Expert Group on Managing Conflicts of Interest

MANAGING CONFLICTS OF INTEREST: THE PORTUGUESE EXPERIENCE

Paris, 30-31 January 2003

For further information, please contact Janos Bertok, E-mail: janos.bertok@oecd.org
Tel: 33-1 45 24 93 57

JT00138192

Document complet disponible sur OLIS dans son format d’origine
Complete document available on OLIS in its original format
MANAGING CONFLICTS OF INTEREST:  
THE PORTUGUESE EXPERIENCE

Summary

The discharge of public duties is governed by the principle of exclusiveness stated in the Portuguese Constitution. The discharge of public duties is incompatible with any activity disqualified by law or that can be seen as jeopardising the neutrality required to serve the public interest in the performance of public duties. The Portuguese framework for preventing conflict of interest situations is primarily based on comprehensive legal regulations that determine, both in general for the whole public service and more specifically for certain positions, which activities are incompatible with positions in the public service.

In practical terms, conflict of interest is an opposition stemming from the discharge of duties where the public interest converges with personal interests, both financial and patrimonial, and direct or indirect in nature. Consequently, those activities and positions that directly or indirectly allow personal economic related advantages to be taken, or advantages of any other nature whatsoever, and give rise to violation of citizens’ rights or interests protected by law, are seen as incompatible with the duties of a public official.

Constructing a Comprehensive Legal Framework

The Civil Service Regulations themselves compel public administration workers to be unbiased, i.e. not to avail themselves of direct or indirect benefits or pecuniary benefits of any other nature whatsoever from the duties they perform, and to act with impartiality as regards interests and private pressures of any kind, so as to comply with the principle of equality among citizens. Laws set out incompatibilities between public positions or employment and other activities, and laws also lay down measures to be employed as cases arise.

Despite the exclusiveness of duties being the common rule, there are a number of exceptions, such as research and teaching activities in higher education. Performance of other duties by civil servants and other contractual staff is always subject to statutory authorisation.

The following laws and regulations constitute the main sources of general principles and rules for avoiding conflicts of interest situations:

- **Primary legislation** which includes the Constitution that sets the basic regulations for the tenure in office for civil servants and other Government officers and their obligation to exclusively serve the public interest. The Constitution also prohibits the plurality of offices, excluding situations expressly stated by law (Article 269 of the Constitution Law No. 1/97, dated 20 September). In addition to the
generic principle of exclusiveness, the Constitution also regulates some specific cases. For example, it states cases of disqualification and impediments for parliamentarians (Members of the Assembly of the Republic in Article 154 of the Constitutional Law) and incompatibilities and restrictions for holders of public offices, including senior public offices (No. 3, 4 and 5 of Article 216 of the Constitutional Law). In addition, laws give further details of disqualifications and impediments applicable to holders of political posts and senior officials (Law No. 64/93) and set out the new regime of disqualifications (Law No. 12/96 dated 18 April). A recent change in the legal framework expanded the exclusivity regime and the special regime of disqualifications for management staff (e.g. Article 22 and 23 of Law No. 49/99 dated June 22).

- **Secondary legislation** which has played a substantial role both in the establishment and the evolution of the conflict of interest system, particularly in the modifications that took place in 1993. The founding blocks are the Code of Ethics for the Civil Service (Decree-Law No. 427/89 dated 7 December) and the regulations on exclusivity of office (Article 12, Decree-Law No. 184/89 dated 2 June). Other important laws in the development of the system include the new framework of disqualifications applicable to ministerial staff (Decree-Law No. 196/93 dated 27 May) and regulations on conflicts of interest resulting from tenure in office (Decree-Law No. 413/93 dated 23 December).

On the whole, plurality of duties are the exception rather than the rule, both in the public and in the private sector, according to the laws that set out norms for strengthening the civil service ethos and ensuring the exclusiveness regime in discharging public duties. But in the exceptional cases when plurality of office is permitted, these laws also impose a compulsory prior authorisation.

Laws lay down additional requirements and more detailed standards not only for politicians (including ministers), their staff in ministerial cabinet and senior public servants but also for **particular categories** of public officials to avoid situations of potential conflicts of interest, these include:

- Officials in charge of contract management.
- Customs officers (Article 105 of Decree-Law No. 252-A/82, dated 28 June).
- Tax officials (Article 32 of Law No. 363/78, dated 28 November and Article 73 of Decree-Law No. 84/84, dated 16 March, Statute on General Council of the Bar).
- Prosecutors (Law No. 60/98, dated 27 August, the Public Prosecutors Statute).
- Doctors (Decree-Law No. 73/90, dated 6 March).

