Management of conflicts of interest in the public sector of Catalonia

Anti-Fraud Office of Catalonia

PARLAMENT DE CATALUNYA

OFICINA ANTIFRAU DE CATALUNYA

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Abbreviations

art.	Article/ Articles
BOPC	*Catalan Parliament Official Gazette*
CBGL FEMP	Code of Good Practices of the Spanish Federation of Municipalities and Provinces
CCSO	Code of Conduct for Senior Officials and Senior Managers of the Administration of the Catalan Government and its public sector entities, approved by the Catalan Government Agreement 82/2016 of 21 June
CCMPC	Code of Conduct for Members of the Catalan Parliament
CE	Spanish Constitution
CIFEF	Commission of Inquiry into Fraud and Tax Evasion and Practices of Political Corruption
CIGAS	Commission of Inquiry into Management in Healthcare and Relations between the Public Healthcare Sector and Companies
CP	Organic Law 10/1995, of 23 November, of the Criminal Code
DA	Additional provision/additional provisions
DL	Decree
EBEP	Royal legislative decree 5/2015, of 30 October, which approves the consolidated text of the Law of Basic Statute of Public Employment
EOFCAC	Organic and Operational Statute of the Catalan Council for Statutory Guarantees
ERGI	Statute of the regime and internal governance of the Catalan Parliament
LOAC	Law 14/2008, of 5 November, of the Anti-Fraud Office of Catalonia
LOREG	Organic law 5/1985, of 19 June, on the general electoral system
LRBRL	Law 7/1985, of 2 April, regulating local government
NARI	Rules of conduct and internal regulations of the Anti-Fraud Office of Catalonia
OCDE	Organisation for Economic Co-operation and Development
op. cit.	*opus citatum (in the work cited)*
ROFCGE	Rules of organisation and operation of the Council for Statutory Guarantees
RORISG	Rules of organisation and internal regulation of the Ombudsman of Catalonia
RPC	Catalan Parliament Regulation
RRISC	Catalan Public Audit Office Internal Regulation
STJUE	Judgement of the Court of Justice of the European Union
STS	Supreme Court judgement
STSJ	High Court of Justice judgement
TRLCSP	Consolidated text of the Law on public sector contracts, 3/2011, 14 November
TSJ	High Court of Justice
UE	European Union

In the following cases, we have referred to the regulation by its number:

Law 3/1982	Law 3/1982, of 23 March, on the Parliament, President and Executive Council of the Catalan Government
Law 53/1984	Law 53/1984, 26 December, on incompatibility of public administration personnel
Law 6/1985	Organic law 6/1985, 1 July, on the judiciary
Law 21/1987	Law 21/1987, of 26 November, on incompatibility of Catalan Government Administration personnel
Law 2/2000	Law 2/2000, of 4 May, on the Catalan Audiovisual Council
Law 1/2003	Law 1/2003, of 19 February, on Catalan Universities
Law 13/2005	Law 13/2005, of 27 December, on the rules governing incompatibility of senior officials of the Catalan Government
Law 14/2005	Law 14/2005, of 27 December, on the intervention of the Catalan Parliament in the appointment of the authorities and the politically appointed offices and on the criteria and procedures to assess their suitability
Law 5/2006	Law 5/2006, of 10 April, on conflicts of interest of members of the Government and senior officials of the Central State Administration (repealed)
Law 13/2008	Law 13/2008, of 5 November, on the Presidency and the Government
Law 2/2009	Law 2/2009, of 12 February, on the Council for Statutory Guarantees
Law 24/2009	Law 24/2009, of 23 December, on the Ombudsman of Catalonia
Law 6/2010	Law 6/2010, of 26 March, on the process for appointment of the Senators representing the Catalan Government in the Spanish Senate
Law 18/2010	Law 18/2010, of 7 June, on the Catalan Public Audit Office
Law 32/2010	Law 32/2010, of 1 October, on the Catalan Data Protection Agency
Law 19/2013	Law 19/2013, of 9 December, on transparency, access to public information and good governance
Law 19/2014	Law 19/2014, of 29 December, on transparency, access to public information and good governance
Law 3/2015	Law 3/2015, of 30 March, regulating the activity of senior officials from the Central State Administration
Law 39/2015	Law 39/2015. of 1 October, on the Common Administrative Procedure for Public Administration
Law 40/2015	Law 40/2015, of 1 October, on the Legal Regime of the Public Sector
RD 2568/1986	Royal Decree 2568/1986, of 28 November, approving the Regulation of organisation, operation and legal regime governing local bodies
DLEG 2/2002	Decree 2/2002, of 24 of December, approving the consolidated text of Law 4/1985, of 29 March, on the Catalan Public Enterprise Statute
Internal instruction 3/2006	Internal instruction 3/2006, on application of Law 13/2005, of 27 December, approved by the Administration and Public Service Secretariat on 19 June 2006

