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Conflicts of interest at local and regional level report

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EPP/CCE: European People's Party Group in the Congress
SOC: Socialist Group
ILDG: Independent and Liberal Democrat Group
ECR: European Conservatives and Reformists Group
NR: Members not belonging to a political group of the Congress

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1 Introduction

1. The expansion of Conflict of Interest (Col) systems and their implementation, monitoring and enforcement pose ever greater challenges. If in the past there were seen to be regulatory gaps and a lack of enforcement, the more recent concern is that some governments have gone overboard in building an elaborate ethics apparatus that reflects the prevailing negative assumptions about the motivations and capabilities of both politicians and public servants. Today, trying to be 'ethical', could mean that public organizations and their leaders end up pleasing no one. The issue at the heart of this new ethics debate is not whether there is too little or too much ethics, but how effective policies and instruments are, and what kind of institutionalization of ethics regimes is needed. As regards the latter, a new debate is also developing about the effectiveness of local integrity systems.

2. The increasing interest in Col has not yet produced consensus on the best way to tackle Col in different contexts, situations, sectors, categories of staff and as regards the right choice of policy instruments. More work is also needed on 'what types of rewards or penalties work best to create incentives for responsible and accountable behaviour, including the search for improvement (Jarvis/Thomas, 2009)³. This does not mean that promising and powerful Col systems do not exist. In fact, many countries are in a process of institutionalizing and professionalizing their Col systems. However, Col policies need to be better integrated into other policies. So far, most policies are a 'plug-in policy' that fills the gaps that other policies and other governance logics produce.

3. Recent trends in Col studies also indicate a growing interest in evaluating the effectiveness of integrity policies, forms of institutionalization of ethics and in identifying which ethics infrastructures work best. When designing effective instruments, there must be a connection between the design and the implementation of policies. This means that any rules or policies should be tested as to whether it can be implemented and enforced. The attention to monitoring Col illustrates a paradox: on the one

² The rapporteur would like to thank Christoph Demmke, University of Potsdam for his contribution to this report.

³ Mark D. Jarvis & Paul G. Thomas, 2009, 'The Limits of Accountability: what can and cannot be accomplished in the Dialectics of Accountability?' Paper presented at Dalhousie University, Halifax, November 11-13, p.11

hand, there have never been so many efforts to regulate and manage Col, measure corruption and define unethical behaviour. On the other hand, scientific evidence about trends and data, and the effectiveness of the different reforms, measures and instruments, are still lacking.

4. There is still no consensus regarding the mechanism by which an instrument might impact on output and outcomes. Despite many efforts and the popularity of measurement approaches (for example by those by Transparency International), no methodology yet exists to accurately measure corruption levels and Col⁴. This also relates to measure Col over time. Are Col increasing or decreasing? Analysing the development and effectiveness of Col policies (at the subnational level) represents a huge challenge for the legal, political and administrative sciences.

5. The available evidence seems to suggest that t whereas some forms of Col are decreasing, others remain stable and yet others are increasing. Therefore, it is no surprise that despite evidence about the existence of the problem, there is frustration at the limited impact of regulatory, political and institutional Col efforts. There is also uncertainty about how best to tackle Col policies, which are producing new dynamics and contradictions.

6. It seems that local and regional authorities are subject to the emergence of new risks to the state of public integrity, with more discretion being given to managers, more mobility between the public and the private sector and a certain blurring of boundaries between the public and the private sector and between private and public life as such. Current societal developments towards more individualization, digitalization, internationalization and intensification are also generating new integrity risks in the public sector⁵.

7. This report will look at the effectiveness of Col rules, policies and standards at the subnational level. In all countries worldwide there is common understanding, at the central, regional and local levels, that rules and standards are necessary to control and manage Col of elected representatives. More than other “public persons”, elected representatives are exposed to a range of Col. They exercise important positions of power and influence, interact regularly with the private sector, take important decisions which have a financial impact, hold important functions in boards, agencies or committees, possess information about important issues, allocate grants of public funds and make appointments to positions. In addition, local and regional representatives introduce measures to decentralize public services, enhance public-private partnerships, improve customer and citizen orientation, promote outsourcing policies and enhance mobility between the public and private sector. All these developments have an impact on the emergence of new Col.

8. Col issue challenge many popular assumptions and increasingly put into question traditional assumptions about the effects of good governance and integrity policies and raise questions as to the outcomes of reforms in this policy area.

2 Defining conflicts of interest

9. In all countries, and in all regions and local municipalities, there is confusion about the multiplicity of issues that fall under the umbrella of Col policies, dissent about how important the problem of Col really is and frustration about the uncertain effects of Col policies. Thus, Col policies have a lot in common with anti-corruption policies: “How do we measure something that is largely hidden?” To resolve a conflict and to distinguish between actual, apparent, real, and potential conflict situations usually requires legal, technical and managerial skills and a fundamental understanding of the many issues and points of view involved.

10. Today, defining Col is becoming ever more difficult, because the concept as such functions as an umbrella that incorporates all sorts of tensions between official and private roles. This difficulty has to do with the dynamics and the expansion of the concept as such. As Ackerman notes, we live in an era where people are taking on ever more conflicting roles, identities, and changing loyalties⁶. De Graaf also observes developments towards more value conflicts in our societies⁷. The concept of Col is

4 P. M. Heywood, *Measuring Corruption: perspectives, critiques, and limits*, in: P.M. Heywood (editor), 2015, *Routledge Handbook of Political Corruption* Routledge Handbooks, New York. See also A. Mungiu-Pippidi, (2016), *The Quest for Good Governance*, Cambridge University Press 2016.

5 Aris van Veldhuisen/Dominique Snel, 2014, *Integriteit in Ontwikkeling*, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, Den Hague

6 Susan Rose-Ackerman, *Corruption and conflicts of interest*, in: Jean Bernard Auby/Emmanuel Breen/ Thomas Perroud (Eds.), 2016, *Corruption and Conflicts of Interest*, *Studies in Comparative Law and Legal Culture*, p.3

7 Gjalte de Graaf, 2015, *The Bright Future of Value Pluralism in Public Administration*, in: *Administration and Society*, pp. 1-9

expanding. The language used can also be confusing: “having an interest” is not the same as “being interested” in an issue.

11. Obviously, trends towards an ever-broadening notion of conflict of interest leads to finding conflicts of interest everywhere in social life⁸. So far nobody knows for sure who trends towards more value conflicts and value dilemmas relate to the development of conflicts of interest. As Anecharico/Jacobs noted already years ago: “the public standard of morality has also become much stricter.... Previously accepted conduct...is now deemed unethical and previously unethical conduct is now deemed criminal.”⁹

12. “Over the past thirty years something transforming has indeed happened to our understanding of conflicts of interest. In fact, two things have happened – one to our conception of “conflict”, the other to our notion of “interest”. We have come to take a distinctly objective approach to conflict. And we have evolved a deeply subjective understanding of interest”¹⁰. “Up until the middle of the 1960’s, the “type of private “interest” that conflict-of-interest discourse addressed remained largely pecuniary – hence “objective”¹¹. Now this has evolved towards subjective, ideological issues and emotional impairments. “we have moved well beyond the objective and the pecuniary to embrace a huge range of subjective and psychological traits”¹² The broadening of definitions and requirement to disclosure obligations to friends and other partners immediately conflicts with other values such as “right to privacy” and “individual freedom”.

13. A Col arises in situations where a person has multiple roles and could be said to wear two hats. In most countries, this may be the case with legislators who can exercise professional activities next to their position as parliamentarians. Generally, where individuals have more than one official role it may be difficult to keep the roles separate.

14. Therefore, Col may result in an “abuse of public office for private advantage” and holds a potential for unfair behaviour. The OECD Guidelines provide the following definition: ‘A conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities’.¹³

15. One illustration of this definition is the President Trump case: On June 12, 2017, the District of Columbia (USA) and the State of Maryland (USA) filed a legal action against President Donald Trump in his capacity as President of the United States. The lawsuit alleged violations by the President of two provisions of the US Constitution that seek to make certain that he faithfully serves the American people, free from compromising financial and non-financial entanglements with other national and international actors. President Trump owns and controls hundreds of business throughout the world, including hotels and other properties. Consequently, he is using his position as President to “boost this patronage of his enterprises, and foreign diplomats and other public officials have made clear that the defendant’s position as President increases the likelihood that they will frequent his properties and businesses” (p. 5/6 of the complaint).

16. These potential conflicts of interest raise a serious question as to whether the “president faithfully serves the people, free from distorting or compromising effects of financial inducements provided by foreign nations, their leaders, individual states in the Union, Congress, or other parts of the federal government. They ensure that Americans do not have to guess whether a President who orders the sons and daughters to die in foreign lands acts out of concern for his private business interests; they do not have to wonder if they lost their jobs due to trade negotiations in which the President has a personal stake; and they never have to question whether the President can sit across the bargaining table from foreign leaders and faithfully represent the world’s most powerful democracy, unencumbered by fear of harming his own companies” (Complaint, page 2).

