What is our understanding of conflict of interest?

Conflict of interest is an extremely complex social, political and legal concept which has recently been gaining importance in numerous countries. The number of public functions encompassed by conflict of interest management policies is increasing as well as the number of instruments used and the density of regulation. General public is becoming more interested in this topic and there are several reasons for those trends.

The ultimate goal of any conflict of interest management policy should be **reinforcement of public trust** through ensuring professional exercise of competences and duties assigned to a certain public office, which is the best guarantee for fulfilment of public interest. In light of global **trends of declining trust in political parties, politicians and politics in general**¹, conflict of interest management policy is considered to be a very convenient remedy instrument for the current the situation. In addition, increased complexity of relations between public and private sector results in the interlock of public interest and organized special, private interests. Increasingly, these relations take form of partnerships and transfer of competences (public-private partnership, subcontracting, transfer of public competences to non-public associations and institutions, joint creation of public policies, etc.). In circumstances of unclear division between public and private sector, managing conflict of interest appears as a guarantee of public interest, reassuring that these complex and multi-stakeholder processes of decision making will not be perceived as a playing field for realization of private interest at the expense of public ones.

**The media** successfully raise circulation and ratings by disclosing not only corruptive activities in politics, but also blunt examples of conflict of interest. In Croatia, one should also keep in mind the **widespread clientelism** evident in the existence of the hidden, informal level of decision making and the implied system of service and influence exchange and in **corruption risks which remain systematically unrecognised**. This further contributes to the significant decline of citizens' trust in public authorities. The majority of corruption cases in Croatia have unmanaged conflict of interest at its core, corroborating that the **conflict of interest** truly is a **breeding ground for corruption**. All this makes conflict of interest policy increasingly relevant in many countries and in Croatia as well.

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¹ “Perception of corruption and real contact between citizens and corruption” a study conducted for the Ministry of Justice of RC within the IPA 2007 project “Strengthening inter-agency cooperation in fight against corruption"
What do we expect from the new conflict of interest management policy?

The GONG’s analysis shows that the key problem of the Croatian system of conflict of interest lies in the legislative framework, which does not provide a basis for development of a meaningful policy for managing conflict of interest. The existing law\(^2\) promotes a false interpretation of conflict of interest, with a tendency to criminalize conflict of interest. Such faulty notion within the law is evident in the annulment of non-constitutional competences of the Commission by the Constitutional Court decision. In addition, such lack of understanding of conflict of interest leads to use of strong sanctions and instruments and neglects soft instruments based on self-compliance to ethical standards. The current law is faulty also in regard to the designated subjects. It stipulates that it is applied exclusively to state officials, but, at the same time, it is not even clear who can be considered a state official. This has a negative impact on raising awareness in Croatian public on the complex issue of conflict of interest due to the existing interpretation that some holders of public offices cannot be in conflict of interest because they are not direct subjects to the Law. However, it should pertain to all persons who participate in any decision making processes regarding public issues.

Therefore, GONG proposes significant amendments to the Act on Prevention of Conflict of Interest in order to reaffirm the interpretation of conflict of interest as an expected and normal situation that can and must be managed. It is a situation in which persons active in public and business sector with broad and numerous social networks, ambitions, material and non-material interests may find themselves regardless of personal ethics standards they have internalized. The purpose of managing conflict of interest is to facilitate a timely identification of risks caused by simultaneous existence of public and private (or special) interest in exercise of public duties, which if not managed create incentives and pressure which can lead to abuse of authority and illegal benefits for oneself or connected persons. **It is of utmost importance that the system for managing conflict of interest, instead of creating taboos, encourages all persons in public positions to be accountable in regards to their private interests and loyalty, as well as for the impact of their actions on the public image of the institutions.** Therefore, we emphasise building of public trust in government institutions as the ultimate purpose of conflict of interest management policies, focusing not only on corruption risks but also on reputation risks arising from situations of potential, perceived and actual conflicts of interest.

The new Law, as a foothold for the new conflict of interest management policy should follow two main paths.