Foreword

The Anti-Fraud Office of Catalonia, through its educational role in the prevention, investigation and correction of malpractice, is a key instrument in the fight against fraud and corruption, which constitute a permanent threat to any democratic system.

Democracy is not invulnerable. The risk is ever present and it only needs doubt or distrust of public employees or the running of institutions to erode it. As a result, in addition to responding decisively to events that have already taken place, it is necessary to take action to make it more difficult for them to be repeated, to identify the weaknesses in the system and come up with solutions; there is a need for a forward-looking perspective. This objective requires work to improve the democratic system, to make it more transparent, to adapt it to the needs and demands of our society and our time.

In this sense, the Law 19/2014, of 29 December, on transparency, access to public information and good government, laid the foundations for building a more transparent public life and a higher quality of democracy; a very valuable tool, which, however, needs to be developed progressively by implementing long-term changes in the running, the mechanisms and the delivery of public service and strengthening in its turn the culture of accountability and integrity.

With this book, the Anti-Fraud Office paves the way in this direction and raises the need to redefine the management of conflicts of interest from an all-embracing and integrated perspective. It does so on the basis of a detailed analysis of the tools for detection and management, noting their weaknesses and irregularities. It also puts forward a number of specific recommendations for making effective responses to these weaknesses and irregularities and to strengthen the prevention of corruption in public institutions in Catalonia.

It is, therefore, a very timely document of great value and practical use, which will certainly become a benchmark study in the field of the management of conflicts of interest. If we can make good use of it, it can help us to strengthen the exercise of public service, to increase the confidence of citizens in institutions, to reduce the risk of fraud and corruption in administrative and political life. To sum up, it can help us to build a better country.

Carme Forcadell
President of the Catalan Parliament

Introduction

In a democracy, citizens have a right to expect that their public servants – whether they are elected representatives, politically appointed officials, or public administration staff – will carry out their respective professional duties in an impartial and objective manner; and that the decisions they take on a daily basis in their name are not influenced by personal interests or by the possibility of private losses or gains. Fundamental values such as justice and equality or principles of conduct by public authorities, such as the submission to the law or good government, can hardly be applied if the prerequisite of the impartiality of public servants is not guaranteed. Moreover, the social perception that public decisions are taken with impartiality and objectivity keeps alive citizens' trust in public institutions, whereas distrust regarding this essential impartiality leads to alienation from public affairs, discourages participation and damages the quality of our democracy.

These reasons are sufficiently important that all of us who make up the public sector in Catalonia, and especially the Anti-Fraud Office, undertake to guarantee the conditions so that public decisions are taken impartially.

However, we are aware that public authorities and employees, as citizens, have legitimate private interests and it is inevitable that at some point in our career we find ourselves in a situation in which one of these interests could come into conflict with our public duty, so that our professional judgment could actually, potentially or apparently be influenced by that interest. Finding ourselves in a situation of risk such as this is not a problem. The problem comes when we do not recognise that we are in the situation and do not manage it properly to avoid any bias in the public decision that we take on behalf of citizens.