17. Conflicts of interests have a lot in common with corruption and fraud. However, conflicts of interests should not be mixed with integrity violations such as corruption and fraud ¹⁴. In reality, the concept of

8 Anne Peters, Conflict of Interest as a Cross-Cutting problem, in: Anne Peters/Lukas Handschin (eds.), 2012, Conflict of Interest in Global, Public and Private Governance, Cambridge, Cambridge University Press, p. 6

9 Frank Anecharico/James B. Jacobs, 1996, The Pursuit of Absolute Integrity, University of Chicago Press, Chicago, p. 16.

10 Stark, Conflict of Interest in American Public Life, Harvard, Cambridge, 2000, p.4

11 “pecuniary interests are hard, external, and visible to the naked eye”, Stark, Conflict of Interest, op cit., p.5

12 Stark, Conflict of Interest, op cit, p. 203

13 OECD (2003), Recommendation of the Council on guidelines for managing conflict of interest in the public service, June 2003, page 4

14 Leo Huberts, 2014, The Integrity of Governance, Palgrave Mc Millan, Basingstoke,

Col as such is at the “borderline” of corruption, fraud and other forms of unethical behaviour. Col concern many social and professional activities and interests. Finally, conflicts of interest can arise at any time and may range from avoiding personal disadvantages to personal profit seeking. What if Col have nothing to do with pecuniary interests and even personal interests do not play a role? In these cases, Col take the character of a dilemma but not the form of a criminal act at all. Therefore, one should also distinguish between persons who have intentional Col and those that have conflicts of interests without even realizing. This also illustrates that not all violators of conflicts of interest rules and policies are simply uncaring, evil people.

2.1 Purpose and objective of Col policies

18. Overall, conflicts of interest policies should not only provide a tool for preventing conflicts of interest. Instead, they should also:

- increase public confidence in the government;
- demonstrate the high level of integrity of most elected representatives and Government officials;
- deter conflicts of interest from arising because official activities would be subject to public scrutiny;
- deter persons whose personal finances would not bear up to public scrutiny from entering public service, and;
- better enable the public to judge the performance of public officials in the light of their outside financial interests.

19. Given this broad list of objectives and purposes of Col policies, it is an important question whether conflict of interest policies can achieve these objectives. Here, most difficult is the relationship between conflict of interest policies and trust levels.

20. The concept of Col is strongly related to the development of trust as such. The most important reason for the expansion of Col policies is a growing lack of trust in the “self-serving statements of the powerful”¹⁵. Overall, conflicts of interest policies reflect a growing lack of trust in public authorities, public officials and “the powerful”. “As a consequence, lawmakers tend to be faced, more and more, with the difficult task of designing typologies of green, orange and red-light situations, for the various categories of public officials and regulatory bodies”¹⁶. Frequently, there is a clear correlation between the regulation of Col and the development of trust: The lower trust levels, the more Col are regulated. This again illustrates how Col are related to national context. “The level of public trust in government (...) impact the choice of legislation”¹⁷. As such, Col rules are an instrument that communicates in an implicit way that they are installed because of the potential distrust and conflict that is present in the group¹⁸ that is an awareness is created that people cannot trust each other, “then building up cooperative and trustworthy relationships over the long term may prove difficult”¹⁹.

21. Since Col policies are inherently distrust policies, it is, however, not clear how they could contribute to an increase in trust in elected representatives and in public institutions. The more rules and standards are introduced, the more often rules and standards can be violated. Consequently, media and the public may interpret this as a sign of declining ethical standards. “Thus, rather than decreasing the number of cases of unethical behaviour, by declaring behaviour unethical which was formerly in accordance with the rules, the absolute number of scandals and cases of unethical behaviour increases, thus creating the appearance of public officials becoming more unethical. However, higher ethical standards lead to an overall more ethical public service.”²⁰ There is therefore a clear correlation between the regulation of Col and the development of trust: the lower the levels of trust in public institutions, the stronger the tendency to manage Col by detailed rules.

15 Susan Ackerman, Corruption and conflicts of interest, in: Jean Bernard Auby/Emmanuel Breen/ Thomas Perroud (Eds.), Corruption and Conflicts of Interest, op cit, p.6

16 Auby/Emmanuel Breen/Thomas Perroud, Corruption and Conflicts of Interest, op cit, p. XV

17 Auby/Emmanuel Breen/Thomas Perroud, Corruption and Conflicts of Interest, op cit, p. XIX

18 Marshall Schminke (eds) (2010), Managerial Ethics, Routledge, New York, p. 121

19 Schminke, Managerial Ethics, op cit, p.121

20 Nathalie Behncke, N. (2005), “Ethics as Apple Pie: The arms race of ethical standards in congressional and presidential campaigns”, EGPA-Paper, “Ethics and Integrity of Governance: A transatlantic dialogue”, Leuven, June 2005, p.8

22. Critics such as Nieuwenburg²¹ (but also Anechiarico and Jacobs²², Mackenzie²³ and Stark²⁴) argue that more rules of ethics do not necessarily provide an effective response to the decline of public trust and integrity issues, but may cause even more cynicism regarding public and political institutions, arguing that the expansion of ethics regulations and more public discussions about the need for more and better (conflict of interest) rules have not contributed to a rise in public confidence in government, but have had the opposite effect. More “ethics regulations and more ethics enforcers have produced more ethics investigations and prosecutions.... Whatever the new ethics regulations may have accomplished...they have done little to reduce publicity and public controversy about the ethical behaviour of public officials.”²⁵

23. They demonstrate that the expansion of regulations and more public discussions about the need for more and better Col rules have not contributed to a rise in public confidence in government. “Despite the increasing number of rules and regulations, politicians continue to promise ever higher ethical standards as a mean to gain votes. Therefore, ethics measures are often introduced by politicians with an eye on the perceived problem of decreasing public trust in the own political class. However, the intention of increasing public trust, however, is rarely met in reality²⁶. (Rosenson 2006, 137).

24. However, one should not overemphasize this explanatory variable. Today, regulating ethics policies is popular. Consequently, being against more rules and standards is risky from a political point of view and may also be contradictory and ineffective. On the other hand, ethics policies are becoming more and more politicised. Politicians can be sure that calls for new initiatives will be applauded by the citizens, because these calls reflect a widespread perception in European societies that levels of corruption and conflicts of interest are increasing and something must be done. From the point of view of a holder of public office (and even more of an elected representative, a legislator or a Minister) it would be detrimental to be against new or even higher ethical standards. In fact, the call for higher ethical standards is more and more the subject of election campaigns in many countries.

25. The downside of this development is that ethics as a policy issue is abused as a moral stigmatisation. More and more politicians use “accusations of unethical conduct as a political weapon...”²⁷ Rules of ethics in particular are resources that politicians mobilise to attack and discredit their opponents. Consequently, ethics are increasingly used as a moral instrument to denounce political opponents. However, the solution to the problem is not to deregulate Col rules and policies to increase public trust. In fact, deregulation would most likely not improve the situation in low trust countries.

2.2 The specific challenge for regional and local authorities

26. All countries accept that municipalities are very vulnerable to Col, as they are often responsible for decision-making and service delivery in spheres renowned for their vulnerability to corruption (urban planning, construction, social services and licensing). The greater directness and frequency of their relationships with citizens offer temptations that test the integrity of local politicians and public servants. Considering these factors, the integrity of local politicians and public servants deserves extra vigilance (Klitgaard, Maclean- Abaroa, and Parris 2000).

27. In Europe, a coherent overview of existing rules, policies and instruments does not yet exist at the subnational level, whereas in the United States, the National Conference of State Legislatures provides comparative information on conflicts of interest policies in all US states.²⁸ In Europe, comparative information is still missing and existing approaches in the field of Col are fragmented. The setting up of local integrity systems requires regional and local institutions, policies, practices, and instruments to contribute to the integrity of a given region and local municipality. The basic characteristic of an integrity system perspective is that it outlines elements and conditions that are important for the integrity of local governance. Compared to the more common concept of organizational ethics management, local integrity systems include both organizational ethics-management efforts and external integrity guardians (such as external financial auditors, ombudsman, and police and justice systems).

21 Paul Nieuwenburg, 2007, The Integrity Paradox, in: Public Integrity, 2007, Vol. 9, No. 3

22 Annechiarico/Jacobs, The Pursuit of Absolute Integrity, op cit, .

23 G. S. Mackenzie, Scandal proof: Do ethics laws make government better? Brookings Institution, Washington D.C , 2002

24 Stark, Conflict of interest, op cit.

25 Mackenzie, op cit, p.112.

26 Rosenson, 2006, op cit, p. 137

27 Williams, The Ethics Eruption: Sources and Catalysts, in: Saint-Martin/Thompson, Public Ethics and Governance, op cit, p.41.

28 (<http://www.ncsl.org/research/ethics/50-state-table-conflict-of-interest-definitions.aspx>).

28. The term “integrity system” is (increasingly) used, as national integrity systems have been in existence for over a decade and are well understood (Pope 2000). A national integrity system can be depicted as a Greek temple with eleven pillars, such as legislation, watchdog agencies, and the media; the pillars stand on public awareness and society’s values. National integrity systems have also been used to map the integrity of countries around the world.”²⁹ Local integrity systems are very important for the integrity of local government and for the public’s trust in government more generally (Nieuwenburg 2007).