Associations and representatives of public administration employees were consulted in the preparation of legal instruments, as prescribed by applicable legislation, as well as the government bodies of the Autonomous Regions of Azores and Madeira and the national association of Portuguese municipalities.
As a general principle, it is a constitutional requirement for holders of public offices within organs with supreme authority and holders of other political posts as well as those holding senior public offices or equivalent to carry out their duties on an exclusiveness basis. Chairmen, vice-chairmen and members of the management of public institutions, public foundations or public bodies, as well as directors general and deputy directors general and those with similar status should also fulfil their duties on an exclusiveness basis, regardless of the type of appointment or designation. Likewise, holders of managerial posts are banned from duties in private sector posts even though they resort to third parties, except in cases when it is duly justified and authorised by the appropriate member of Government. This authorisation can only be granted in cases where the concerned activity does not jeopardise or interfere with neutrality required for the fulfilment of the officials’ posts. In general, the exclusiveness regime entails disqualification in the following cases:

- Any other professional activities, whether they are remunerated or not.
- Adherence to governing bodies of any profit-making corporate bodies, or the remunerated participation in governing bodies of other corporate bodies.

Research and teaching activities in higher education, non-remunerated participation in commissions or working groups, advisory bodies, auditing bodies or any other corporate entities are excluded from the said regulations whenever provided for in law and in fulfilment of supervision and control of public money. In addition, participation in commissions and working groups is also excluded whenever they are set up by a resolution or a decision of the Council of Ministers, as are representative functions of ministerial departments or public services. Holders of senior public posts may be entitled to copyright and fees resulting from organising short conferences, seminars, training initiatives and any other activities with a similar nature.

Regulations also further specify cases of disqualification, such as, for instance, the followings for tax officials:

- To act as lawyers or as solicitors, with the exception of the lawyers from the Centre for Tax Studies and Legal Consultancy in non-tax cases.
- To establish relationships with businesses or industry, except in cases duly authorised by the Minister of Finance.
- To fulfil any public or private activity, without authorisation from the Minister of Finance, that can jeopardise neutrality required in the discharge of duties, namely, whenever such activities bear a similar connection thereto, even though they are fulfilled resorting to a third party.

Lawyers who are either permanent or temporary public office holders, they are also banned from acting as private lawyers. The ban also applies to them if they are retired, unemployed, on unlimited leave of absence or in a pool awaiting assignment, whenever public or administrative services to which they are linked are involved.

At the sub-national level particular restrictions exist that are related to the specificity of exercising public power in local self-governments, for example, for municipal councillors performing part-time duties. Although they are allowed to carry out a number of activities, some of them are seen as incompatible with the duties of an elected municipal officer on a part-time basis. They shall not:

- Be members of governing bodies of public corporate bodies, of statutory undertakers and of companies which are mostly or entirely state-owned.
• Provide professional services, consultancy, advisory services and legal assistance to public
corporate bodies, statutory undertakers or companies participating in public invitation of tenders.

• Carry out business or industrial activities in the domain of the corresponding municipality, on their
own or by means of an entity in which they hold a share, nor shall they participate in government
calls for tenders, services, sub-contracting or undertakings or in any other calls from corporate
bodies of public law. Furthermore, it is forbidden for municipal councillors to participate in such
tenders called by companies whose share capital is mostly or exclusively state-owned, or called by
statutory undertakers.

• Provide legal assistance to foreign states.

• Benefit personally and unduly from acts, nor shall they enter into contracts, whose creation
counted upon organisations or services under their direct influence.

In spite of the development of the existing legal framework, day-to-day experience points to a
reality where a number of grey areas are palpable. This applies to less transparent situations where issues
of neutrality meet conflicts of interest due to a financial and patrimonial interest, whether direct or indirect,
which might influence the performance of an official duty. In the past few years, a growing concern has
increased regulation of activities and situations that in practical terms had proved to generate conflicts of
interest. A critical area where most cases of conflicts of interest occur is the health sector because the
medical staff is not covered by the exclusiveness regime.

In addition to the grey areas caused by the increasingly close relationship between the public and
private sectors, other decisive factors that have influenced the evolution of conflict of interest policy are:

• The growing demand for quality of services provided to citizens.

• The rising public awareness and rising community expectations to increase transparency in public life,
that have drawn attention to the conflicts of interest concept and on perceived conflicts.

The overall trend of the last decade was an emphasis on clarifying rules and the providing a
more precise definition of conduct through remedial action that aimed at plugging identified shortcomings.
In addition, the existing complementary mechanisms and tools have also been strengthened. The latest
change took place in 1996, when a new law set out the current framework for disqualification. This is the
only way to fully ensure the prevention and settlement of conflicts of interest that may arise during a term
of office.