Therefore, as public institutions we have the obligation to make sure that our public servants are trained and have at their disposal all the necessary tools to guarantee the proper detection and management of their conflicts of interest. With this report, the Anti-Fraud Office aims to contribute to this objective by clarifying this controversial concept, flagging up the consequences of not dealing with this phenomenon on a preventive basis and providing an overview of all the tools that institutions have at their disposal.

However, this is not an academic study. It is a report in which the Anti-Fraud Office reviews the most common irregularities of which they are aware as a result of their investigative responsibilities or through other control bodies; the results of a survey to assess the degree of impact of the current regulations on the day-to-day management of conflicts of interest; the analysis of this regulation to identify weaknesses or short-comings that create

opportunities for these irregularities, and various international practices that could help us to improve the current situation. The end result is a diagnosis of all these aspects for each of the preventive tools and a number of recommendations to the public authorities, which foresee both regulatory amendments and proposals for change in the management of public bodies, to ensure the prevention of these risks and, therefore, the impartiality of public decisions.

Miguel Ángel Gimeno Jubero
Director of the Anti-Fraud Office of Catalonia

Executive summary

Conflicts of interest are a corruption risk, not an act of corruption, and occur in all public organisations. This risk has to be managed in order to ensure the impartiality of public servants, which is necessary in order to act objectively in pursuit of the public interest and to maintain public confidence in institutions.

The findings set out in this report highlight many weaknesses in the current system for managing conflicts of interest, with breaches on a regular and repeated basis. The Anti-Fraud Office of Catalonia believes there is an urgent need to carry out a comprehensive review of the system for managing conflicts of interest, taking as a starting point a risk analysis for each group of public servants in Catalonia.

It has been confirmed that institutions and their representatives view the tools for managing conflicts of interest simply as formal obligations, rather than real tools for guaranteeing the impartiality and objectivity of public servants. Nor is there an overall vision of the set of tools available to the public authorities to deal with conflicts of interest, and little awareness of the purpose of each of these tools.

As general weaknesses of the system, it should be noted that there is no over-arching legal definition of conflicts of interest in the legal system applicable to the public sector in Catalonia. The regulation governing conflicts of interest is so highly fragmented that it is challenging to identify the applicable law in each case. Moreover, certain public positions and functions are outside the scope of this regulation. Based on these weaknesses, the Anti-Fraud Office recommends:

— Establishing by law an unequivocal regulatory concept of conflict of interest as a risk of corruption, defined as any situation in which a public servant has private interests which could influence, or appear to influence the exercise of their professional judgement on behalf of another person who has legitimately placed their trust in them. This concept encompasses situations of real conflict of interest (actual or real risk: the professional judgement must already be made), potential conflict (future risk: a decision has to be taken or professional judgement made) or apparent conflict (apparent risk: there is no personal interest).

— Developing a single regulatory code or rulebook to provide a more coherent and comprehensive structure for regulating the fundamental aspects of conflicts of interest. This would set out the rules and the essential principles, applicable across the board, to all public servants. This recommendation does not preclude, but on the contrary it supports, a regula-

tory development that provides for different approaches to the issues according to the kind of functions and the level of responsibility of each of the groups of public servants.

— Linking the regulatory regime for conflicts of interest to the exercise of official duties and not to the workplace. In this way, no individual performing public functions is excluded from the system, whether the duties are performed in a public sector position or within a public-private partnership.

We set out below the main weaknesses and irregularities that have been identified, as well as the corresponding recommendations, for each of the preventive tools of conflicts of interest, classified according to their purpose.

Tools for identifying conflict of interest situations

Training and providing advice to public servants on conflicts of interest

The Anti-Fraud Office notes the lack of a specific provision in the current legal system of obligations for, firstly, raising awareness among public servants regarding the identification of personal interests that may influence their professional judgement and the consequences, and secondly, training regarding the tools for identifying conflicts of interest and the standards of behaviour expected in the event of a conflict.

