a broad segment of the public**." Iowa finds personal interest in an advantage or pecuniary benefit **that is not available to other similarly situated members or classes of members of the general public**, etc. Some instances when this approach is used can also be found in other countries, such as Armenia: person in office shall not be guided by his or her personal interests if the action or decision concerned is universally applicable or affects a wide range of persons.

14/ E.g. see Davis, p. 897. Discussing whether the U.S. Secretary of Defense is allowed to own a large stake in General Motors. Davis draws a very distinctive conclusion: "If the prohibitions of this statute are brought to bear on posts like the Secretary of Defense, no important official will be able to retain financial ties of any kind with private enterprise. The danger this creates to effective recruitment is obvious. Moreover, the emphasis of the statute would then be misplaced, for real issue is whether the conduct of a particular official will be affected by divided loyalties. His financial stake in a private business is only one of the factors relevant to that issue. It must be recognized that anyone who goes into Government does so for a wide variety of reasons and with a full complement of prejudices based upon his past experiences and background. A man from the steelindustry will probably be biased in favour of the steel industry. This is elementary, and his point of view cannot be changed by a statute or by the elimination of his financial interest in the industry."

3.3.4. TANGIBLE AND INTANGIBLE GAIN

Another "decision node" that arises when defining personal gain comes from the fact that its nature can be quite different. Conflict of interest regulation always covers situations where a public official has the opportunity to obtain for himself or herself or related persons *a tangible gain*: money, property, property rights, services of property nature or other benefits that can be assessed in value terms. In some countries, the definition of a conflict of interest deals exclusively with tangible gain.

Thus, in Italy, according to the law, a situation of conflict of interest exists under this law when the holder of government offices participates in the adoption of a deed, even formulating the proposal, or omits a duty, being in a situation of incompatibility <…>, or when the deed or omission has a specific and preferential **impact on the assets of the owner, spouse or relatives within the second degree, or of the companies or companies controlled by them <…>** with damage to the public interest. In the U.S., the 18 U.S. Code §208 establishing punishment for a public official's actions that involve his or her personal gain is called "Acts Affecting **Financial** Conflict of Interest."

However, in practice, factors affecting the exercise by a public official of his or her duties are not exclusively represented by the simplest types of tangible gain.

First, in many cases, tangible gain, if any, is present implicitly. E.g., a public official, who decides to issue a license for certain activities to an organization headed by his or her relative, does not benefit that organization directly and materially, but allows it to start out and thus provides an opportunity to obtain gain in the future. A public official, who by his or her actions harms or hinders the activities of an organization that competes with the firm of his or her relatives, possibly does not provide gain to that firm, but creates preferential business conditions for it. A public official, who unlawfully facilitates the awarding of an academic degree to a related person, does so not for the sake of getting an additional income, but in order to improve his or her career prospects. So, if the definition of conflict of interest deals only with a gain of tangible nature, it is important, at least to provide clarifications in guidance papers that the formula also applies to implicit tangible benefit.

Second, in exercising official powers, a public official may show bias in his or her actions, being guided by pursuit of an intangible gain. Actual examples of such gain can vary a great deal: there are awards and honorary titles that do not involve a tangible component, there is a satisfied feeling of revenge or other personal dislike, and there is the desire, offering no prospect of tangible gain, to get into graces with

certain people, etc. Of particular importance is the fact that some types of intangible gain pose significant public danger. This is mostly about situations in which a public official may help persons related to him or her to illegally avoid or mitigate sanctions, including criminal punishment. In our opinion, this reason alone makes intangible gain an important factor, which is not to be discarded.

Most countries whose legislation we have studied tend to include both tangible and intangible gain in the definition of conflict of interest. This could be done by using the general term of "personal interest" or "personal gain" without specifying what kind of gain is exactly meant. Canada, Mexico, and Brazil, for example, have followed this path. In many cases intangible gain is explicitly mentioned in the definition: personal or financial interests (**Latvia**); private economic or non-economic interests (**Lithuania**); property or other private interests (**Georgia**); interest, whether or not of an economic nature (**Chile**), etc. Sometimes the definition lists different types of tangible and intangible gain lumping them together, for example: "benefit" means any income in money or in property, including acquisition of participating interests or shares, as well as granting, transferring or renouncing rights, receiving a privilege or honours, acquiring goods or services gratuitously or at prices below the market prices, assistance, vote, support or influence, advantage, obtaining or receiving a promise to obtain a job, a position, a gift, a reward or a promise to avoid a loss, liability, sanction or another adverse event (**Bulgaria**).

It should be taken into account that intangible gain being included in the definition of conflict of interest may cause specific complications in the attempts to implement the relevant legislation in practice. Moreover, if among possible causes leading to conflict of interest, the legislator recognizes the satisfaction of a feeling of revenge or a desire to harm persons whom a public official dislikes personally, then the number of life situations, which occurrence should be monitored by both the public official himself or herself and the supervisory authorities, increases dramatically. The use of standard procedures, such as declaration of conflicts of interest and the measures to resolve each conflict of interest, in such a situation, seems completely unrealistic: a public official can hardly be expected to report each instance he or she has a personal dislike leaving it up to anti-corruption bodies and units to analyze all this information in the prescribed manner. In contrast, in the event that a public official enters a conflict of interest acting upon his or her desire to obtain not quite tangible, purely psychological benefits, then bringing him or her to account would entail significant difficulties. Attainment of moral consideration, let alone the possibility thereof, is much more difficult to verify or prove, than the possibility of obtaining cash or property. And that is exactly why, in our opinion, some countries distinctively narrow down the definition of conflict of interest, limiting it only to tangible gain.

3.3.5. RUSSIAN EXPERIENCE

The Russian definition of conflict of interest, just like any other one based on Model No.1, has, among its key elements, the gain that can be obtained by a public official and related persons. To refer to this type of gain the legislation introduced a special term – "personal interest". However, the introduction of the definition of personal interest to the legislation has not, as might have been expected, provided a more detailed description of the characteristics of gain that can give rise to a conflict of interest. The perception of personal interest initially was and still is extremely broad.