29. To enable comparison of integrity systems, a framework is necessary. Such a conceptual tool should be broad (for example by the adoption of checklists), but must also incorporate specific measures and practices which are considered important. Hoekstra and Kaptein define the institutionalization of integrity policies as the process of transferring integrity ambitions into intended outcomes by means of support structures, specialized agencies and formalization processes within a given context³⁰. “Nowadays there does not seem to be any shortage of knowledge and expertise on the content of integrity policies and the measures and instruments an organization could adopt. However, the organizational aspects of integrity, the way integrity should be institutionalized within organizations, have been neglected.

30. Most subnational authorities focus on legislation, rules, standards and codes. However, increasingly, countries accept that the effective management of conflicts of integrity requires an integrative policy which depends not only on the introduction of effective preventive and punitive legal measures, but also on guidance, prevention, value based approaches, incentives, the right ethical culture, monitoring, leadership and (management) instruments for increasing awareness. Proper behaviour should be supported by an ethical-friendly organizational environment, characterized by the fact that the variables are interdependent. As regards best-practice local integrity systems, Huberts et al. (2014)³¹ discuss the Hong Kong Independent Commission Against Corruption (ICAC) and the Integrity Bureaux in Amsterdam and in Hamburg. Professional website presentations on integrity issues can be seen at the City of Bremen and the Zentrale Antikorruptionsstelle (ZAKS) (<http://www.zaks.bremen.de/>).

31. It is much more difficult to promote integrity where the separation of powers between the executive and the judiciary is blurred, than in a system with a clear division of powers. Close relations between the political and private sectors are sensitive and give cause for Col. With increased contacts between those two sectors due to the increasing trend towards private-public partnerships, Col situations are becoming more frequent. The problem may be greater in small countries, or in institutional contexts where people have close personal contexts and “micro-politics” (Neuberger) play an important role. The Estonian case study shows how Col are related to the size of a country.

Size of a country and relationship with Col – the case of Estonia

32. With a population of under 1.3 million, Estonia is one of the smallest countries in Europe. The size of the population influences Col in the public sector. This is not to suggest that Estonia has higher levels of Col simply on account of its size (in reality, it has relatively low levels of corruption, fraud and Col). Still, the size of the country relates to Col. First, because few actors are working in the administration. This means that people know each other (personally) with the result that decision making and communication structures are less formalized and anonymous than in bigger administrations. Thus, the fact that the public workforce is small may have positive (side-effects through more possibilities for social control of actors) and/or negative effects because of enhanced possibilities to create networks and personal ties which make it more difficult to maintain strictly formalized decision-making procedures and processes

33. Another problem is the high labour turnover in the public sector. High turnover favours high levels of interaction between the public and private sector, facilitates corruption and weakens institutionalized knowledge. This again may support the appearances of Col.

²⁹ Leo Huberts & Frederick Six, 2012. Local Integrity Systems, Towards a Framework for Comparative Analysis and assessment. Public integrity, Vol. 14, Issue 2, p. 152.

³⁰ Alain Hoekstra, & M. Kaptein, 2012. The Institutionalization of Integrity in Local Government. Public integrity, Vol. 15, Issue 1, pp. 5-28

³¹ Huberts, The Integrity of Governance, op cit, pp. 187.

34. Looking at this case, it becomes clear that the traditional focus on centralized approaches to Col needs a radical change. In the future, the management of conflicts of interests needs a much better combination between top-down and bottom-up approaches and a stronger focus on the need for institutional issues (such as the need for a solid local integrity system) and better support and more investments in soft-instruments such as ethical leadership.

2.3 The content of Col policies and regimes

35. For a long time, Col policies were input driven. Elected representatives focused on the adoption of ever more rules and codes, but less on the implementation and enforcement of policies. In the 1980s, Transparency International was the first body to promote the concept of ethics infrastructures and ethics regimes. This was a reaction to the existing “implementation gap” in the field. Afterwards, International organizations such as the OECD, Council of Europe and the EU started to adopt useful toolboxes, guidelines and practical Col manuals for decision-makers and public officials. Demands for better “Ethical Leadership”³² and the institutionalization of integrity policies³³ became popular.

36. A review of literature shows that most countries address the following questions:

- What needs to be covered? The actual conflict of interest issues covered can be organized in four categories, namely, conflicts related to in-office activity (activities related to the office); conflicts related to political activity (e.g. if the office holder intends to stand for election); other activity (e.g. other public functions, charitable activities etc.); and financial interests.
- At what point in time is coverage required? This addresses the time before taking office (pre-office), during office (in-office) and after leaving public office (post office).
- Who needs to be addressed? Ethics rules focus on the office holder. However, some of the possible conflict of interest situations also involve the office holder's family and other relations (e.g. partners, friends and pre-office professional contacts).
- How can compliance be enforced? Ethics rules generally include provisions on the prevention of conflicts of interest (e.g. via training), internal enforcement (i.e. within the office), external enforcement (e.g. reporting to outside bodies) and sanctions (i.e. the consequences of unethical behaviour).

37. In the meantime, many countries have moved from a focus on regulating Col policies to managing Col and from top-down approaches to more complex value based approaches including education, training, transparency requirements and better monitoring systems. Consequently, modern Col systems are no longer based purely on law, compliance and penalizing wrongdoing, they are oriented towards preventing Col from happening and encouraging proper behaviour through guidance and orientation measures, such as training and the introduction of codes of conduct. Consequently, all countries now offer a wide range of instruments in the fight against unethical behaviour and the emergence of Col. For example, in Norway, instead of “hard measures”, complaint mechanisms and whistleblower policies play a critical role in combating corruption.

38. Countries have started to invest in the institutionalization and implementation of Col policies. In many cases, also regional and local authorities have started to institutionalize Col infrastructures. Still, there is too little evidence regarding the outcomes and effects of Col policies. In most cases, regional and local authorities themselves have neither data nor comprehensive oversight about the regulation, management and effectiveness of ethics policies as regards the effectiveness of regulations and policies concerning ancillary activities, post-employment, gift acceptance, use of organizational resources and data. Or, whether rules and procedures are effective as regards declaring Col, whistleblowing, reporting of potential Col etc.

39. This lack of evidence means for policymakers that certain challenges need to be addressed: first, they need to ask if some Col are so harmful that they ought to be criminalized even if they do not rise to the level of fraud or corruption. Second, has the state set up the right mixture of ex ante prohibitions

³² Karin Lasthuizen, 2008, *Leading to Integrity: Empirical Research into the effects of Leadership on Ethics and Integrity*. Amsterdam: University of Amsterdam

³³ Alain Hoekstra, 2016, *Institutionalizing Integrity Management: Challenges and Solutions in Times of Financial Crises and Austerity Measures*. In: Lawton, A., Z. van der Wal and L.W.J.C. Huberts (Eds.) (2016), *The Routledge Companion to Ethics and Public Service Organizations*

and ex post penalties. Third, the need to draw the line precisely between tolerated alignments of public and private interests and prohibited situations or behaviour.³⁴

40. Different opinions exist as to the right design of (legally binding) instruments, the need for (or the limits of) transparency and accountability, the effectiveness of soft-instruments and value based approaches and different opinions as to which certain processes and procedures have the potential to be effective. The latter can only be evaluated if instruments are used, tested and implemented. As it seems, often, instruments are perceived as more effective when they exist, known and applied in the administration. For example, newer soft instruments are often considered to be less effective simply because they are also less known. Often, positive perceptions about the effectiveness of an instrument can only increase if the instrument is applied in practice. For example, if ethics training on Col is offered it is also considered to be more effective. If a risk analysis is carried out its effectiveness is considered to be much higher as if the effectiveness of this instrument is only considered in theory³⁵.

41. One should also mention that judgments about whether instruments are effective depend very much on the group of respondents and the organizational culture. For example, politicians judge the effectiveness of instruments differently than administrators, and a police administration may have a different perspective than a Ministry. In future, it will be important to further define the effects of different instruments and policies in different contexts. Only then will it be possible to further progress as regards the question whether or not ethics policies and instruments are effective, or not. Therefore, we recommend continuing work as only this will allow for a fine-tuned analysis as regards the effectiveness of different instruments in different contexts and help to bring in a more rational, non-ideological discourse.

3 (In-) effective tools for implementation - the need for innovation

3.1 Discussing tools and instruments - are they (in-) effective?

42. The preconditions for effective implementation of conflicts of interest policies depend on the choice and the design of effective instruments, or tools, for implementation. To be successful, policy instruments require compliance from stakeholders (national politicians, civil servants, citizens and other stakeholders).

43. In some countries, this is easier if decision-making processes are more consensual and trust levels in public institutions are higher. In these cases, government can use relatively soft instruments, such as voluntary agreements, codes or guidelines. As has been shown elsewhere, countries with high levels of distrust, conflictual decision-making cultures and high levels of corruption often also have a high number of legally binding and detailed rules in the field of Col, whereas this is not so much the case in 'high trust' countries e.g. the Scandinavian countries. Thus, the effectiveness of measures in the field of Col does not only depend on the choice of instruments (top-down, command and control, legally binding, direct enforcement, sanctions) but also on the national context and culture. "Where to draw the line between conflicts that should be outlawed per se and those where disclosure is sufficient depends upon the level of public trust in government and the country's size. Where the level of trust is high, citizens may be willing to accept a rule that permits an agency head to hire his or her relatives so long as the relationship is disclosed in advance. Where the public is suspicious of government, a rule banning the hiring of relatives may be needed"³⁶.