In connection with this tool, the Anti-Fraud Office recommends:

— Introducing a legal requirement for the duty to raise awareness and train public sector employees and senior managers in the particular area of conflicts of interest. Specifically, this would have to translate, firstly, into the inclusion of the essential elements of conflicts of interest in the introductory programmes or subject matter for taking up, and secondly, into the obligation of the public institutions of Catalonia to raise awareness and train public servants on this issue.

— For public organisations to offer advice to public servants, either through an ethical framework or ethics committee, or through internal control bodies, to resolve doubts in identifying conflict of interest situations and how the organisation expects them to be handled.

— These functions could either be guaranteed through each institution's internal control body or by a specialised control authority.

Declarations of interests [1]

Significant weaknesses have been detected both in the regulation of declarations of interest and its application.

With regard to the legal framework, leaving to one side the terminology used in each regulation to define the various statements that must be submitted, it was found that only those in political appointments are obliged to declare interests, whereas other public serv-

1 As indicated in section 5 of this report, due to the variety of terminology used in the existing regulatory framework we use the term *declarations of interests* to refer, generically, to any declaration of circumstances that may constitute interests for a public servant.

ants are not, notwithstanding their public functions or the level of responsibility they hold in each case.

It was observed that the content of the declarations and the time of submission is inconsistent across the groups, and also that these differences in treatment do not appear to follow objective and reasonable risk criteria. Moreover, it was found that certain interests do not have to be declared, such as those which pre-date the arrival in the workplace or position of employment, or, for instance, the interests of spouses, partners or other family members. It was also found that the information that has to be declared is either not specified or, if it is, it is specified in documents which are not regulatory, and therefore, do not receive the required publicity. In this regard, and according to the results of the survey carried out, one in four municipalities do not have an approved model declaration (whereas it was noted that the municipalities with approved models show a significantly better outcome in the submission of declarations, even at the end of the term of office or termination of employment). In the case of the Catalan Government, although the models have been approved, this has been communicated just through an internal instruction.

Where the obligation to submit a declaration has not been met, particularly with reference to changes and updates of information, or declarations to be submitted at the end of the term of office or termination of employment, the current local system does not provide for any legal penalty, which encourages non-compliance.

With regard to the application of the regulation on declarations of interest, it was concluded that public institutions attach insufficient importance to compliance and the enforcement of the obligation to declare. While on the one hand it was noted that the Catalan Government checks that the declarations of its senior officials are submitted on time and are complete, it does not check the truthfulness of the information. The main irregularities detected by the Anti-Fraud Office with regard to the locally elected representatives are the submission of incomplete declarations and the absence of declaration submissions modifying the circumstances declared or on termination of the employment. The highest compliance is found in the submission of declarations on entry into office of locally elected representatives. In this case, a failure to comply at that time would prevent them from gaining full access to the rights associated with the position.

With regard to this tool, the Anti-Fraud Office recommends:

— Modifying the current regulation of the system of declarations of interest, taking into account the risk analysis for all the groups of public servants, focused on the nature of the functions they carry out and their level of responsibility. This risk analysis will enable us to: (i) identify individuals who need to submit statements; (ii) vary the content of the declaration of interest; (iii) extend the time-frame of the declarations of activities to include the key activities over their professional career prior to their present position; and (iv) make the contents of the declarations more accessible.

— Approving the model declarations through provisions of a general nature; standardising the nomenclature of the models of declaration, irrespective of the group which is required to make the declaration; including in these models other sources of income (shareholdings); enabling the declarations to be completed online, facilitating their subsequent

treatment by the control bodies, and making them accessible to the public in the transparency websites established in the law.

— Always requesting tax returns when the individuals who are required to submit them together with the declarations of interests have chosen to authorise the public authorities to obtain them directly from the pertinent Tax Office.