In particular, the Federal Law "On Combating Corruption" does not contain any direct restrictions in terms of materiality or significance of gain. As opposed to the laws of some foreign countries, such as the U.S., the Russian regulation does not use the terms "significant personal interest" or "significant gain".

As we have already noted, some functionality for assessment of how significant the obtained or possible gain is to a public official is embedded in Model No.1 itself. Indeed, taken literally the definition provided in Art. 10 of the Federal Law "On Combating Corruption" means that a conflict of interest does not always arise when a public official has a personal interest, i.e. the possibility to obtain a certain gain, but only when it may affect the proper, objective and impartial execution by this public official of his or her official duties. Consequently, if the gain is so insignificant for a public official that he or she would not opt to abuse office for the sake of it, then conflict of interest does not arise, even if personal interest is present. Hypothetically, it is possible to reach such a conclusion, but insofar the government has not taken steps to prompt employers and Conflict of Interest Resolution Commissions to such an interpretation of the law. The applicability of this interpretation has not been stipulated in official guidance, and the authors are not aware of any cases when it was actually applied.

In the meantime, the idea that the conflict of interest regulation should be applicable only to cases where gain is *significant* for a public official can be very productive for Russia. Russia already has somewhat negative experience in practical implementation of other elements of anti-corruption legislation (e.g. asset and income disclosure procedures), where sanctions, including dismissal from office with loss of trust, were often used for violations so obviously insignificant that they could not be linked to corruption.

To avoid this negative scenario, we believe that the legal definition of conflict of interest should carry a clear statement that only significant gain, if obtained or possible to be obtained, may create a conflict of interest. In this case it is important for the law to directly use the term "significant" or any of its alternatives. Unfortunately, as we have demonstrated above, exhaustive criteria of significance are not possible to be established in legal acts, so any term used here will remain somewhat vague. Nonetheless, the condition of significance of gain will prompt Conflict of Interest Resolution Commissions and employers to give this feature separate and careful analysis before taking final decision about the presence of conflict of interest. It will also provide reasons, much clearer than presently, for reaching conclusions about the absence of conflict of interest and/or about the absence of the need to apply measures to resolve the conflict of interest in situations where the interest, despite being present, obviously fails to affect the actions of a public official.

If the legal definition of conflict of interest will be reformulated in accordance with Model No.3, it would consequently appear advisable to introduce a separate definition for significant gain into law. For this purpose, it is proposed that such gain should be understood as a gain that may result in abuse of office. On the surface, it may seem that the recommended changes are not very different from the approach currently in use. This is partially true: they are not aimed at introducing some fundamentally new feature of conflict of interest, but rather at unlocking the potential that is already present in Model No.1, but not sufficiently deployed.

It is advisable to take certain factors into account, when assessing the significance of gain being obtained or to be possibly obtained by a public official, such as the ratio of property-related gain to the official income of a public official, how gain impacts the safety and health of a public official and related persons, etc. – these factors should be considered in detail in the guidance. In addition, as in some foreign countries, concrete criteria, including value-related criteria, can be established as conditions for the application of certain measures to prevent, detect and resolve conflicts of interest.

As to the issue of whether or not the definition of conflict of interest should include intangible gain, the Russian legislator's approach has undergone several changes. Originally, the definition established in 2004 in the Federal Law "On Civil Service in the Russian Federation" was focused exclusively on tangible gain: personal interest was understood as the possibility of obtaining, in the course of exercise of official duties, of unjustified **income of monetary and in-kind nature, income in the form of tangible gain**.

However, at the time of adoption of the Federal Law "On Civil Service in the Russian Federation", the alternative approach that assumes that public official's actions come, among other things, under the influence of non-property interests, was also known and even reflected in legal acts. Firstly, the repeatedly mentioned bill on "The Code of Conduct for Civil Servants of the Russian Federation" suggested that improper gain should be understood as improper remuneration as well as **tangible and intangible gain** obtained by an interested person as a result of decisions or actions (inaction) of a public official. Secondly, more importantly, the Russian Criminal Code already used the term vested and other personal interest as an essential element of some offences, including abuse of office (Article 285 of the Criminal Code). Interpretation of this term was proposed in the Resolution of the Plenum of the USSR Supreme Court[15], according to which another personal interest as a motive for abuse or forgery may present itself in **the pursuit to obtain gain of intangible nature**, due to such impetuses as careerism, protectionism, nepotism, the desire to embellish the real situation, receive a reciprocal favour, to enlist support in resolving a certain issue, to hide own incompetence, etc.

With regard to non-criminal anti-corruption legislation, an attempt to establish non-property gain as a possible reason for abuse of office was made when drafting the Federal Law "On Combating Corruption". In the bill submitted for the first reading it was proposed that personal interest should be understood as the possibility to obtain by state or municipal officials in the course of exercise of their duties, an income in the form of tangible gain **or other unlawful advantage**. However, as a result of amendments to the second reading, this formulation was replaced by income in the form of money, valuables, other property or services of a property nature, other property rights.[16]

It was not until October 2015, that the reference to other types of gain, apart from the tangible one, was included in the definition of conflict of interest, although the terms "intangible gain" or "gain of a non-property nature" were never used. The changes and amendments introduced resulted in that personal interest began to be understood as the possibility of obtaining income in the form of money, other property, including property rights, services of property nature, the results of work performed **or any benefits (advantages)**. But, although this very approach to the definition is currently in force and in some cases has already been applied in practice, it cannot be said that the balance between property and non-property gain in the definition of conflict of interest has been officially reached.

15/ Clause 17 of Resolution of the Plenum of the USSR Supreme Court of 30 March 1990 No. 4 "On judicial practice in cases of abuse of office, illegal abuse of powers, negligence and forgery in office." (as amended on 10.02.2000). In the superseding Resolution of the Plenum of the Supreme Court of the Russian Federation of 16.10.2009 No. 19 "On Judicial Practice in Cases of Abuse of Office and Abuse of Powers" the approach to the definition of other personal interest remained practically unchanged.