44. Normally, governments have a very large choice of tools at their disposal. In the following overview, we have decided to classify these tools in categories such as economic tools, legal tools, persuasive tools, managerial tools and others. Other categorizations distinguish between 'carrots and sticks' approaches or 'soft- and hard law' approaches.

45. Today, discussions about the pros and cons of the right choice of instruments continue in the field of Col. So far, it seems, the increasing interest on Col policies has not necessarily produced more clarity and consensus on the effectiveness of Col policies in different contexts, the right choice of policy instruments within the best-fit organizational design of ethics infrastructures and the question what types of incentives, rewards or penalties work best in which situation. For example, whilst some

³⁴ Yseult Marique, Integrity in English and French public contracts: Changing administrative cultures?, in Auby/Breen/Perroud, op cit, pp.85 . (Auby/Breen/Perroud, Introduction, p. XV)

³⁵ J.H.J. Van den Heuvel et al., 2010, Integriteit van het lokaal bestuur, Boom, pp. 96-97.

³⁶ Richard E. Messick, Policy considerations when drafting conflict of interest legislation, in: Jean-Bernard Auby et al., Corruption and Conflict of Interest, op cit, p.115

experts call for the need for more behavioural approaches and more ‘nudging’ in the field of ethics, others believe that there is too little control and monitoring. Again, others point to the need for more intrinsic incentives for doing good and warn against a too strong focus on compliance approaches. Again, others are sceptic as to the effectiveness of value based approaches and soft-instruments.

46. However, evidence exists to the importance of the overall ethical climate of organizations and the importance of organizational justice³⁷ and the relationship between ethical leadership and follower behaviour. Despite the view that ethical behaviour cannot be taught in individual cases, organizations can design structures, processes and strategies to encourage and support such behaviour. Here the focus shifts from the disposition of individual employees to the possibility of designing sound organizational structures and coherent integrity management systems. Nowadays consensus prevails among scholars that integrity is a responsibility of the organization and management.

3.2 Conceptualizing rules, codes of ethics and codes of conduct

47. Overall, there is no shortage of rules, but a lack of clarity and high degree of fragmentation of existing rules. In the meantime, Col rules have been promulgated by a variety of international organizations such as the UN, OECD, Council of Europe and the EU (OLAF), each providing its own rules, standards, (model) codes and guidelines. To this should be added the numerous national, regional and local rules and standards.

48. According to the latest figures in EU countries (2008), in most EU countries, the ‘dominant’ approach is to address Col with legislation covering the entire public administration sector. Relevant legislation is in place in 23 Member States, 17 of which have adopted codes of conduct, and 14 have a ‘combined’ approach, with both legislation and codes of conduct to address Col in the public administration. To this should be added the existing legislation, rules and standards on Col in federal and decentralized countries. However, this overview only takes stock of whether relevant legislation or codes are in place. It does not examine the detail or intensity of the integrity requirements, nor the existence of legislation and rules in different subnational governments. For example, in Germany, each of the 16 Bundesländer has adopted its own legislation on corruption, fraud and Col.

49. According to Demmke et al. (2008), the use of law is the predominant form of regulation. Whereas most Member States of the EU have adopted general anti-corruption or anti-fraud laws, fewer have also adopted specific Col laws and regulations. Few countries have adopted general Col laws which apply to all institutions. Instead most countries have different and separate rules for different institutions. The same can be said for codes. In almost all countries, regions and local administrations codes of ethics are designed for individual institutions. Only rarely (as in the case of the “Seven Principles of Public Life” in the UK) do they apply to the whole governmental sector. Moreover, whereas some countries have highly regulated systems, others only regulate some specific topics.

50. Another distinction can be made between the regulatory instruments: here, it is important to note the differences between most of countries who regulate Col by general and/or specific sectoral laws and regulations (and codes) and the United Kingdom, and for a part the Netherlands and Denmark, which regulate Col almost exclusively, in the case of the UK, or partly, in the case of Denmark and the Netherlands, by means of general and specific sectoral codes. As regards national institutions, the highest regulatory density can be found for the European Central Banks and for Government. Parliaments are the least regulated institutions. Whereas the differences between the Central Banks and governments are not very significant, they are significant between all institutions and the Parliaments. The relative low degree of regulation of Parliaments in Europe reveals the question whether Parliaments are structurally under-regulated. And if so, why that is the case? US literature suggests that Parliaments are indeed structurally under-regulated because legislators must regulate themselves. However, in reality most Parliaments are not very eager to regulate themselves.

51. The under-regulation of Parliaments seems indeed to be problematic. For example, a recent GRECO study discusses the exposure of Council of Europe parliamentarians to corruption and conflicts of interests. “PACE – like any other national or supra-national parliamentary assembly – is not

³⁷ See especially Treviño, L. K. 1990. A cultural perspective on changing and developing organizational ethics. *Research in Organizational Change and Development*, 4: 195-230; Treviño, L. K., Hartman, L. P., & Brown, M. 2000. Moral person and moral manager: How executives develop a reputation for ethical leadership. *California Management Review*, 42: 128-132; Russel Cropanzano/Jorgan H. Stein/Thierry Nadisc, *Social Justice and the experience of emotion*, Routledge, New York, 2011 Trevino, op cit.

immune to corruption risks”³⁸. Indeed, many studies by Transparency International show that the political sector is one of the most corrupt sectors of all. If this observation is correct one should also derive from this the conclusion that elected representatives and legislators should be more strongly regulated than other categories such as, for example, civil servants.

52. In the field of Col, an increasing number of international, European, national, regional and local authorities have adopted different types of codes. Because of this increasing interest in adopting this specific instrument in the fight against corruption, fraud and Col, interest is also growing in evaluating the effectiveness of codes.

53. However, there is a lack of agreement as to what these ethics documents should include. According to OECD, there is a definitional differentiation between codes of conduct and codes of ethics. A code of conduct serves as an instrument of a rules-based compliance approach. It describes as specifically and unambiguously as possible what kind of behaviour is expected and establishes strict monitoring and punishment procedures to enforce the code. A code of ethics is rooted in the values-based management approach, focusing on general values rather than on specific guidelines, putting more trust in the employee’s capacities for moral reasoning. A code of ethics seeks to support and coach on the application of these values in daily real-life situations (OECD, 2009, p. 34).

54. Codes for the different categories of institutions, sectors, policies and categories of staff are also subject to some considerable variation. In addition, the different codes vary as to their legal and political effects. Also, as regards the term “code” many countries differentiate between code of ethics, code of conduct and code of rules and regulations.³⁹

55. According to Frankel, three types of codes of ethics can be identified. An aspirational code is a statement of ideals to which practitioners should strive. Instead of focusing on notions of right and wrong, the emphasis is on the fullest realisation of human achievement. Another type is an educational code, one which seeks to buttress understanding of its provisions with commentary and interpretation. A conscious effort is made to demonstrate how the code can be helpful in dealing with ethical problems associated with professional practices. A third type is a regulatory code, which includes a set of detailed rules to govern professional conduct and to serve as a basis for adjudicating grievances. Such rules are presumed to be enforceable through a system of monitoring and the application of a range of sanctions. Although conceptually distinct, in reality any code may combine features of these three types. A decision about which type of code is appropriate for any single profession at a particular point in time will necessarily reflect a mixture of both pragmatic and normative considerations⁴⁰.

Categories of Codes⁴¹

- Legally-binding or voluntary
- Aspirational, compliance oriented or regulatory,
- Educational or public relations
- Integrative ethics instrument or guideline
- Combined with sanctions or without deterrent mechanisms
- Detailed or general/short

3.3 Effects of Col rules and codes – more rules, more effectiveness?

56. The EC’s Anti-Corruption Report 2014 suggests that important additional efforts are required in many countries to translate the requirements set out in law or in codes of conduct into actual practice. In recent years, Col policies have become more regulated, detailed, institutionalised but also more bureaucratic and fragmented. Today, most countries provide for increasingly sophisticated Col

38 GRECO, Assessment of the Code of Conduct for Members of the Parliamentary Assembly of the Council of Europe, GRECO (2017) 5 fin, 19 June 2017, p. 4

39 M. Van Wart, Codes of Ethics as Living Documents, in: Public Integrity, Vol. 5, No. 4, pp. 331.

40 Frankel, M.S. 1989, Professional Codes: Why, How, and with What Impact?, in: Journal of Business Ethics, No.8, pp.110-111, 1989.

41 Demmke et al., Regulating Conflicts of Interest, op cit, p. 146.

approaches in different sectors, for different governmental levels and for different categories of people, such as managers, legislators, bankers, and judges. In addition to these prohibitions and restrictions, different countries and institutions implement new measures as to disclosure duties, transparency requirements, monitoring and control instruments and training and awareness policies. Despite the inherent limitation to regulate “behaviour”, some countries establish impressive lists of prohibitions and restrictions.