The former mechanisms to ensure that no conflicts of interest were generated by the plurality of
functions were solely based on the political accountability of political post holders and staff appointed on a
trust basis. These mechanisms were replaced by a system based on the requirements of transparency.
Current measures are intended to preserve the neutrality of public office holders and promote openness of
all private or public professional activities.

Therefore, holders of political posts and public offices are disqualified from carrying out the following:

1. Law No. 12/96 dated April 18.
Any private or public professional activity, whether remunerated or not, barring those resulting from performance of the official duty itself. Teaching activities in higher education and activities falling within the scope of the corresponding professional speciality and rendered on a non permanent basis to entities outside the field of activity for which the concerned official is responsible, are exceptions provided the appointment order authorises them.

Executive positions in governing bodies of public corporations, mostly or fully public-owned companies, statutory undertakers, credit institutions or bank-like institutions, insurance companies, real estate companies; or in governing bodies of any other corporate bodies entering into contracts with the government and all other public law entities.

Voting rights relating to a more than 10% shareholding in companies participating in public invitation for tenders for provision of goods and services and entering into contracts with government and other corporate bodies of public law.

The system has also introduced post-employment restriction for senior public office holders and public servants working for the highest central government authority. Holders of political posts and senior officers are also banned from acting as arbitrators or experts in any legal proceedings involving the State and other public corporate bodies. This impediment remains in force until one year has elapsed since termination of office. In addition, holders of posts in highest central government authority and holders of political posts² are banned for a three year period from fulfilling duties in private companies operating in sectors they have directly supervised, if during their term of office such companies were subject to privatisation operations or have benefited from financial incentives schemes and tax benefits of a contractual nature. However, an exception is made where concerned officials go back to the same company or resume the activity they were carrying out at the time of taking up office.

When public officials have a doubt about a concrete case, they can contact their managers, dedicated persons both within and outside the organisation concerned (including Trade Unions) for counselling. The Directorate General for Public Administration also operates a central telephone help desk that can be consulted if an official is in doubt.

The legal framework also provides some reciprocal provisions for business and non-profit sectors to support the measures in place in to avoid conflicts of interest in the public sector. Companies in which an official working for a highest central government authority, a political post holder or a senior official holding more than 10% shares are prohibited from:

- Participating in calls for tenders for the provision of goods and services while carrying out their business or industrial activity.
- Entering into contracts with the state and other public corporate bodies.

The same regime is applicable to companies where:

- The spouse of the official concerned not affected by a limited divorce, the ancestors and descendants in whatever degree and collateral relatives up to the second degree, as well as the cohabiting partner hold an equal share amount.

² This requirement is not applicable to all other holders of public offices, which therefore imposes a shortcoming in the Portuguese legislation that needs remedy.
• The official concerned, directly or indirectly holds, on his own or jointly with his relatives determined above, a no more than 10% share.

Disclosure: an Effective Supporting Mechanism

The implementation of legal regulations is supported by complementary mechanisms, amongst which the disclosure of individual interest plays a significant role in bringing transparency to the system to prevent conflicts of interest. Key actors of this system include:

• The Constitutional Court, which reviews, monitors and confirms declarations submitted by holders of political posts.

• The Attorney General’s Office, which checks formal compliance of declarations and the existence of any incompatibilities and impediments concerning the senior officials. The Attorney General’s Office has to notify appropriate bodies with a view to checking and sanctioning irregularities or non-compliance with the time limit for submission of such declarations.

• Managers who check any unauthorised plurality of offices held by civil servants and contractual staff. In general, managers also supervise compliance with statutory obligations.

• The mayor or the delegate councillor is vested with such powers in local self-government.

Portugal has introduced obligatory disclosure reports for political posts, including parliamentarians, and other senior officials. Holders of political posts must file with the Constitutional Court within sixty days after taking office, a declaration of no-disqualification or impediments, stating all offices, duties and professional activities performed by the applicant, as well as any initial shareholding.

As for senior officers, they must file with the Attorney General’s Office, within sixty days after taking office, a declaration of no disqualification or impediment stating all data needed for checking compliance with provisions of law No. 64/93. The Attorney General’s Office may ask that the content of such declarations be clarified, in case of doubt. Failure to clarify any doubts, or insufficient clarification, leads to the competent bodies being notified to check irregularities, and exposure to sanctions if necessary. In the event the declaration is not filed, the official is required to appear before the competent bodies within 30 days. Deliberate non-compliance with relevant requirements leads to a loss of office, resignation or legal removal from office. In this case, relevant authorities have to notify the Constitutional Court and the Attorney General’s Office of the date when the officials concerned took up their office.