16/ https://sozd.duma.gov.ru/bill/105369-5 (In Russian)

In 2018, the Russian Ministry of Labor issued Guidelines on holding public officials responsible for failure to take measures to prevent and/or resolve a conflict of interest[17], which Guidelines offer surprise interpretation of legal provisions concerning the nature of possible gain. According to the Guidelines, "**other gains are understood as benefits of property nature (tangible advantage)**."

To support the above interpretation, the Guidelines refer to the definition of "corruption" given in Federal Law "On Combating Corruption". Here, the following logic can be traced: the definition of conflict of interest is established in the same Federal Law; thus, the regulation of conflict of interest is aimed at preventing corruption; the definition of corruption identifies it as the unlawful use by an individual of his or her official position for the purpose of obtaining gain solely in the form of money, valuables, other property or services of a property nature, or other property rights; accordingly, the regulation of conflict of interest is aimed at preventing abuse of office perpetrated for the purpose of obtaining only the specified tangible gain.

Such an approach, in fact, aims to return to a definition focused solely on tangible gain, just as it was until October 2015. Although the Guidelines are not legally binding, their impact on law enforcement practice should not be underestimated. Often they are perceived by the Russian government agencies as an explicit directive on how to act, especially since this document was agreed by the Russian Ministry of Labor and the General Prosecutor's Office of the Russian Federation.

Still unresolved indecision of the Russian legislator as to including the non-property gain in the definition of a conflict of interest, obviously stems from the fundamental difficulties in formulating this element of the definition, as we have previously indicated.

In one respect, the recognition of *any* non-property gain as a possible cause for abuse of office will lead to the need to detect and prove all instances of personal dislike on the part of public officials towards persons dependent on their actions and decisions, which is obviously impossible in practice. Diversely, there are certain types of intangible gain that are not related solely to psychic income and can bear significant, in some cases even greater impact than tangible incentives on the actions of public officials. Primarily these are benefits in the form of partial or total indemnity from prosecution, especially criminal.

17/ https://rosmintrud.ru/ministry/programms/anticorruption/9/15 (In Russian)

It should be noted that avoiding responsibility is recognized in Russia as an important factor even by those opposed to the inclusion of non-property gain in the definition of conflict of interest. The above mentioned Guidelines contain, in particular, the following thesis: "In some cases, the property gain can be collateral. E.g., when inaction of an investigator or a prosecutor in indicting a close relative or relative-in-law allows the latter to proceed to retain his or her position and receive wages (other payments related to the work) which he or she could lose if indicted, as well as to keep property which could be confiscated".

Accordingly, an employer, faced with obvious situations where certain types of non-property gain can influence actions of a public official, is implicitly advised to find the property component related to such intangible factors when deciding on the presence of conflict of interest and the use of sanctions. This approach seems highly controversial: it is obvious that in many cases, partial or total indemnity from prosecution (e.g. avoidance of actual imprisonment) is of inherent value to a public official, not just because it may offer possibilities of retaining income and property.

In our opinion, neither of the following seem reasonable: a complete refusal of any mention of non-property gain in the legal definition of conflict of interest; the inclusion of any gain apart from tangible one in the definition; the attempts to artificially reduce the most important types of intangible gain down to the eventual receipt of money, property, property rights or services of a property nature. It would be more practical to focus the definition of conflict of interest on property gain while expanding the concept of personal interest (or gain) to cover certain types of intangible benefits that are very likely to affect the actions of public officials. Incidentally, we believe it is important to explicitly record in the law at least such types of benefits, as refusal to indict, mitigation of sanctions, indemnity from prosecution, as well as to consider the need and possibility of extending the definition to other types of non-property gain, such as awards and honorary titles, competitive advantages, etc.

3.4. RELATED PERSONS

As mentioned before, the concept of conflict of interest is based on the assumption that an individual performs many social roles. Those roles generate networks of social connections and create a variety of interests and responsibilities. As a result, a public official may share in, and want to advance, interests of an extremely wide range of persons. When introducing a legal definition of conflict of interest, any country will have to come up with its own answer to the question as to what extent the entire diversity of social connections and relationships should fall under this regulation.

3.4.1. POSSIBLE APPROACHES TO THE REGULATION

There is always a temptation to make the conflict of interest regulation as far reaching as possible, especially as even seemingly very weak and remote social ties can in fact be both a cause and a tool for corrupt interactions.

In view of this, some countries use a very broad approach:

TURKEY

conflict of interest is understood as a situation where any financial or other personal interests of **public officials, their relatives, friends, or individuals and organizations related to them**, may affect the performance by public officials of their activities in an impartial and objective manner;

FRANCE

conflict of interest is any situation of conflict between **public and private interests;**

MEXICO

conflict of interest is understood as possible adverse impact on the impartial and objective performance of a public official's functions arising out of **personal, family-related or commercial interests.**

This approach, however, can hardly be considered appropriate. It should be taken into account that the longer is the list of various types of relations between a public official, on the one side, and individuals and legal entities, on the other side, included in the definition of conflict of interest, the more complicated and time-consuming it is for both public officials and supervising agencies to track all relevant connections and interests, and their intersections with official powers. A public official may not be aware of many facts (e.g., place of work, ownership in or operational control over companies, etc.) even as regards close relatives, not to mention understanding intricate corporate relations of legal entities related to him or her. So, the wider is the range of persons to be declared and taken into account in decision-making, the smaller is the chance that the obligation to do so will be fully complied with even by the most scrupulous public officials. As for supervisory authorities, even they can hardly be up to the task of identifying and proving certain types of relationships, such as extramarital relations, etc. Also not to be overlooked are the resources to be spent on identifying a wide range of persons related to public officials.

Thus, the intention to proactively detect all possible personal interests capable of putting a public official on the path of abuse may overburden the law with obligations that are obviously impossible for both public officials to comply with, and the government to enforce compliance with.