57. As a result, existing rules and standards are fragmented and inconsistent. For example, GRECO (2017)⁴² states in its Assessment of the Code of Conduct for Members of the Parliamentary Assembly of the Council of Europe: “The Parliamentary Assembly of the Council of Europe (PACE) has adopted over the last ten years various rules to govern the conduct of its members and to preserve their integrity. However, the multiplication of texts – which have been imperfectly put together in 2015 in a compendium entitled “Code of conduct for members of the Parliamentary Assembly” (Déontologie des membres de l’Assemblée Parlementaire) – has led to a regulatory framework which needs a number of improvements (...). The interaction between the various texts is unclear and may give rise to confusion. Different sets of standards have been adopted successively to deal with various categories of parliamentary activities/functions (...). A single, comprehensive and more coherent regulatory framework on integrity standards, which would replace the various scattered texts, would increase the level of understanding and awareness of these standards by those who are meant to implement and comply with them. It would also contribute to limiting unnecessary doubts when it comes to their enforcement”.⁴³

58. The highest regulatory density can be found in national central banks and national governments. Parliaments are the least regulated institutions. Also, here, the situation within the Parliamentary Assembly of the Council of Europe (PACE) is representative for many national parliaments: While “PACE has played a key role in promoting the need to regulate and increase the transparency of lobbying and third-party contacts, the latter are not properly and comprehensively regulated as regards PACE itself”. The above-mentioned GRECO report concludes that PACE is lacking rules and standards, especially about Col and gift-taking.

59. In the European Union, the EU member states who entered the EU after 2005 are generally more regulated than the old member states, whereas the USA and Canada have higher levels of detailed rules than most European countries.

60. Countries differ widely as to the degree of transparency policies, powers of the different ethic commissions and committees, training and disclosure requirements (e.g. declaration of personal income, declaration of family income, declaration of personal and family assets etc.). In addition, important differences exist as to rules and standards in the field of post-employment policies (existence of cooling-off periods, strict, flexible or no restrictions and control of post-employment activities), complete or only partial restrictions and control of gifts and other forms of benefits, personal and family restrictions on property and divestment requirements. Overall, the issue of post-employment differs widely. It is therefore not surprising that GRECO finds in its assessment of the PACE rules and policies that “The various provisions appearing in the compendium of 2015 do not impose strict “post-employment” restrictions, for instance in the form of so-called “cooling-off” periods which would limit – inter alia – the vulnerability of PACE members to improper offers or even bribes in the form of professional prospects. PACE members are thus free to take up any professional or other activity after their term”⁴⁴.

61. The promulgation of ever more international, national and regional law, guidelines, toolboxes and existing subsidies in the field of capacity building, transposition, implementation and enforcement of ethical standards poses one of the main barriers in the European fight against Col. Of course, the various international monitoring mechanisms are generally considered to have contributed to the compliance at national, regional and local level. However, there is also an increasing lack of horizontal and vertical integration in terms of consistency with related monitoring and enforcement mechanisms

42 GRECO, Assessment of the Code of Conduct for Members of the Parliamentary Assembly of the Council of Europe, GRECO (2017) 5 fin, 19 June 2017

43 In GRECO’s Fourth Evaluation Round reports adopted to date, the introduction of a code of conduct for parliamentarians, or improving the general approach followed by the existing rules, was often one of the starting points recommended – it concerned more than 40 GRECO member countries. Specific recommendations on the consistency, uniformity and overall quality of the rules already in place were addressed in particular to Ireland (§50, recommendation i of the report), Italy (§46, recommendation i), Latvia (§38, recommendation iii), Malta (§31, recommendation i), Poland (§40, recommendation ii) and Portugal (§47, recommendation ii).

44 GRECO, op cit.

and the rule of law more generally, as well as between international, European, national, regional and local governance levels. No country, institution or parliamentary assembly is calling for the deregulation of ethics policies. Instead, all countries and international organizations are continuing to enlarge their toolboxes⁴⁵.

62. In June 2017, the newly elected French government unveiled its new “moralization law” pledged by the newly elected Emmanuel Macron to clean up French politics following a series of fraud scandals. Minister Bayrou said the bill was not intended to “solve personal problems of morality” but eliminate CoI. The new law should focus on CoI and requests that Members of parliament, local representatives and senior civil servants will be banned from employing members of their family and required to make a declaration of personal interest. Instead of being given a sum of money for expenses without having to justify expenditure, they would need to produce receipts to be reimbursed for what they had spent. Any person convicted of a crime or offence concerning their honesty would be banned from public office for 10 years. Only one day after the presentation of the new draft law the French president faced embarrassment as one of his ministers was urged to resign over a property deal, a case shows that conflicts of interest laws have also become a political instrument. According to Stark, CoI policies have become a “moral minefield” (Stark, 2000⁴⁶). Whereas the “President Trump case” illustrates the existence of numerous conflicts of interests, the case of “President Macron” illustrates the “politicization” of CoI.

63. According to Stark, “we have come to demand reassurance from office holders that their official judgment is unencumbered in ways that require increasingly sophisticated excursions into their (and often their own) moral psychologies”⁴⁷. Consequently, “We now prophylactically prohibit all officials from entering into an ever-increasing number of specified, factually ascertainable sets of circumstances because they might lead to inner conflict”⁴⁸. Especially in times of fake news, ever new scandals and media interest. Perceptions of (un-) fairness can be easily manipulated if conflict-of-interests become a moral stigmatizer, political weapon and moral measurement of persons, when, “in reality it is just law”⁴⁹.

64. Johnston (2005)⁵⁰ argues that legal regulations ignore essential aspects of morality and justice perceptions in the society as a whole, ignoring vital components of leadership and accountability in public administration. Systems that focus on rules, compliance and sanctions are easier to implement, unambiguous and represent a useful tool for policymakers to respond to public demands after individual corruption scandals. In addition, compliance management does provide senior managers with legal shields, following Johnston’s (2005)⁵¹ argumentation that they can make use of legal provisions to blame the act of breaching the law instead of systematic organizational malfunctions in leadership and lack of accountability. However, compliance approaches may also create negative side effects. Even though the approach is well suited for ensuring “compliance with laws”, fostering an integrity culture is highly unlikely.

65. Thus, there is no shortage of rules and standards in the field of CoI. CoI are becoming more regulated but not necessarily better managed or enforced in many countries. Because of the fragmentation of rules, there is also no understanding about the definition of CoI, as too many definitions overlap. The focus on regulation instead of implementation can be explained as follows. In contemporary societies, it seems that when political scandals and new conflicts of interests appear “...failure is attributed to poor drafting and not enough law; typically, the solution is ‘smarter’ legal interventions...In the aftermath of serious scandal, concerns about guaranteeing integrity and about the appearance of integrity trumps efficiency. Rarely is the integrity/efficiency trade-off even considered”⁵².

3.4 CoI rules as effective instruments in the fight against corruption

66. Experience shows that rules and standards may also have side-effects which are both negative and positive, such as improved societal outcomes, but also more bureaucracy, red-tape and administrative burdens. CoI rules may conflict with other rights, unworkable, counter-productive in practice, or may

45 Christoph Demmke/Timo Moilanen, 2012, Effectiveness of Public – Service Ethics and Good Governance in the Central Administration of the EU-27, Peter Lang, Frankfurt/M., p. 133

46 Andrew Stark, 2000, Conflict of Interest in American Public Life, Harvard, Cambridge, p.263

47 Stark, Conflict of Interest, op cit, p.3

48 Stark, Conflict of Interest, op cit, p. 264

49 Stark, Conflict of Interest, op cit, p. 266

50 M. Johnston, 2005, Keeping the Answers, Changing the Questions: Corruption Definitions Revisited, in: Politische Vierteljahresschrift, pp. 69

51 M. Johnston, Keeping the Answers, op cit, p.69

52 Antechiarico/Jacobs, The Pursuit of Absolute Integrity, op cit, p.12.

create impediments to bringing experienced people into public office. The OECD has warned that too strict approaches, excessive prohibitions and restrictions have perverse effects. Therefore, a modern Col policy should strike a balance between the need to regulate Col issues and guaranteeing individual and organisational freedom and flexibility.⁵³

67. The existence of strict rules and standards is no guarantee of an ethical government. Especially in some of central and eastern countries it seems that one of the objectives of the introduction of strict and detailed rules was to prophylactically prohibit holders of public office “from entering into an ever-increasing number of specified, factually ascertainable sets of circumstances because they might lead to inner conflict.”⁵⁴ Another objective was obviously to satisfy the requirements of EU membership. The situation in some of the central European states (like Bulgaria) is in an interesting contrast with the situation in most Scandinavian countries, which have much fewer rules and standards but at the same time relatively low levels of corruption and bribery.