— Establishing punitive measures, administrative or penal, for non-compliance with the duty to declare, in a timely and truthful manner, all interests at the time of taking up office or termination of employment and in the case of changes in previously declared circumstances.

Transparency measures and publicity

Whereas all the declarations submitted by the locally elected representatives and the Members of the Catalan Parliament are accessible to the public, in the case of the Catalan Government senior officials, only the declarations of activities are made public. For senior Government officials, it is stipulated that the data contained in the registers are to be cancelled two years after the termination of the office, thus substantially limiting the ability to access this information. In addition, this provision is specified in the Internal instruction 3/2006.

Moreover, there is little social control of the declared information, in light of the low number of requests to access the information.

In connection with this tool, the Anti-Fraud Office recommends:

— Establishing the maximum transparency level for those groups of public servants who, on the basis of their functions or responsibilities, have a higher risk of conflicts of interest, by ensuring, amongst other measures, the publication of the agenda of meetings of MPs, members of the Government and senior public officials.

— Introducing a rule that the information contained in the registers of interests is maintained and that there is permanent public access.

— Raising of awareness and promoting among citizens the right of access to public information and their guarantee mechanisms, thus contributing to social control over the declared interests.

Tools for detecting conflicts before entering office

Before a future public servant enters office, there are no specific tools to identify interests that could put their impartiality at risk. Currently, parliamentary hearings are the only mechanism that could be used to examine them. However, when hearings are held, they are not being used to detect conflicts of interest. In addition, a large number of positions with important public functions are not included in prior suitability checks, increasing the risks associated with potential conflicts of interest.

In connection with this tool, the Anti-Fraud Office recommends:

— Submitting to a prior suitability check all those positions of political appointment (public senior managers, temporary appointments, certain senior officials, etc.)

who are not entering through a process based on equality, merit, ability and publicity, or with a representative function, which would allow interests that could lead to situations of potential conflicts of interest to be detected. For these cases, a prior suitability check is deemed most appropriate, either in a parliamentary hearing, a municipal plenary session or in other venues guaranteeing the same transparency and plurality.

— In the case of senior officials, it would be advisable for a specialised control body to carry out a check on their professional background, with the aim of detecting possible interests affecting the office they would be taking up and proposing measures to manage any interests that could not be eliminated.

— Assessing the opportunity for new public employees to submit information on their prior professional background before taking up their position. And, in any case, to standardise in selection or recruitment procedures the obligation for applicants to declare any family relationship or previous employment relationship with members of the selection body and also any family connection with the organisation's employees. This obligation should be reflected in the selection conditions, and, in addition, lay down the consequences of any misrepresentation of information or submission of incomplete information.

— Reviewing the current wording of Article 176 of the Regulation of the Catalan Parliament, relating to the hearings of the parliamentary elected offices, so that:

– the applicant declares all their interests in writing and that, if they do not do so or do so in an incomplete or inaccurate way, they are automatically excluded as a candidate, or, if this is detected after they have taken up their duties, that Parliament requests the Government to terminate their position;

– the material and time limitations to asking questions beyond the strictly professional background are removed, enabling the identification of other personal interests that might lead to conflicts of interest if they took up the position.

Tools for managing conflict of interest situations

Abstention and recusal

The regulation establishes in a closed form, as a numerus clausus, the circumstances which would give rise to the obligation for the individual to abstain. In addition, the courts have a tendency to interpret in a restrictive way the scope of the circumstances giving rise to the obligation to abstain. At the same time, the obligation to abstain is currently configured as an obligation whose fulfilment depends solely on the individual public servant affected by the reason for lack of impartiality, without providing for any control. In regard to the consequences of the public servant's actions where they do not abstain, the current legislation appears to favour the legal presumption that the decisions taken by the individuals who should have abstained or been recused are valid, except in cases of decisive involvement by members of local bodies who are not impartial, in which the actions or decisions are considered to be invalid (this last exception, when applied to the judicial sphere, becomes the general rule.).