To avoid this predicament, many countries formulate the definition of conflict of interest in a way that narrows the circle of persons related to public official. We believe that for the most effective prevention of corruption, the following types of social connections are of the utmost interest:

Persons directly related to a public official:

1 

public official's close relatives and relatives-in-law to a certain degree of kinship / relation-in-law (e.g. grandparents, parents, children, grandchildren, siblings, spouses, as well as spouse's siblings, parents, grandparents, children, grandchildren and spouses of children), as well as his or her stepfather, stepmother, stepchildren, individuals in his or her custody;

2 

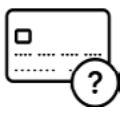
individuals in extramarital relationship with or friends of public official;

3 

public official's former spouse;

4 

individuals in joint or shared ownership over immovable property with public official;

5 

persons to whom a public official has property obligations, or persons who have property obligations to a public official;

6 

persons with whom a public official is bound by employment contracts or recipients of works performed (services provided) by a public official under civil law contracts;

7 

persons controlled by a public official, and also persons of which a public official is a participant, founder, member of governing body, owner or beneficial owner;

8 

persons, from whom a public official and/or persons specified in clauses 1-2 above, received gifts or property services, as well as property of a certain nature or in excess of a certain value for ownership or use;

9 

person who is a party opposing a public official in a lawsuit;

10 

persons to whom a public official directly reports;

Persons indirectly related to a public official:

11 

close relatives and relatives-in-law of the persons specified in clauses 2, 5, 6, 10 above;

12 

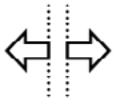
persons with whom the persons specified in clauses 1, 2, 4 are bound by an employment contract, or who hold interests in works performed (services provided) by them under civil law contracts;

13 

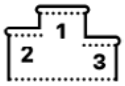
persons of which any of the persons specified in clauses 1-10 is a participant, founder, member of a governing body, owner, beneficial owner, or who are controlled by the persons specified in clauses 1-10;

14 

a person who controls the legal entities specified in clauses 5-7, 9-10;

15 

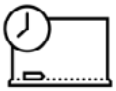
a person who is opposing in a lawsuit the person specified in clauses 1, 2, 4, 6-8, 10;

16 

competitors of the legal entities specified in clauses 5-8, 12-14;

17 

persons who have offered a public official to enter into the relations specified in clauses 6-8, and (or) who have offered the persons specified in clauses 1-2 to enter into the relations specified in clauses 8, 12, 13;

18 

persons with whom a public official was bound by employment contracts or those holding interests in works performed (services provided) by a public official under civil law contracts for a certain period of time before entering the public service.

As of today, no country has such a detailed list in its legislation, and usually some combinations of the listed items are being used. The most frequently mentioned in legal acts are different types of kinship relationships, property relations, and relations arising from participation, including on a non-paid basis, in the governing bodies of organizations. This is not surprising, as these relationships are the most formalized ones and therefore easier to be identified and proved. Among the non-formalized types of relationships, which are mentioned more frequently than others, there are extramarital relations, as well as friendships and personal dislikes. Some examples of different types of related persons used in foreign legislations are presented in Box 4.

In its practical applications, the category "related persons" may have different contents. The development of the respective part of the conflict of interest definition should, in our opinion, follow some principles. Firstly, it should align with the cultural and social context, including with the specific to certain culture understanding of close relatives, the prevalence of "professional dynasties", etc. Secondly, it should be realistic in assessing the capabilities – availability of underlying legal regulation, information technologies, human resources – of anticorruption and other supervising bodies for detecting public official's relations. Ideally, the anti-corruption agencies should have tools to identify each type of personal relations specified in the definition of conflict of interest. The inclusion in the definition of certain hard-to-detect types of personal relationships, such as friendships, is acceptable, also due to reliance on assistance from citizens and civil society organizations in providing relevant information, but should be very limited. Thirdly, it is advisable to use specific terms for personal relationships and to avoid too generalized terms such as "business relationships", especially if they are not defined in the legislation. All in all, we do not recommend trying to extend the definition to cover all possible types of relations between a public official and individuals or legal entities. Much more advantageous would be at first to learn how to effectively regulate conflicts of interest targeting a narrow circle of related persons and then, perhaps stepwise, try to expand that circle.

Box 4

RELATED PERSONS IN LEGISLATION:

Relatives

Minimalistic option – spouse, minor child (**USA**).

More extended options: (a) Description of specific kinship relationships – father, mother, grandfather, grandmother, child, grandchild, adoptee, adopter, brother, sister, half-sister, half-brother, spouse (**Latvia**); parents/adoptive parents, children/adopted children, brothers, sisters, grandparents, grandchildren (**Lithuania**); (b) Description of degree of kinship – family interests, including those of your spouse or person with whom you live in a similar relationship of affectivity and relatives within the fourth degree of consanguinity or second degree of affinity (**Spain**); husband or wife, any person related by blood or marriage in the direct line of ascent or descent or in a collateral branch as close as a first cousin (**Denmark**);

Broad option – persons who are related to a public office holder by birth, marriage, common-law partnership, adoption or affinity (**Canada**).

Property relations and participation in the governance of organizations

In some cases, it concerns persons who have a property relationship with a public official himself or herself: general partner, organization in which he is serving as officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment (**USA**); when a public official or employee is a member of a board, a public official, or a substantial stockholder of a private corporation or owner or has a substantial interest in a business (**Philippines**); involved in the management of or are otherwise closely associated with any company, partnership, association or other private legal entity (**Denmark**).

No less common is the approach that oversees property relations not only of a public official himself or herself, but also those of his or her relatives: legal entities or private enterprises with which a public official had an employment or professional relationship of any kind during the two years prior to his or her appointment to a public office, or with which his or her relatives have an employment or professional relationship of any kind, if such relationship includes managerial, advisory or administrative functions (**Spain**); companies controlled by a public official, his or her spouse or relative down to second degree of kinship (**Italy**); the legislator or a member of the legislator's immediate family has a financial interest in a business, investment, real property, lease, or other enterprise (**Alaska, USA**).