Firstly, criminalization of conflict of interest should be stopped through introduction of soft instruments based on self-compliance of holders of public office; introduction of soft sanctions, whose impact is strengthened through internalisation of new ethical standards through education and a participatory process of drafting of codes of ethics. This will, primarily, initiate development of institutional routines, and in the long run, the culture of managing conflict of interest, which is currently missing in the Croatian system. Simply, it is necessary to promote self-evaluation of private relationships that could influence professional execution of duties by holders of public office. **The Commission should, therefore, be granted broad discretionary rights** in order to ensure that the sanction is appropriate to the level of public office holders’ misconduct.

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\(^2\) The Act on Prevention of Conflict of Interest (Official Gazette 26/11, 12/12)
Secondly, the conflict of interest management system should encompass all public functions defined in the most general way - not through focusing on the legal status of a certain public position but on the role of a certain public position in decision making and policy processes. Therefore, the subjects of the law should be state officials, civil servants, local government civil servants, employees of state agencies and public institutions, judges, state attorneys, employees of public national and local companies and non-profit organisations with public duties and competences - briefly, all persons in public positions which contribute to the fulfilment of public interest. Conflict of interest management mechanisms should also be applied to all external stakeholders, involved temporarily or occasionally, in the processes of public governance and decision making (e.g. members of mixed committees for drafting regulations or for allocation of subsidies). We hold that such a law would strongly facilitate activities and campaigns aimed at awareness raising regarding conflict of interest, those targeting holders of public offices but also those targeting the wider public.

Local Government should be the priority area for the development of mechanisms and good practice in managing conflict of interest. There is a prevailing perception of all stakeholders that corruption on the local level is extremely widespread and accompanied by clientelistic relations. In addition, decisions made at the local level are less general than the ones at the national level. Since their impact is limited to a smaller number of people who are mutually interconnected by the very fact of living and functioning in a small community, purely statistical chances for conflict of interest increase.

The question which remains open is which institutions or sectors should develop institutional specific systems for managing conflict of interest. However, without a doubt such system should be established in the judiciary, state attorney's office, and for civil servants. These recommendations should not be considered as GONG's requests towards the Government, but as GONG's initial contribution to the participative process of drafting of codes of ethics and accompanying by-laws, which will produce new internalized ethical standards and accompanying instruments which will have been agreed upon through exchange of conflicting arguments and perspectives.

How do we perceive the role of the Commission for Conflict of Interest?

We hold that the Commission for Conflict of Interest should play a strong role in quality assurance of these sub-systems for managing conflict of interest – existing in all levels and branches of government, encompassing all decision making processes, some even at the level of entire sectors. It is recommended that all institutions with public functions should create institutionally specific systems for managing conflict of interest. Namely, one central body cannot be directly in charge for managing these systems, since they cover a multitude of different activities encompassing tens of thousands of public positions. Furthermore, systems of managing conflict of interest should be devised in line with institutional specificities in order to increase chances of success. Working processes, institutional framework, content of public decisions, competences of institutions, actual cases of conflict of interest significantly vary between institutions and it is not advisable to cover them with general rules and norms within a centralised system of conflict of interest implemented by a single body. Finally, the purpose of conflict of interest management policies is to develop a culture of accountability, and not to transfer accountability to one central monitoring and oversight instance.

In such system for managing conflict of interest the Commission would have the authority to issue non-binding guidelines and opinions, but also, if needed, a possibility to intervene heavily in the established systems (in form of binding instructions, veto over decisions or decrees) of ethical
Finally, all this contributes to increasing chances for better efficiency of these specific systems which should primarily be oriented towards awareness raising and internalisation of ethical principles, sanctions being the last resort. This approach to managing conflict of interest is based on the idea of an umbrella act which should oblige institutions in the public sector to develop self-regulation in the area of managing conflict of interest. This would also allow its application in highly autonomous systems such as academic community, judiciary, media and even civil society organizations (publicly funded or which participate voluntarily in implementation of public policies).