In connection with this tool, the Anti-Fraud Office recommends:

— Completing the list of reasons for abstention established in the regulation governing the legal regime of the public sector with a scenario that encompasses any other circumstance constituting a conflict of interest, in accordance with the conflict of interest definition proposed in this report, which is included in the regulation, so that no situation of conflict of interest can influence any public decision. This new reason for abstention should also include the appearance of conflict of interest in line with the European trend of recent years. In this regard, it is worth remembering that the scenarios of lack of impartiality provided for are currently regarded as basic according to the national standard. Therefore, sectoral or autonomous region regulations can extend these, following the notion of duty of abstention as a sufficiently broad concept to include other reasons.

— Interpreting the reasons for abstention and recusal in a broad manner, in order to adequately safeguard the impartiality of public servants.

— Establishing by regulation that if a public servant does not abstain in a potential conflict of interest, their immediate superior may order them to abstain from the process or any other equivalent formula that prevents all the responsibility falling on the public servant.

— Publishing any decision to remove a public servant from a decision-making process (whether this is through abstention, recusal or order of abstention) to guarantee that it is properly carried out.

— Assessing whether it should be made a general rule that acts or decisions are invalid if abstention is required and does not take place, for professional groups who have been determined as having a higher risk in situations of conflict of interest.

Control of secondary employment and other sources of income

The operation of the current system of incompatibilities is based on the individual responsibility of public servants, who are obliged to apply for authorisation. Therefore, if the latter do not fulfil this obligation, the system remains entirely dependent on the efficiency of the control mechanisms. In this regard, the Anti-Fraud Office has ascertained that the absence of an application for authorisation of a secondary activity is one of the most frequent breaches and, at the same time, one of the most difficult to detect for the internal or external control bodies.

There is no specific system in place for incompatibilities of MPs or locally elected representatives. Therefore, as a fallback they are regulated by the causes of ineligibility established in the electoral legislation, which redirects to causes of incompatibility. This system proves to be inadequate, given that it only deals with incompatibility for some public offices and does not make any provision for any possible secondary employment or sources of income of a private nature. These inadequacies are one of the reasons why the process for applying for approval becomes just a formality to obtain permission rather than a process of assessment and appraisal prior to the authorising decision.

With regard to this tool, the Anti-Fraud Office recommends:

— The adoption by immediate superiors of a proactive role in the identification and management of the potential conflicts of interest in which the members of their staff may find themselves.

— Making a legal provision, for greater efficiency in the control powers, for the entitlement to access the public servant's tax information in the event of a justified alert to the existence of an undeclared/unauthorised secondary employment or activity.

— Making a legal provision for the obligation, where the public servant has a secondary public sector employment, for this second public employer to request accreditation from the worker of the authorised compatibility. When the secondary employment is carried out in the private sector, measures to raise awareness should be implemented in order for the private organisation to request the individual for accreditation of approved compatibility.

— Periodically monitoring the degree of compliance with the secondary employment system by professional groups carrying out public functions in Catalonia in the three areas (Catalan Government, local bodies and universities). Given there is no record of any public sector organisation collecting and assessing the data from requests and authorisations, either partially or fully, we recommend assessing the possibility of assigning this task to the specialised control body.

— Making a legal provision for specific regulation for a secondary employment by the Members of the Catalan Parliament which broadens the scenarios of incompatibility beyond the current causes of ineligibility.

— Reinforcing the transparency of the procedure for the authorisation of secondary employment for the Members of the Catalan Parliament, through parliamentary regulation.

— Making a legal provision for local public office holders, for an extension of the situations of incompatibility beyond those currently set out in Organic Law 5/1985, of 19 of June, of the General Electoral System.

Policy on gifts and other benefits

It is noted that the current legal framework barely regulates the offering of gifts to public servants. As a result, there are few clear rules for regulating this area of risks for impartiality. It follows, therefore, that there is a lack of uniform criteria for the regulation and guidance of public organisations in setting out their gift policy.