68. This allows for the hypothesis that more regulations do not lead to less corruption. Instead, it seems that more regulation is not required in those situations where high levels of public trust exist. However, this is not to say that countries with a high level of corruption and conflicts of interests should have fewer rules in place. Strict rules are not a necessary condition for low levels of Col. Too many ethics measures can damage the public interest instead of enhancing it. The problem is that subjective perceptions of increasing levels of Col “risk to reflect citizens’ general predispositions towards government, rather than actual experienced corruption.”⁵⁵

3.5 Positive aspects of rules and standards⁵⁶

69. One may argue that the rise in regulations and of expectations in the field of ethics is to be welcomed and reflects more critical and mature citizen attitudes towards authorities. In fact, citizens tolerate unethical behaviour less than ever. People expect public officials to have high standards of integrity because they have considerable power, influence and decision-making discretion. Because of this, standards of integrity must be set at high levels.

70. A study by Gaugler⁵⁷ shows that the higher the prestige and the position of a holder of public office, the more companies and organizations seek to establish contacts and to offer board memberships to them. Accordingly, top-politicians and civil servants frequently assume new and important positions or functions in companies and organizations after they have left office. In recognizing this, it seems appropriate that specific rules and standards should regulate the behaviour of holders of public office and public servants. Also, supporters of more and better ethics rules in the field of registering financial assets claim that rules and standards are important because holders of public office and top officials “hold positions of such importance and such accountability that the public can claim a reasonable right to know some of the details of their personal finances and the potential conflicts those might create”⁵⁸.

71. A transparent system that is observed by everyone in an organization as a matter of course will demonstrate to members of the public that its proper role is performed in a way that is fair and unaffected by improper considerations. Especially, the often cumbersome requirements for transparency and declaration of information reveal important information to the public. The existence of strict transparency requirements may not automatically improve public trust. Thus, integrity, openness, and loyalty to the public interest are necessary conditions in increasing public trust. Partisans in favour of more or better rules do not always pretend that these will decrease corruption and Col. However, additional standards may deter public officials and holders of public office from questionable behaviour. Feldheim and Wang demonstrate that ethical behaviour of public officials improves public trust. The authors find higher levels of public trust in cities where managers have higher perceptions of ethical behaviour”⁵⁹

53 OECD, Managing Conflicts of Interest, 31 March 2006, p. 8.

54 Stark, Conflict of Interest, op cit, p.264

55 Stephen van de Walle, Decontaminating Subjective Corruption Indicators, Paper presented at the EGPA-Conference, Leuven, June 2005, p.16

56 This chapter refers to the findings in Demmke et al. (2008), Regulating Conflicts of Interest, op cit, p. 117-121.

57 Gaugler, M., Bundestagsabgeordnete zwischen Mandat und Aufsichtsrat, VDM, Saarbrücken 2006, p.108

58 Mackenzie, Scandal Proof, op cit, p. 168

59 M.A. Feldheim/X.Wang, 2004, Ethics and Public Trust, in: Public Integrity, 2003-2004, Vol. 6, pp. 73

3.6 Debating the effectiveness of codes of conduct

72.Despite existing research, it is not yet clear how and whether codes of conduct fulfil their objectives. This uncertainty can be explained by the variety of existing types of codes, the differences of institutional, political and legal contexts and the difficulties to define codes as such.

73.According to a recent survey⁶⁰ regarding the impact of codes, only two studies show that codes of conduct might have a positive impact on employee's attitude and behaviours, whereas most studies conclude that codes have a limited impact. "The results (...) revealed no significant effects on ethical attitude or behaviour. Nor did codes of conduct exert a direct effect on organizational attitude"⁶¹ Positive effects are only reported if codes are combined with other elements that encourage ethical local cultures. Overall, literature reveals a broad range of determinants and outcomes of codes of conduct such as the relevance of different content elements such as the frequency of communication, and managerial support for the code.⁶² The mere presence of a code of conduct as a formal cultural artefact has been compared to personal reinforcement of a code's content⁶³. Studies reveal a positive impact of codes on conduct on ethical perceptions, such as awareness and understanding of ethical issues, support for ethical behaviours and actual ethical behaviour⁶⁴. However, overall, according to Thaler and Helmig, the impact of codes of conduct on employee attitudes and behaviour in public administration needs further investigation."⁶⁵

74.Moreover, codes may be only useful for those people who want guidance because they want to act ethically. If a holder of public office wants to act unethically, it is unlikely that a code will stand in the way.⁶⁶ Consequently, codes should have an educational effect. "However, once written down, significant problems arise". For example, codes without an effective institutional implementation strategy and support from the top are likely to be relatively useless. The same is true if no enforcement and no sanctions for misconduct exist. According to Gilman, "Successful codes rely on an environment ready to nurture them."⁶⁷

75.Another side effect is presented by Anechiarico and Jacobs (1997). In their 'anti-corruption project analysis' conducted in the city administration of New York, the authors concluded that codes of conduct can facilitate a stigmatizing corrupt image of public officials, resulting in lower working motivation and higher pressure to conform with diffuse values. Hereby, the caution and fear of ethical misbehaviour can lead to slower decision-making, involving the consultation of several instances counteracting to the efficiency paradigm behind the decentralization of management discretion and blurring boundaries between public and private sectors (Anechiarico & Jacobs, 1997, p. 174).

76.Where corruption is societally accepted, codes of conduct must be accompanied by advanced human resources mechanisms such as recruitment and staff replacements. In a situation where compliance orientated controlling instances and mechanisms are essentially affected by corruption i.e. in executive prosecution and judicial punishment, a values-based management code has little effect on the ethical behaviour of public officials (OECD, 2016, p. 8). This 'paradox of integrity' management has also been acknowledged amongst other public ethics scholars. According to Nieuwenbourg⁶⁸, even though codes have to be seen as instruments to restore the trust in public administration amongst citizens by showing efforts for ethical guidance, the instrumentalization of an ethics discussion debating the role of integrity in administration can backfire if the policies are meant as responsive post-scandal action. In such a scenario, the implementation of a code can be seen as an indication of lack of integrity in the first place, resulting in more public distrust than before. One of the weaknesses of codes of conduct is that in most cases, they are characterised by weak enforcement mechanisms compared to other instruments and their implementation depends to a large extent on the existence of an environment of trust.

60 Julia Thaler and Bernd Helmig, 2016, Do Codes of Conduct and Ethical Leadership influence Public Employees Attitudes and Behaviours, in: Public Management Review, vol. 18, 9, 1365-1399

61Thaler and Helmig, op cit, p. 1378

62 M. Kaptein, 2011, Toward effective codes: Testing the relationship with unethical behaviour. Journal of Business Ethics, 99: 233-251

63 M.S. Schwartz, 2004, Effective corporate codes of ethics: Perceptions of code users. Journal of Business Ethics, 55: 323-34

64 B. Stevens, B. 2008, Corporate ethical codes: Effective instruments for influencing behaviour. Journal of Business Ethics, 78: 601-609

65 Julia Thaler and Bernd Helmig, do Codes of Conduct and Ethical Leadership influence Public Employees Attitudes and Behaviour, op cit, p. 1368/1369.

66 Hine, Codes of Conduct,, in: Saint-Martin/Thompson, op cit, p.45.

67 S.Gilman, 2005, Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons, Washington, DC, 2005

68 Paul Nieuwenbourg, 2007, The Integrity Paradox. Journal of Public Integrity, Vol. 9, 2007

77. In this context, a significant factor to consider is the consultation with all key stakeholders in the development phase, the involvement of all key persons in the drafting of such a code. An effective code and its objectives must be formulated in an inclusive bottom-up process that is more likely to have better outcomes, because employees were faced with its development and are hence more attracted to comply. Due to the bottom-up inclusive drafting process, it can also be ensured that the code's content is expressed in such a way that it can easily be understood and implemented.

78. It is important that a code is drafted in a clear, consistent and comprehensive manner, realistic for its practical application. Consistency means that it harmonises with existing legislation and procedures, while clarity should aim to minimise ambiguity. However, the objective of more clarity is just as difficult to achieve as the requirement for less bureaucracy in the Member States or better regulation at EU and national level.

79. A further significant factor for guaranteeing an effective functioning of codes relates to the implementation phase. Quite often, drafting and adopting codes of conduct is looked upon as being an end in itself. Once adopted, they are often forgotten and not further implemented. However, this is only the first step, and to make the code a viable document and part of the organisational culture, training and raising awareness of the content of the codes should be an ongoing task. Moreover, as regards communicating the various codes, many administrations focus on the distribution via Internet and intranet. It is therefore unlikely that public officials and members of monitoring committees are regularly reminded in their daily lives of the existence of codes. One may also doubt whether these are the most effective communication channels.

80. In most cases, the code of conduct restates and elaborates the values and principles already embodied in legislation. This is useful since the relevant values and standards in many countries are scattered in numerous legal documents, which makes it difficult to locate the information and to understand the general idea of public service. As Transparency International (TI, 2013, p. 5) concludes, the main benefit of a code of conduct is the organization of an institution's ethical framework in one document. Hereby, a single document can provide clear guidance on how practical behaviour according to law and ethical dilemmas should be interpreted.