Sometimes more specific criteria of relation are established, including participation interest: a conflict of interest shall exist when <…>public official<…> has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than 5% of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation (**Alabama, USA**); a conflict of interest may exist if a legislator "is required to take an action in the discharge of his or her official duties that may affect his or her financial interest or cause financial benefit or detriment to him or her, or a business in which he or she is a public official, director, stockholder owning more than 10% of the stock of the company, owner, trustee, partner, or employee (**Arkansas, USA**).

Other relationships

Among other specific types of relationships, the most frequently mentioned are friendships and dislikes: friends (**Canada, Turkey**), people of intimate friendship or manifested hostility (**Spain**).

Sometimes other types of relations occur: an adversary party in pending litigation (**Spain**); relations with a public authority where an individual earlier held a public office (**Denmark**); political relations (**Slovenia**). In some cases, the definition uses a broad formula indicating that the conflict of interest regulation may cover essentially any relationship that is of importance to a public official: any other closely attached person (**Denmark**); interests of an individual, including those resulting from personal, family or friendship based or other informal relations with individuals or legal entities, including those resulting from membership in, or participation in the activities of, public, political, religious or other organizations (**Ukraine**).

3.4.2. RUSSIAN EXPERIENCE

From the very moment it began to implement the conflicts of interest legislation, Russia, like most countries, has been and is now on the search for an optimal approach to defining the circle of persons related to a public official. The first definition of personal interest, established in the Federal Law "On Civil Service in the Russian Federation", implied that the execution by a public official of the public duties may be influenced by the possibility of benefits to be obtained **1) directly by a public official himself or herself, 2) by members of his or her family or persons in close kinship or relatives-in-law, as well as 3) by organizations or citizens with whom a public official is bound by financial or other obligations**.

For that purpose, a list of close relatives and relatives-in-law was developed in order to limit the possibility of their being directly subordinate to or controlled by a public official, and included parents, spouses, children, siblings, as well as spouses' siblings, parents and children. Despite the fact that other lists of family members and close relatives[18] were used in some legal acts and bills applicable at that time, the approach initially established in the Federal Law "On Civil Service in the Russian Federation" with minor amendments (spouses of children were added) remained unchanged over the following years and have persisted, including in Article 10 of the Federal Law "On Combating Corruption."

It appeared much more difficult to define other related persons. The formula "organizations or citizens with whom a public official is bound by financial or other obligations" carried a significant legal uncertainty: the term "financial obligations", although used in the legislation, was nowhere legally defined, while the concept of "other obligations" allowed extending the definition of personal interest to virtually any relationship. Attempts to offer more precise wording were made already during the reading of the Federal Law "On Civil Service in the Russian Federation" and immediately after its adoption. Thus, in the draft law "The Code of Conduct for Civil Servants" it was proposed to use the term "interested persons" and make it to include close relatives of public official, or legal entities that have as their participant (member) the public official or his or her close relative, or individuals or legal entities to whom the public official or his or her close relative has a liability in an amount exceeding fifty thousand rubles, or individuals or legal entities with whom the public official's close relative has employment relationship. This proposal was never

18/ E.g., the concept of "close relatives" used by the Family Code of the Russian Federation also included and still includes grandparents. This approach has been adopted by some legal acts that regulate conflicts of interest but have no relation to anti-corruption legislation. Thus, the Federal Law "On the contractual system for the procurement of goods, works and services for state and municipal needs" understands conflict of interest as arising from cases in which certain public officials of the contractor are either in marriage with or close relatives (relatives in a straight ascending or descending line (parents and children, grandparents and grandchildren), full and half-siblings), adoptive parents or adopted children of people who have certain relations with the bidders.

implemented, while the bill was criticized, among other things, for leaving aside many types of relations obviously important for the conflicts of interest regulation.

Despite the shortcomings of the wording used in the Federal Law "On Civil Service in the Russian Federation", it was initially planned to be used as is during the inaction of the Federal Law "On Combating Corruption", and it was exactly the wording with which the bill was passed in the first reading. But when preparing it for the second reading, the changes did appear and notably of the kind that very few expected: instead of detailing, the already unclear term "financial and other obligations" was replaced with the one even more general. Personal interest began to be understood as an opportunity for public officials to obtain income **for themselves or for third parties**. In our opinion, this formula was a failure: essentially it implied that in order to check the presence of conflict of interest, all relations need to be monitored existing between a public official and a virtually unlimited circle of persons to whom he or she could bring tangible gain through his or her actions in the course of exercise of official duties.

When the definition of conflict of interest was revised in 2015, this part of Article 10 was also substantially amended. And this time the changes were aimed precisely at *detailing* the circle of related persons. In addition to public official and his or her close relatives or relatives-in-law, the concept of personal interest began to include a new category – **citizens or organizations with whom public official and/or his or her close relatives or relatives-in-law have property, corporate or other close relations**.

In fact, the legislator has switched back to the approach used in the Federal Law "On Civil Service in the Russian Federation", which tried to outline the circle of related persons by listing types of relationships. This approach, in our opinion, is much better than the one relying on very generalized and indistinct categories such as "third parties". This being said, it should be noted that being applied to the circle of related persons, the current definition of personal interest has many of the same shortcomings as the definition originally established in 2004. The problem that is most important in terms of law enforcement practice still lies in the use of terms that are not defined in Russian legislation.

Thus, legal acts, including the Civil Code of the Russian Federation, widely use the concept of "property relations", but none of them provides its clear definition, let alone the definition to be used in anti-corruption legislation. This makes it difficult for an employer to classify with certainty one or another type of relationship, a public official and (or) his or her close relative may have with individuals or legal entities, as property relation. For example, do property relations arise when a public official's spouse performs a paid work in some organization based on an employment contract? Or should such relationship be considered labor relation, rather than property one (especially since labor relations, unlike property relations, have a legal definition – Article 16 of the Labor Code of the Russian Federation)? And, accordingly, given that labor relations are not directly mentioned in Article 10 of the the Federal Law "On Combating Corruption", is one justified in assuming that actions of a public official in respect of such an organization may lead to a conflict of interest?