At the same time, it was noted that the majority of public institutions do not have their own policy on gifts, and those that do have only partial guidelines, without covering all the items that an adequate gift policy should cover.

With regard to this tool, the Anti-Fraud Office recommends:

— Setting out legally the common bases of the regulatory regime for the risks arising from gifts and other non-monetary benefits, which at the same time cover the obligation of public bodies to develop, approve and disseminate, within their respective organisations, specific gift policies. This should take on board the general recommendations included in this report, in order to prevent the potential conflict of interest arising from the social custom of offering gifts and other non-monetary benefits as a gesture of gratitude to public servants.

— Approving within each institution a specific gift policy by means of a regulatory provision, after analysing the mission, the context and the circumstances, in addition to the risks of the various groups of professionals who work there.

Control of interests after leaving public office

The current limitations and prohibitions of private activities after leaving public office display inexplicable differences with regard to the content and the control of these limitations or prohibitions in the professional groups concerned. Moreover, they exclude public officials who have carried out functions at a high decision-making level or in which they have acquired sensitive information that they can use in the private sector.

With regard to this tool, the Anti-Fraud Office recommends:

— Determining through risk analysis of the various profiles and groups of public servants:

– the individuals subject to the prohibitions or limitations on private activities and of use or communication of privileged information after leaving their public office;

– the kind of post-office private activities that must be prohibited or limited;

– the general «cooling-off period» within which these private activities are forbidden or limited; although on certain issues where the duration of the risk of use of privileged information cannot be foreseen, this period may be extended until the issue is closed or made public (e.g. changes to urban planning), and

– the type of information that cannot be used or passed on after the conclusion of the public functions.

This risk analysis must take into account the level of responsibility and decision-making capacity of each position or professional group, in addition to the privileged information and the contacts that could be made while in office. This will ensure that no individual who has held important public functions will be outside the scope of this system.

— Avoiding the use of vague legal concepts in the policy regulating the prohibitions and limitations of the post-office private activities; and where this is not possible, making it as specific as possible in order to guarantee legal certainty.

— Appraising the possibility of a specialised control body monitoring compliance with the system on prohibitions or limitations in private activities by public servants terminating employment or leaving office. This body would have to issue a public statement regarding the compatibility of the private activities that the individuals subject to the post-office prohibitions or limitations wished to initiate. The latter, during the abstention period that was established, would be obliged to declare any activity before starting it.

Tools to guarantee the efficiency of the detection and management tools

Control bodies

Based on the results of the survey and the experiences of the Anti-Fraud Office and of the Catalan Public Audit Office, the internal control structure over conflicts of interest is of questionable efficiency. This weakness is not counterbalanced by a specialised control body that has full authority in these matters, as happens in neighbouring countries.

With regard to this tool, the Anti-Fraud Office recommends:

— Preventing or correcting by the bodies in charge of the management or leadership of the different services or units, under their responsibility, the situations of possible conflicts of interest which their personnel may face. This duty, which is already established in regulation, is based on the organisational and functional proximity that places the directors of the units in an ideal position for the timely detection of possible situations of conflict for their personnel. Thus, the awareness-raising, involvement and leadership of these directors are essential in dealing with conflicts of interest.

— Checking the information contained in the declarations of interests: always for those positions that require verifying according to the risk analysis; when called for in cases of a justified claim; and randomly for the rest. A percentage or absolute number of declarations should be checked so that the individuals are aware that their declaration may be checked at any time.

— Strengthening the existing control bodies, giving them greater autonomy, specialised material and human resources, and giving professional status to their officials or managers, in order to guarantee the independence and efficiency of the functions assigned regarding conflicts of interest.

— Establishing, through the control bodies, partnership agreements with institutions that have relevant information for the detection of potential conflicts of interest. In this regard, co-operation with the Tax Office and the Social Security authorities and the public registers is essential for this task.