The Commission, apart from quality assurance of institution specific systems of managing conflict of interest should also continue to be in charge of managing conflict of interest system which encompasses a wide array of state officials. This is important for the visibility and setting of new standards for conflict of interest management, but also, for the development of culture of accountability. With this in mind, further legal changes that target state officials should focus on introduction of new instruments for managing conflict of interest. In addition to existing assets declarations, the obligation of declaring non-financial interests is proposed - these would constitute the statement on prevention of conflict of interest that would be submitted by officials upon taking over the public position. With no possibility for supervision and control of statements of assets their purpose becomes futile. Therefore, we recommend the development of a separate procedure for periodic verification of accuracy of the submitted statements of assets. The Registry of business meetings is a strong instrument for deconstructing clientelistic relationships and diminishing the relevance of hidden, informal decision-making processes. The registry of meetings held by state officials would be kept by civil servants/employees ex officio and would be updated by officials with information on meetings held after office hours. Combined with the statement on conflict of interest, the Registry of business meetings could strongly encourage reflection of officials on the appropriateness of informal contacts they already have or plan to establish. Such contacts in Croatia, not only raise suspicion in professional exercise of public duties, but also present a clear source of corruptive activities.

What other instruments for managing conflict of interest are particularly useful?

The introduction of divestment as a new instrument (selling of partial ownerships of private companies) is recommended for cases when ownership of company stocks allows influence on company’s business policies or in case of company growth provides significant profit. The instrument of transfer of shareholders rights is recommended for cases when ownership interests are result of a personal investment strategy with the purpose of portfolio diversification, leading to ownership of a large number of smaller shares with no potential for large profit in case of company growth. It is important to mention that in Croatia, on numerous occasions the transfer of shareholders rights does not result with elimination of financial interest, and since it is legal, this practice further contributes to the loss of citizens’ trust in public bodies. A clearer legislature is required in the area of privileged information. Even more important is the process of code of ethics drafting which should be used to list existing types of privileged information available to specific categories of officials in order to raise their awareness and knowledge. The issue of postemployment of officials gains importance in all countries, due to increased complexity of the relationship between public and private sector, which is partially characterised by higher levels of employment mobility between the
two sectors. Regarding **postemployment**, special attention should be paid to **officials and employees of regulatory agencies** - due to the scope of privileged information they acquire, and the possibility of using established personal networks after leaving public position. Promise of postemployment presents a great risk since it easily enables influence on the content of regulatory decisions which are of great importance for an entire economic sector.

**The mechanism of self-exclusion from the decision-making process** is an instrument of conflict of interest policy *par exellance*, since it is based on continuous self-evaluation of personal interests and identification of situations when they can influence professional exercise of duties. This is possible only if the level of awareness is very high and ethical principles are deeply internalized. The awareness of officials and civil servants should be increased and result in the use of this instrument in legislative processes (initiatives, amendments), policy processes (development of policy options, policy counselling, development of public policies), staffing decisions, decision-making processes on use of public resources (public tenders, concessions, sub-contracting, public procurement), and also in all other work processes within a specific institution.

This instrument is particularly suitable for civil servants. **Internal organisational documents can easily define criteria and mechanisms for self-exclusion, and it is simple to find a replacement - a person with same level of obligations, duties and competences within the system.** In addition, it is possible to define criteria for unacceptable internal communication (advocacy) and for information sharing on decision making processes in which there is a possibility (or presence) of conflict of interest. As it has been previously mentioned, this instrument is based on self-reflection and timely identification of conflict of interest, followed by self-exclusion. This requires a **deep understanding of the notion of conflict of interest that can be acquired only through education and participative process of developing codes of ethics.** Organisation of trainings for civil servants is simpler than for state officials, since they remain employed by the system for a longer period of time and public bodies which provide various forms of trainings for civil servants already exist. **Civil servants and state officials who manage public resources should be a priority** - decisions on public calls for project proposals and subsidies, public procurement, awarding concessions, sub-contracting, investment projects, etc. This is proposed since conflicts of interest which result in private financial profit destroy public trust even more rapidly. In addition, the issue of non-transparent influence of special interest on legislative and policy processes should be opened, having in mind multi-level decision making processes awaiting Croatia at the EU level. It is necessary to develop communication standards with representatives of interest groups and deal with the open question of lobbying regulation.

**The instrument of postemployment regulation should be additionally considered for the highest level of civil servants**, as well as the development of meaningful monitoring mechanisms, which proved to be rather challenging in other countries.