For parliamentarians, an open list of interests was created in the Assembly of the Republic in 1993. This list of interests consists of all activities which may generate disqualification and impediments and any other acts that may yield financial benefits or generate conflicts of interest. It comprises the following specific data for Deputies of the Assembly of the Republic and members of government:

• Public or private activities, including businesses or companies as well as professional activities.

• Roles on governing bodies of companies, even if not remunerated.

• Financial or material support or benefits received for such activities, namely from foreign entities.
Entities to which remunerated services of whatever nature are rendered.

Companies of which the official by himself, or on behalf of his/her spouse or children, is a shareholder.

Individuals’ lists of interest are available to the public for consultation. Creation of a similar list for local authorities is not compulsory, however, local self-government assemblies have authority to decide upon the creation of such a list, its governing regulations, the content and implementing mechanisms.

Contractual staff, and civil servants seconded to hold advisory posts or technical consultancy to holders of political posts and senior officials must file a declaration stating that there is no conflict of interest. This type of declaration should be filed when someone takes an office and it is valid during the term of office.

Civil servants and contractual staff of central, regional and local administration, including staff of public institutions, carrying out either personalised or public funding services are prohibited from:

• Performing (on their own or by way of a third party, and for pecuniary consideration, be it autonomous work or subordinate work) any private activity that competes with, or is similar to, that performed within public administration and which may generate conflicts of interest.

• Providing third parties (either on their own or by way of a third party, be it autonomous work or subordinate work) with services dealing with review, preparation or financing of projects, applications and requests to be submitted to their consideration or decision, or to the consideration and decision of bodies or services placed under their liability or direct influence.

• Personally and unduly benefiting from acts or entering into contracts whose drafting benefited from the intervention of bodies or services directly accountable to them or placed under their direct influence. Non compliance of these provisions makes such an act or contract void.

A spouse’s interest is considered to be equivalent to that of holders of functions in public organisations, civil servants and contractual staff, for example the interest in companies in which he/she holds a no less than a 10% and no higher than 50% share, either directly or indirectly, on his own, or jointly with his family. Members of the family include spouse, ancestors, descendants, and collateral relatives up to the second degree, as well the person cohabiting with the official concerned. When the share holding is higher than 50%, it must be seen as the self-interest of concerned holders of public office, civil servants and contractual staff.

Strong Enforcement

Legal regulations not only pronounce the principle of exclusiveness and describe some cases for particular officials, but also specify the consequences of non-compliance with concerned laws. When it comes to political posts, senior public posts, advisers or technical consultants, a breach of the law relating to disqualifications and impediments entails removal from office of the faulty official by administrative courts. Non-compliance with provisions relating to exclusiveness and impediments applicable to companies entails the following sanctions:
• Loss of mandate for holders of elected posts, except for the Head of State.

• Resignation for holders of non-elected posts, except for the Prime Minister.

Advisers in ministerial offices who failed to submit the requested declaration certifying that there is no conflict of interest when they take office, or misrepresentation entails immediate cessation of office. The adviser concerned should also return all benefits that he/she might have received.

When senior civil servants fail to comply with regulations after leaving office, restrictions applicable to companies and to arbitration and expertise, they face a three-year suspension from senior political offices and senior public offices. For managerial staff, failure to comply with legal provisions relating to principle of exclusiveness entails the justifiable loss of office.

For civil servants and contractual staff who do not observe the relevant legal provisions the following disciplinary sanctions can be applied:

• Non-activity, in cases where they carry out any private activity concurrent or identical to those they perform in the public administration and where such activities give rise to a conflict of interest. Similarly, inactivity is applicable in cases when those activities are carried out without authorisation or when authorisation is given on the basis of misrepresentation or incomplete information given by the applicant.

• Non-activity or suspension respectively in those cases when they render services to third parties in the ambit of issues to be reviewed or decided upon by themselves or by persons they have designated, promoted or appraised until a full year has elapsed, or by organs or contractual staff collaborating with them on an equal hierarchy basis within the same services or department.

• Suspension – in cases when they take part in deeds and contracts in the creation of organisations or services under their direct supervision or influence.

• Fine 3 – in cases where they fail to notify existing conflicts of interest involving persons or entities already referred to (family or companies in which they hold no less than 10% and no more than 50% of the share capital).

3 In addition penal sanctions can also be taken into account (Articles 372, 373, 376 and 377 the Penal Code).