81. If properly used, legislation and code of conduct complement each other effectively. As argued by Doig and Wilson (1998, p. 142)⁶⁹, a code of conduct can represent an opportunity for a public administration to create moral capital and to improve the ethical behaviour of its workforce. This assumption is supported by three different reasons. First, when ethical standards are comprehensive and well known, employees are more likely to identify and avoid misbehaviour. Secondly, employees hesitate to commit ethical wrongdoing when people around them know what and why it is wrong, and thirdly, employees believe the disclosure of wrongdoing is more likely in ethics-aware environments (TI, 2013, p. 4).

82. Codes of ethics and codes of conduct can be seen as two steps in the development of official ethics. As a first step, public authorities often begin by identifying their core values and promote them by announcing a statement of core values (code of ethics). After this, as the discussion on public-service ethics advances, the state is ready to introduce more systematic and detailed guidelines in the form of a code of conduct. There might well be a third step in the development, to take the codes of conduct down to the agency-level to provide more specific and useful guidelines for practical situations. This enables a bottom-up approach to codes that leads into stronger commitment. The downside is that this approach increases discrepancies, which may fragment the public-service ethics if not coordinated. In many countries, the rules and codes of ethics look good in themselves, but this does not mean that the different institutions and the people take them to heart. The problem is often a lack of capacity and effort in the enforcement process. Codes only work when they encompass people's existing beliefs and practices and are well designed, understood and supported by those who have to apply them in their daily lives and can only be effective in an atmosphere of trust.

83. The differences amongst the different codes, their functions, their political and legal nature and meaning in different traditions and cultures suggests that it would be not wise to suggest any form of model code or best practices. Hine suggests that whereas the best known and most popular codes are probably the British, US and Canadian codes⁷⁰, the German code "seems to get close to what we might think of as a model code of conduct. It is detailed, practical, and apparently taken quite seriously

69 Alain Doig & J. Wilson, 1998. The Effectiveness of Codes of Conduct. *Business Ethics: A European Review*, 7 (3). p. 14

70 For example the British [Ministerial code: A Code of Ethics and Procedural Guidance for Ministers](#), the Canadian [Conflict of Interest and Post-Employment Code for Public Office Holders](#) or the US [Standards of Ethical Conduct for Employees of the Executive Branch](#).

by departments and individual civil servants alike.”⁷¹ A different question is whether the German code would “fit” into other legal and administrative cultures. National codes cannot be exported easily and will have not the same meaning, acceptance and purpose in other administrative cultures. Therefore the case for introducing common codes across differing legal, administrative and institutional cultures “might be thought of as questionable”⁷².

84. In this manner, Doig and Wilson (1998)⁷³ suggest a proper implementation of a code should be accompanied by the ethical leadership of senior management (Doig & Wilson, 1998, p. 141). This argument is also supported by Demmke (2005, p. 99), who states that a pure rational understanding of ethics is useless. Ethics promoted in codes are only effective, if they foster the motivation for practical ethical behaviour. To that end, ethics must be understood as a continuing inclusive leadership, learning and teaching process. Short-term impacts are thus very unlikely.

4 Towards a better measurement and evaluation of Col policies

4.1 Towards national monitoring of ethics policies

85. OECD data shows that countries have started to implement and employ more diagnostic tools to measure the impact of policies. Whereas in 2012 only 27% of all countries applied different evaluation measures in the field of Col, figures increased to 55% in 2014.⁷⁴ Countries have become more active in raising awareness and enhancing understanding of Col policies. In 2014 77% of all countries provided for training on Col to public officials. 68% of all countries provided for official advice when public officials have doubt about the legality of incidences, procedures and policies⁷⁵.

86. Van Dooren shows that more countries are now investing in staff assessments and evaluate staff attitudes about the development of the ethical climate in organizations. “Staff assessments are one of many sources for monitoring integrity, but potentially a very strong one. In the first place, staff know best what is happening within the back office. They are prime witnesses of improvements or decline in integrity or the integrity climate. As a result, staff assessments can provide more valid indicators of real integrity compared to assessments of outsiders that often (but not always) have no direct experiences with misconduct. Their judgement is ... based on what they see in their daily job”⁷⁶.

87. Despite these trends, in most countries, the lack of knowledge and training on Col are the main reasons why civil servants are not prepared to anticipate potential Col⁷⁷. For example, as a Polish study shows, most of the staff in ministries and other central offices have insufficient knowledge and preparation to properly react to Col situations⁷⁸. Overall, “there are huge institutional differences in approaches to Col. Some ministries have relatively well prepared and developed systems to counteract corruption, including the risks related to the conflict of interest (e.g. the Ministry of National Defense). Others seem to have some infrastructure in this field, but it is not properly used. In still other ministries, the awareness of the Col is so low that even the most basic solutions that are available are not recognized as tools to counteract the problem”⁷⁹.

88. Lack of awareness of rules and policies is also a problem for elected representatives. As the above-mentioned GRECO report states: “Overall, members of PACE are reportedly little aware of the existing integrity standards. PACE needs to show greater determination in raising members’ awareness and providing training and guidance on the implications of the rules of conduct”⁸⁰.

71 Hine, Codes of Conduct, in: Saint-Martin/Thompson, op cit, p. 66.

72 Hine, Codes of Conduct, in: Saint-Martin/Thompson, op cit, p. 66.

73 Doig and Wilson, op cit.

74 OECD, Survey on Managing Conflict of Interest in the Executive Branch and Whistleblower Protection, OECD, Paris OECD, Managing Conflicts of Interests, OECD Publisher, Paris, 2014. Julio Bacio Terracino, OECD, Deputy Head of Public Sector Integrity Division, Public Governance and Territorial Development Directorate, Preventing and Managing Conflict of Interest in the Public Sector, Powerpoint Presentation.

75 OECD (2014), Survey on Managing Conflict of Interest in the Executive Branch and Whistleblower Protection, OECD, Paris

76 ibid

77 Stefan Batory Foundation (2014), The Conflict of Interest in the Polish Government Administration, Warsaw

78 Stefan Batory Foundation (2014), op cit., p.13

79 Stefan Batory Foundation, op.cit, p. 14

80 GRECO, 2017, op cit, p. 3

4.2 Effectiveness of disclosure policies⁸¹

89. In recent years disclosure policies have become important instruments in monitoring Col policies. The principle of proactive disclosure, that information must be publicly available prior to public request, is important in achieving greater accountability, transparency and openness in government. The trend towards ever more disclosure requirements is a popular issue. The public availability of information disclosed by top decision makers is seen as important to reinforce trust in government. The popularity of public disclosure “seems due in part to the ease of implementation and the message it sends of a commitment to transparency in government.”⁸²

90. In addition, obligations to declare personal interests in public will contribute to establishing a more open and transparent political sector, which is vital if legitimacy and citizen's trust is to be increased. At present, more countries apply the principle of disclosure in the field of Col. Differences still exist between voluntary and obligatory approaches. For example, within the Council of Europe Parliamentary Assembly “Declarations concerning Col are made under the sole responsibility of each member. It is considered sufficient for him/her to merely state that s/he has no interests conflicting with the intended responsibilities. The rules do not provide for ways to object at a later stage to a PACE member, whose situation could have subsequently changed or who would have made a false statement, or for recusal or replacing him/her, such situations being ultimately handled politically”⁸³. While this situation is still typical for many parliaments, other institutions provide for stricter and binding rules.

91. The trend in most countries is to strive for more transparency and disclosure requirements about the private lives of elected representatives. New requirements include an obligation to register additional jobs, private income or shares, or to provide information about the activities of a partner, which may conflict with his/her public position. There are also rules on the acceptance of gifts and invitations to prevent unwanted external influence on decision-making. This may include a dinner offered by a private firm or accepting a gift which can involve a holiday offered by an applicant in a public procurement procedure. The higher the position the stricter the policy, regulations and codes and the more transparency is required. According to OECD, paid outside positions are the most regulated private interests across the three branches of government⁸⁴.

92. Insights into the intensity of integrity requirements are also available from the OECD data on approaches to ensuring integrity in the executive branch of government and in the civil service in the form of a composite indicator of levels of disclosure and public availability of private interests.⁸⁵

93. Differences concern the degree of openness and questions of sanctioning if members do not disclose or disclose too late. According to Demmke et al. 2008, especially those Member states that entered the EU in 2005/2007 in particular have very detailed disclosure requirements. There are bans on honoraria, limits on outside earned income, and restrictions on the acceptance of gifts.

94. A distinction should be made between public or confidential declarations of financial interests, the declaration of additional interests and whether declarations should be stored in a register of interest. Whereas in some cases public officials have obligations to declare only their financial interests, in most cases they must also declare other issues such as professional activities, honorary memberships and presentations in registers of interest. Thus, the most important questions concern what should be declared, whether the declarations should be made public, whether independent bodies should have the power to monitor the registers and whether there should be sanctions for noncompliance

95. The OECD data shows that levels of integrity requirements tend to be proportional to seniority, i.e. the higher the level of the civil servant, the higher the level of the integrity requirements. It is interesting to note that integrity requirements for senior civil servants and civil servants are on average lower for the ‘old’ Member States (26 out of 100 points) than for the ‘new’ Member States (32 out of 100 points).