Even more complications are caused by the concept of "other close relations", because not only it lacks definition, but there is even no mention of it in any legal act outside the anti-corruption legislation. Accordingly, an employer, as well as anti-corruption authorities, get an opportunity to interpret this concept arbitrarily, extending it to various types of relations: from kinship relations, which are not directly described in the Federal Law "On Combating Corruption", to friendships, extramarital relations, etc.

Unfortunately, official guidance does not add clarity here either. The above mentioned Guidelines on how to hold public officials responsible for failure to take measures to prevent and/or resolve a conflict of interest offer the following interpretation of other close relations: "A public official, his or her close relatives and relatives-in-law may maintain close relations with distant relatives (relatives-in-law), former spouses, school friends, fellow college students, co-workers, including former ones, neighbors and other individuals. Also, such a relationship should be marked by a special trust. Such a relationship may manifest itself through shared residence, registration at the same place of residence, common household, common children born out of wedlock, shared expenses, repayment of debts and payment for vacation, treatment and entertainment of another individual, regular joint leisure activities, gifts in the form of valuable property, other facts testifying to how valuable is the life, health and well-being of a certain individual to a respective public official due to particular circumstances." So, other close relations may include an

extremely wide range of social connections of a public official and his or her close relatives and relatives-in-law, again making the definition of personal interest nearly all-inclusive.

In practice, anti-corruption authorities face serious problems not only in interpreting the concept of "other close relations" but also in attempting to detect and prove the existence of various social ties of public officials specified in the Guidelines. Even the most formalized other close relations, such as kinship relationships, are often difficult to identify because anti-corruption units lack the necessary tools and have no access to the relevant databases, such as vital records. Even more difficult is the task of proving other - not formalized - close relationships: friendships, non-official marital and sexual relations, relationships with former spouses, etc. Although some Russian regions, agencies and organizations have experience in proving close relations by attracting, and using the intelligence of, the bodies authorized to carry out investigative activities, there are very few such examples, and the uniform effective procedure for detecting and proving close relations has not been legally established.[19]

Finally, additional difficulties arise due to the fact that, according to Article 10 of the Federal Law "On Combating Corruption", conflict of interest may result from both direct and indirect personal interest. And the definitions of these types of personal interest are not to be found in the legislation. The guidance also does not offer effective ways to interpret these concepts. As a result, it is not clear enough whether the legislator contemplates any boundaries of indirect interest, depending, among other things, on the nature and intensity of relations a public official has with persons to whom his or her actions can bring tangible gain. For example, should a conflict of interest be recognized in a situation where a public official's spouse has a paid job in organization "A" and the actions of the public official may bring income to organization "B", which is either a parent company to or subsidiary of organization "A", or has the same owner as organization "A"? Does it matter in this case how big the share of organization "B" in the authorized capital of organization "A" is, etc.? As of today, no answers to these and many similar questions can be found in the legislation, which further expands the range of situations falling under the definition of conflict of interest.

Amendments made in 2015 to the definitions of conflict of interest and personal interest made it possible to dismiss the overly broad formula "third parties" used to designate

19/ As for corporate relations, unlike property and other close relations, they have a legally established definition. According to clause 1 Article 2 of the Civil Code of the Russian Federation, corporate relations are understood as relations involving shareholding in, or management of, corporate organizations. However, the practical application of this concept also raises questions. E.g., do corporate relations arise between shareholders of the same joint stock company? Or does this situation give rise to property relations?

individuals and organizations whose interests may be promoted by a public official's actions. But we think there is still work to do to reach the final goal of providing clearest possible description of the circle of persons related to public official for the purpose of conflicts of interest regulation. The goal has not been reached so far largely due to extensive use of terms which are not defined in the applicable legislation. In our view, this element of conflict of interest definition needs further improvement for which there are two options.

The first one prompts the legislator to follow the approach, which has already become customary and calls for the inclusion in the conflict of interest definition of a list providing the *types* of relations most important for better regulation of conflict of interest. In this case, it is important, first of all, to legally establish the definitions of all such types of relations to be used in the anti-corruption legislation. Then these definitions should be further explained and illustrated by examples of their practical implementation in the guidance.

The other option, we believe, is more effective, albeit more complicated, and proposes to dismiss the approach that has been used since 2004 and withdraw from using the definition based on general types of relationships. Instead, a specific term could be introduced into the legislation to describe persons who may have interest in actions of a public official, and then this term should be given a clear definition with closed list compiled featuring specific social relations and interactions of a public official with individuals and legal entities. Such proposals were already put forward more than 15 years ago in the draft law "The Code of Conduct for Civil Servants of the Russian Federation", and although the specific formula used by its authors does not seem effective to us, the general approach deserves close attention.

As for the terminology, the most appropriate choice we think would be "related persons". Other wording is also possible – e.g., the authors of the Code used the term "interested persons". In detailing this term, we suggest drawing on the list of public official's possible social relations given in subsection 3.4.1. The detailing should exclude those types of social relations that cannot be

unambiguously interpreted, as well as those the detection and proof of which requires specific tools not available to anti-corruption authorities. If the legislator decides that certain type of social relations should be listed, but the data required to identify such relations are not being collected, or unavailable to, or restricted or made difficult in practice to be accessed by, anti-corruption units, then the decision should be accompanied by measures aimed to remove such constraints. Certainly, some types of social relations – e.g., friendships or sexual relations – may prove so important for corruption prevention that the legislator will still find it necessary to include them in the list despite obvious difficulties in defining, identifying and proving them. Therefore, such initiative should be preceded by thorough consideration and implemented with care and full awareness of the problems that may arise in law enforcement practice.

The list of specific social relations and interactions is likely to be substantially narrower than even the currently used one featuring types of relations. But this is hardly an argument against changing the approach: in our opinion, it is much more rewarding first to learn how to be up to a simpler task and effectively regulate conflicts of interest resulting from few types of social relations than try to "embrace the unembraceable", thus increasing legal uncertainty and paving the way for selective application of anti-corruption legislation.