**Finally, we wish to emphasise that conflict of interest management policy should be aligned with the specificities of the local political culture, and the cultural context in general, since a clear risk of non-implementation of too strict regulations does exist.** Probably this is most true for the **policy regarding the receipt of gifts**. Negative impacts of giving and receiving gifts can be solved by obligatory declaration of received gifts, maximum value of gifts or some other softer and more innovative mechanisms (for example a lottery used to distribute gifts among all civil servants within an institution). It could be expected that the participative process of reflecting on ethical dilemmas civil servants face in their work will result with identification of needs for more complex reform processes. Due to the delayed reform of the public administration, it is necessary to create opportunities for implementation of at least those elements of structural reforms necessary for establishing a meaningful conflict of interest management system for civil servants.
Managing conflict of interest in the judiciary?

Analysis of the status in judiciary branch of the government calls for immediate action aimed at raising public trust in judges and judiciary in general. According to public opinion surveys, perception of corruption among judges and the judiciary are at high levels, corrupted judges are identified as one of the greatest dangers for society, and on the other hand actual encounters with corruption in the judiciary are extremely rare. Raising levels of public trust should be one of the aims of the judiciary reform. The most appropriate tool seems to be the conflict of interest policy, or to be more precise introduction of new instruments. Development of additional internal mechanisms is recommended. No legislative changes are need since legal basis for this already exists - judges are obligated to identify and evaluate situations which may put their impartiality in doubt.

Thus, the novelty in the presented proposal is the obligation of the judge to inform the parties in dispute and their lawyers about his/her relevant private interests, since currently the judge autonomously decides on this and if necessary only informs a higher instance within the system. It is necessary to make a decision on modalities of informing the parties in court proceedings - in written or oral form. If there exists a non-managed conflict of interest of the judge (regardless of the fact that the court decision may be legal, just, rational, legitimate or appropriate), a sense of injustice is created simply due to doubts regarding the professional exercise of judging duties in light of his/her private connections with the other party in dispute. It is worrying that the State Attorney’s Office (SAO) annually rejects a large number of criminal charges submitted by dissatisfied parties in court dispute, seeking criminal prosecution of all involved in the court proceedings (from lawyers to judges of Supreme Court). It is becoming clear that the assessment of relevant interests of the judge by parties involved in the dispute is more relevant than the autonomous assessment of these interests by the judge. In case of efficient declaration of relevant interests of judges, it is possible to create an additional criterion for the system of assigning cases to judges.

We consider the introduction of declaration of assets by judges to be a large step forward in increasing transparency of the judiciary, and an instrument which should remain in place. Special attention should be paid to the participative process of developing codes of ethics during which existing open ethical dilemmas in the judiciary could be discussed (e.g., how to proceed in case when a colleague judge asks for a lower sentence for a some person). In addition, this would enable judges with an opportunity to reflect on external perspectives of relevant stakeholders.

It is recommended to introduce an obligation to declare relevant personal connections with political and business elite for high level holders of public office in the judiciary and State Attorney’s Office. Publicity of these statements is optional; however it should be delivered to the Commission which could provide advice and recommendations if deemed necessary. It is important to emphasise that persons on the top of the hierarchy of these systems are not easily covered by conflict of interest management systems applied to the lower ranked personnel. Danger of abuse of personal influence in the issues relating to conflict of interest is realistic; therefore it is advisable to consider this recommendation which differs from the principle of self-regulation.

Due to specific characteristics of the judiciary as an autonomous branch of government, an extremely low number of legislative measures are proposed, focusing on strengthening competences and accountability of the State Judicial Council to develop effective mechanisms at court level and oversight over the implementation of these mechanisms by individual judges. We can expect that the role of the Commission for conflict of interest, in quality assurance of the system could face opposition in judicial circles and get rejected as an unconstitutional proposal. Same argument was used to criticize the introduction declaration of assets by judges and to criticise any recommendations aimed at introducing some form of oversight over the SAO. Therefore, a dialogue between the State Judicial Council, Ministry of Justice and the Commission for conflict of interest on the improvements of the current approach to conflict of interest in the judiciary system should be opened, since it is a precondition for success of on-going reforms and strengthening of public trust in the rule of law in Croatia.