96. The countries with the highest levels of integrity requirements for senior civil servants and civil servants include Latvia (88), Estonia (39), France, Sweden and the United Kingdom (all 38); the

81 Demmke et al. (2008), *Regulating Conflicts of Interest*, op cit, p. 128/129.

82 Gerard Carney, *Conflict of interest*, op. cit.

83 GRECO (2017), op cit.

84 OECD (2015), *Government at a glance*, OECD Publisher, Paris, p. 209.

85 OECD (2015) *Government at a glance*, 2015 edition, public sector integrity, <http://stats.oecd.org/Index.aspx?QueryId=66858#>

countries with the lowest levels include the Slovak Republic (4), Portugal (8), Poland (17) and Italy (19).

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97. While these overviews suggest that most countries have dedicated substantial efforts to addressing Col as affecting public administration, they do not provide information on actual levels of compliance / effectiveness of the integrity requirements. Consequently, GRECO warns of situations if there “is no overall system for the declaration of assets, income, and interests (...), insisting on the need to ensure the soundness of such declaratory arrangements for the robustness of national parliamentary integrity policies. The information to be disclosed needs to be (i) accurate – especially regarding elements of income and occupations in profit or non-profit organizations, and ultimate beneficial ownership interests held domestically or abroad; (ii) updated on an on-going basis; and (iii) complemented by information on close relatives. These declaratory arrangements can contribute significantly to transparency with respect to elected representatives, to the dissuasion of corrupt behaviour and to the better management of conflicts of interest”⁸⁷.

4.3 Critical developments in the field of disclosure

98. Despite the popularity of disclosure instruments, discussions on the pros and cons of requiring people to declare Col remain the subject of debate within countries and different institutions. “Proponents of public disclosure argue that officeholders may legitimately remain in possession – and aware – of their financial interests as long as those interests are made visible to the public as well...”⁸⁸. And even more: “With full disclosure (...), the public can come to its own judgment as to whether any given official is in conflict. Knowing this, officials will comport themselves properly”⁸⁹. Pure disclosure casts the public in the role of both legislator and adjudicator and as legal arbiters of right and wrong⁹⁰. Of course, in most cases, disclosure does not operate in the absence of other (legal) enforcement measures. However, often, disclosure is simply used as a means of checking whether a person has divested conflicting interests. In many countries, disclosure policies are more popular than enforcement policies. Whereas trust is high in the effectiveness of “soft” disclosure policies, trust is low in the effectiveness of “hard” enforcement measures. In fact, what is often seen is that disclosure policies mean that administrative bodies, ethics committees and citizens are given the facts, the raw data of disclosure forms and then we trust that these bodies and/or the public will take the right judgment.

99. Even among those who favour a public disclosure system, there are different opinions about the items of information that officials should be required to disclose. Some believe that officials should be required to report the identities of their assets, but not their values. Others believe that the value of an asset is a critical predictor of whether it will cause a Col. Differences should also be considered between public officials who exercise important state functions and other public officials⁹¹. The call to regulate post-employment issues more strongly for members of the government than for ordinary public officials also stems from these differences.

100. Another criticism against declaration of interests is that reporting systems are often too simplistic, merely requiring a person to report in a general way. Declarations and registers only work if requirements (as to what must be declared) are clear and known. There must also be means to monitor these declarations and registers effectively and independently and sanctions for non-compliance. If all of this does not exist, it will be difficult to detect wrong, misleading or partial information.

101. Disclosure policies and registers must be designed in such a way that the collection, storage and management of detailed disclosure forms will not cause a new Col bureaucracy. The introduction of a declaration of interests may cause important bureaucratic workload in terms of the management, updating and protection of data. Another problem is the legal challenge: whereas in some countries people are required to declare detailed information (e.g. the income and assets of their family) in a register, in other countries detailed requirements to register are not easily accepted, in the belief that registers conflict with fundamental rights (privacy, personal rights, family rights, etc.). Because of the

86 Blomeyer and Sanz, *The Code of Conduct for Commissioners - improving effectiveness and efficiency*, Study for the European Parliament, Brussels PE 411.268, 200

87 GRECO, op cit.

88 Stark, *Conflict of Interest in Public Life*, op cit., p.236

89 Stark, *Conflict of Interest in Public Life*, op cit, p..250

90 Stark, *Conflict of Interest in Public Life*, op cit, p. 251

91 J. Fleming./I.Holland, 2000, *Motivating ethical conduct in government ministers*, International Institute for Public Ethics Conference, Ottawa, September 2000, No 1.

different attitudes towards registers and financial declarations, some countries require detailed disclosure requirements, whereas others ask for much less information.

102. Col declarations or registers only make sense if they are managed and followed up by management decisions. Otherwise, they may end up as a ritual performance of filling out forms. Typical for many organisations is the above-mentioned report by GRECO on the “Assessment of the Code of Conduct for Members of the Parliamentary Assembly of the Council of Europe”. Whereas GRECO calls for a disclosure system that “needs to be (i) accurate – especially regarding elements of income and occupations in profit or non-profit organizations, and ultimate beneficial ownership interests held domestically or abroad; (ii) updated on an on-going basis; and (iii) complemented by information on close relatives”, the report remains silent as to who is collecting the information, how is it collected, who manages the information, who recommends conclusions and what type of conclusions, e.g. sanctions.⁹²

103. In a recent survey about the Management of Col, OECD⁹³ concludes that, following the collection of disclosure forms, only 63% of respondents verify receipt of the forms and only 32% carry out audit or review the accuracy of the information. Thus, from a practical point of view, there seems to be a point where too many Col requirements, if not well managed, become ineffective, inefficient and even counter-productive.

104. Thus, even if disclosure policies are important they mostly reveal Col without providing any guidance for resolving them. To offer possible suggestions one option could be the one proposed by Thompson: “Independent ethics committees could regularly review the financial activity of members, identify potential problems, and recommend measures to correct them. They would publicize information only if members failed to correct the problems. Committees could ask for much more information than is now disclosed, but most members would have to make much less public. As always, leaks would be a risk, but both ethics committees have unusually good records in protecting confidential information. Furthermore, the information could be targeted more specifically to the problems that particular members may have.”⁹⁴

5 Looking into a glass darkly: future trends in Col

105. Col policies still tend to focus on the input rather than on the monitoring of policies and the output side although some countries have started to shift their attention to the implementation of Col policies. As regards the choice of instrument, countries still concentrate on the introduction of ever more rules and codes. At the same time, the definitions of Col continue to expand.

106. Currently, more transparency, openness, accountability, new ethical rules and access to government-held information, as well as more effective declaration of interests are widely applauded as remedies for public and individual deficiencies. Especially in the field of conflicts of interests, requirements for more transparency and declaration of information etc. are supposed to discipline institutions and elected representatives making information about their potential conflicts of interest public. Like this, disclosure and transparency especially are positively related to ethical behaviour, as public exposure is presumed to act as a stimulus: the more the public knows, the better people will behave. Transparency and openness requirements are also popular since they are widely supposed to make institutions and their office holders both more trustworthy and more trusted. In addition, more reporting requirements about Col should contribute positively to public trust. However, these suggestions are not without their difficulties. For example, as discussed, public disclosure requires effective management systems and may produce huge quantities of information. Another question is whether this information – which is offered for public scrutiny – is of interest and easily understandable.

107. Another challenge is that financial disclosure and public registers can easily be politically abused for political interests and used to stigmatise political opponents. Similarly, declarations and registers offer many ways of being abused for populist purposes. Thus, despite all positive intentions, more transparency can also have adverse side-effects.

108. It remains to be seen whether these trends will continue. During the past years, claims for other rights built on confidentiality, secrecy, security and the restriction of the right to privacy have become more prominent. It remains an open question how recent trends towards more openness and

⁹² GRECO, 2017, op cit.

⁹³ OECD (2014), Survey on Managing Conflict of Interest in the Executive Branch and Whistleblower Protection, OECD, Paris

⁹⁴ Thompson, Overcoming Conflicts of Interest in Congressional Ethics, op cit, p.7

transparency will be reconciled with new trends calling for more control, data protection, security, tighter management of information, better individual performance monitoring and even the restriction of human rights etc. To this should be added the overall “digitalisation” trend.

109. Overall, in all countries, we observe trends towards the blurring of boundaries between the state of society, government and citizens, public and private sector, work and leisure time, office and home work. These trends have implications on the development of Col. Differences between public and private sector values are diminishing. If current trends continue, the future will be dominated by more value conflicts and newly emerging values.

6 Conclusions

110. Today, national and international rules, policies and guidelines are abundant in the field of Col and no political debate goes by without mentioning the importance of integrity. But the existence of instruments and ethical knowledge is not the same as ethical know-how. Thus, it seems to be easier to teach, preach, study, advocate and debate ethics than to practice behaviour. In the field of Col, the monitoring and measuring of Col still constitute the biggest challenges.

111. Local and regional authorities need to be aware that the introduction of codes of conduct, disclosure registers and other Col regulations are only a first step. These codes have to be effectively implemented, evaluated and monitored, which requires leadership, resources and a strong political will.

112. A real change in organisational and political culture towards a culture that is more accountable and maintains high ethical standards will require a sustained effort on the part of all levels of government. However, it is a challenge that must be faced.