04

RECOMMENDATIONS

The above analysis shows that countries use very different approaches to the legal definition of conflict of interest. There are cases when the legislator completely dismisses the idea of a special definition established in legal acts, finding it sufficient to have in place a detailed prohibition on actions in situations of conflict of interest. But much more frequent are the cases where the concept of "conflict of interest" is set forth in the law. However, approaches to how formulate the definition may vary considerably, ranging from focusing on one of the basic models or a combination of them down to the use of clarifications and restrictions targeting certain elements of the definition.

Neither of the above approaches is obviously better than the others to be recommended as the best option for any country. But a careful study of international experience is, in our view, essential. To give the legislation that regulates conflict of interest a chance to become effective, the legislator needs to understand what elements of conflict of interest definition are key ones; to know the approaches, both already used and possible to be used, to formulate these elements; to be aware of the advantages and disadvantages of the alternatives; and also to see how well they serve the general purposes of the conflict of interest regulation in a particular country and adapt to the peculiarities of its legal system and law enforcement practice.

This study made it possible for us to offer some recommendations to improve the current legal definition of conflict of interest and the related legal provisions in Russia, as well as to offer ways to clarify the concept of "conflict of interest" in the guidance papers. We believe this area now requires changes. Despite all the efforts made by the Russian legislator, the definition of conflict of

interest contained in Article 10 of the Federal Law "On Combating Corruption" is still fraught with serious pitfalls that hurt law enforcement practice.

These recommendations laid the basis for developing the definition of conflict of interest, which is presented in Box 5 and proposed for further discussion. We understand that many of our proposals may seem controversial, but one of the main purposes of this work was to spur a competent discussion on the issue of conflicts of interest regulation. Some elements of the definition that we find most debatable are given in square brackets.

The recommendations, though targeted primarily at the Russian legislation, in our opinion could also be of use to experts and decision-makers in other countries that consider developing or amending the statutory definition of conflict of interest.

It should also be noted that the recommendations, as well as this paper itself, focus exclusively on the definition of conflict of interest, i.e., only one – albeit fundamental – element of the conflict of interest regulation system. Other elements – first of all, the set of anticorruption restrictions and prohibitions, as well as other measures to prevent conflict of interest; mechanisms for identifying conflicts of interest, including disclosure procedure; measures to resolve conflicts of interest and procedures for their application; sanctions for violations of the conflicts of interest regulation procedure – no less deserve the detailed study and discussion.

RECOMMENDATIONS

1

The definition of "conflict of interest" should remain in the legislation.

We pointed out that some countries have demonstrated that it is possible to build a conflicts of interest regulation system without defining the concept itself – instead they use a specifically developed package of prohibitions and restrictions. Yet, we find it advantageous to have the definition of conflict of interest legally established: it shows the importance of the conflict of interest regulation in the context of anti-corruption policy, and makes it easier, from the practical point of view, to formulate key restrictions.

2

The definition of conflict of interest should switch from the currently applicable underlying Model No. 1 contained in Article 10 of Federal Law "On combatting corruption" to Model No. 3.

In general, it means that conflict of interest will be understood as a situation where actions of a public official in the exercise of official powers may lead to personal gain.

Unlike Model No. 1, the new approach is much less sensitive to public official's arguments about mental state he or she had when deciding whether there was a conflict of interest. In addition, Model No. 3 allows for better alignment of the conflict of interest definition with the procedure for personal interest declaration, the prohibition of actions in a situation of conflict of interest and grounds for imposition of sanctions.

3

The definition should be stripped of any language that allows seeing conflict of interest in situations where personal gain or the prospect thereof in and of itself has already affected the performance by public officials of their official duties.

The formula "affects or may affect" currently used in the Russian legislation, in our opinion, distorts the essence of the concept of conflict of interest as a situation existing prior to an offense, and in fact allows classifying any breach of law committed out of personal interest as a conflict of interest.

4

The definition should include a clarification that a conflict of interest may result not from any actions of a public official that bring him or her personal gain or harm, but only from actions taken in the course of exercise of his or her official powers.

This clarification will allow to narrow down to some extent the scope of the conflict of interest definition and to exclude from it various situations when personal gain affecting the performance of official duties may be obtained as a result of actions, either in no way related to the status of public official, or caused by opportunities incidentally arising at a particular public office, rather than by official duties.

5

The provision should be preserved covering not only obtainment of personal gain, but also the prospect thereof may result in conflict of interest.

This clarification is very important from a practical point of view, since in many real life situations that may escalate into an offence, an unprincipled public official is not fully confident, but rather assumes or hopes that his or her actions will result in personal gain.

6

The definition should include a clarification that not any obtained, or possible to be obtained, gain may result in a conflict of interest, but only a significant gain.

Without this clarification, the limited resources will be spent, among other things, to regulate situations, which, by their very nature, cannot escalate into any significant offence, let alone a corruption-related offence. Also, it creates a high risk that public official will be brought to disciplinary responsibility even though the gain received by them cannot, due to its insignificance, cause improper behaviour.

Here, it may be advantageous to use elements of Model No.2, establishing the ability of gain to adversely affect the performance of official duties as a basic criterion of its significance.

7

Certain types of non-property gain should be included in the definition of personal interest (personal gain).

In our view, it is not reasonable to extend the definition of personal interest to all possible types of intangible benefits: in practice, a significant portion of such personal interests will be extremely difficult, often impossible, to detect, let alone prove.

However, there are types of intangible personal gain such that for public officials the prospect of obtaining them presents a strong motive for committing offences. These are, first and foremost, non-imposition of sanctions, unlawful mitigation of sanctions or relief from responsibility. Such types of intangible gain are eligible for the inclusion in the definition along with material gain.

8

The circle of persons whose interests may be advanced by public official's actions should be clearly delineated, while excluding from it general terms not defined in the legislation and replacing them with a list of concrete relationships.

The current definition of personal interest applied to the circle of persons related to a public official uses at least two terms not defined in the Russian legislation: "property relations" and "other close relations". Without legal definition, these concepts appear to be differently interpreted by different state bodies.

In addition, these categories are very broad and, according to official guidelines, include such types of relations, which in order to be identified and proved require the use of tools that are not available to anti-corruption authorities.

9

The legislation should have a direct prohibition on actions taken in the course of exercise of official powers that affect personal interests, i.e., that either benefit or harm a public official or persons related to him or her.

We believe that the violation of this prohibition should serve as a ground for the use of most severe measure of disciplinary responsibility envisaged by the Russian anti-corruption legislation – dismissal from office with the loss of trust. The ground used now – the failure to take measures to prevent and resolve conflict of interest – raises many questions: ranging from what exactly are the measures to resolve, and especially to prevent, a conflict of interest are, all the way down to whether a public official should be held responsible if the measures to resolve conflict of interest taken by him or her proved to be obviously insufficient.

Such a prohibition should be accompanied by certain exceptions, in particular, the ones allowing some actions if they are permitted by employer in writing.

10

Consideration should be given to the matter of how possible and expedient it is to adopt a separate Conflict of Interest Act.

The past few years have seen active development of the area of conflict of interest regulation in Russia: there was a sharp increase in the number of relevant decisions made by commissions for conflicts of interest resolution; growth is seen in relevant case law as well. In our opinion, it has already become obvious that the current regulation, which is essentially represented by two small articles within the framework law, is not keeping up with practice.

To be effectively managed, the conflict of interest requires regular, not only occasional, disclosures; detailed procedures for review of identified cases of conflict of interest; a broader list of possible measures of resolution, etc. All this well deserve to become the subject of regulation of a special federal law.

In addition, another problem needs to be addressed – that of fragmentation and, at points, incoherence of conflict of interest regulation and key anti-corruption restrictions and prohibitions. In our opinion, they should be brought together within a separate legal act.

11

The guidelines prepared by the Ministry of Labor of Russia on how to bring public officials to responsibility for failure to take measures to prevent and/or resolve conflicts of interest should be transformed into detailed guidance on preventing, identifying and resolving conflicts of interest.

At present, these guidelines address only a small portion of the issues that arise in practice when making decisions about whether or not a conflict of interest is present and when developing measures to resolve it. These guidelines can be complemented by analyses of some controversial aspects, including those raised in this study, such as the relation between official powers of public officials and real capabilities they have for taking actions bringing them personal gain; targeted vs. untargeted personal gain; possible additional criteria for assessing significance of personal gain, etc.

12

The list of typical conflict of interest situations should be updated. The possibility should be considered of creating an electronic assistant, which will aid the detection of conflict of interest.

The only official review of the typical conflict of interest situations was adopted in Russia back in 2012 and is now largely outdated. Since that time, the legal definition of the concept of "conflict of interest" has changed, large amount of new experience has been accumulated in the field of its identification and resolution, and certain opinions have been formed by courts with regard to various situations of conflict of interest. The currently published Reviews of Law Enforcement Practices in the Field of Conflict of Interest Regulation can hardly be a substitute for an exhaustive systematized list of typical situations.

Also, as we have noted, possible conflict of interest cases are so numerous that they can hardly be presented in their completeness in any convenient and traditional "paper" format of guidance format. The solution to that may come in the form of specialized software, which is already being piloted in some countries.

Box 5

PROPOSED APPROACH TO THE LEGAL DEFINITION OF CONFLICT OF INTEREST

Conflict of interests is a situation when a public official through his or her actions (inaction) in the course of exercise of official powers (duties), may facilitate an [unlawful] significant gain to be received by the public official himself/ herself and (or) persons related to him/ her [or a damage to be inflicted to public official and (or) persons related to him/ her].

Gain is understood as income in the form of money, other property, property rights, services of a property nature, [awards, honorary titles, promotion at work, competitive advantages], as well as non-imposition of sanctions, mitigation of sanctions or relief from responsibility.

Significant gain is understood as a gain that, if obtained or possible to be obtained, may result in abuse of office.

Related persons are understood to be:

1) relatives and relatives-in-law (grandparents, parents, children, grandchildren, siblings, spouses, as well as children's spouses and spouses' siblings, parents, grandparents, children, grandchildren), as well as stepfathers (stepmothers), stepsons (stepdaughters), individuals in custody of public official;

2) individuals in extramarital relations [or friendship] with a public official;

3) [individuals who have common children with public official];

4) individuals in joint or shared ownership over immovable property with public official, except for the common property in an apartment building;

5) persons to whom a public official has property obligations, or persons who have property obligations to a public official, as well as persons who provided for use by a public official and (or) persons specified in subclauses 1-3 immovable property and vehicles;

6) persons with whom public official and (or) persons specified in subclauses 1-3 are bound by employment contracts, or who hold interests in works performed (services provided) by them under civil law contracts;

7) persons of which a public official and (or) any of the persons specified in subclauses 1-3 is a participant, founder, member of a governing body, owner, beneficial owner, or a person in control;

8) other persons, from whom public official and/or persons specified in subclauses 1-3, received income in the form of money, property, property rights, services of a property nature;

9) a person who is a party opposing in a lawsuit a public official and (or) the persons specified in subclauses 1-3;

10) persons to whom a public official directly reports;

11) close relatives and relatives-in-law of the persons specified in subclauses 2, 5, 6, 10;

12) controlling persons of the legal entities specified in subclauses 5-7;

13) competitors of the legal entities specified in subclauses 5-7;

14) persons who have offered a public official and (or) persons specified in subclauses 1-3, to enter into the relations specified in subclauses 5-8;

15) persons with whom a public official was bound by employment contracts or who hold interests in works performed (services provided) by a public official under civil law contracts [during the 2 years preceding his or her entering into the public service].

05

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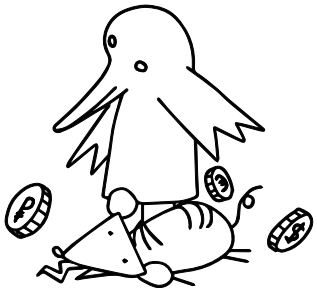

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