— Considering the delegation of the functions of prevention, surveillance, monitoring, evaluation and ethical advice on conflicts of interest within the Catalan public sector to a specialised control authority. The distancing that is characteristic of external control guarantees an independent and homogenous response to non-compliance on issues of conflicts of interest. Moreover, the responsibility to Parliament of the authority would reinforce this independence and would legitimise the accountability of all the public sector bodies or managers in Catalonia. Finally, the lack of social control of the statements of interests found in the survey is an additional argument in favour of the delegation of this control to a specialised independent body.

Internal reporting channels and whistleblower protection

The law applicable to the Catalan public sector does not set out any specific regulation for internal channels through which possible situations of conflict of interest, among others, may be reported. This gap is partially covered by general channels of communication, complaints, suggestions or disclosure that the public authorities have traditionally used to receive notice of irregularities. Moreover, no measures are provided in the regulation for the protection of whistleblowers.

In connection to this tool, the Anti-Fraud Office recommends:

— Establishing a legal obligation for all public institutions to have a secure channel for complaints that guarantees the secrecy of the whistleblower's identity, if this has been provided. The existence and operation of these channels should encourage disclosure of irreg-

ular situations which, otherwise, would continue to be hidden, and enable the institution to manage and remedy those irregularities.

— Establishing regulatory protection mechanisms to ensure «a safe alternative to silence» for individuals who, in good faith, disclose wrongdoing in the management of conflict of interest (including corruption risks). These would be aimed at encouraging internal reporting and avoiding reprisals on individuals who co-operate in the detection and pursuit of wrongdoing. In this regard, it is vital to ensure that the whistleblower cannot be subject, directly or indirectly, to acts of intimidation or reprisals, including being unjustifiably and illegally subject to dismissal, disqualification or impeachment, to a postponement of their career advancement, suspension, transfer, reassignment or removal of their responsibilities, negative records, qualifications or reports, loss of benefits they could be entitled to or any form of punishment, sanction or discrimination as a result of having filed the report or communication.

Penalty and restitution system

The current penal and administrative penalty system is inadequate to ensure the enforcement of the regulatory system in conflicts of interest. Moreover, it has been noted that the response of the public authorities to the breaches committed in this area has been inadequate.

With regard to this tool, the Anti-Fraud Office recommends:

— Guaranteeing the authorities' response to any breach of the rules governing conflicts of interest, through the provision of resources and the specialised training required for this purpose.

— Heightening the supervision taken by the competent bodies in the exercise of their sanctioning powers in order to avoid infringements becoming statute-barred or the expiry of proceedings.

— Assessing the possibility of delegating the power to impose sanctions for breaches of the rules governing conflicts of interest to a control authority that is specialised in this area, given the inadequate response of the authorities in the exercise of this power.

— Developing without further delay the sanctioning procedure for senior officials of the Catalan Government.

— Establishing as a legal provision the publication of the most serious breaches of the regulations governing conflicts of interest.

— Establishing specific criminal offences for breaches of the rules governing conflicts of interest, as in neighbouring countries.

1. Introduction

1.1. The background to this report

In both the previous parliamentary term and in the current one, the issue of corruption has been particularly at the forefront of debate in the Catalan Parliament. In the course of the discussions, one specific corruption risk has become especially prominent: conflicts of interest. Their presence in decision-making processes involving public servants can influence not only the necessary impartiality they should have to act objectively in the pursuit of the public interest but also citizens' perception of the way public authorities work and, therefore, affect their confidence in the institutions.

In this report, the Anti-Fraud Office, within the framework of its collaboration with the Catalan Parliament, discusses the challenge posed by this issue.[2] The resultant report we are presenting is within the framework of the indicative power granted to the institution by Law 14/2008 of 5 November, on the Anti-Fraud Office of Catalonia. In particular, it provides for the possibility of issuing special reports when there is a significant social impact or when it is required due to the importance of the investigations undertaken.[3]

The mission entrusted to the Anti-Fraud Office to fight corruption must include preventive measures, in accordance with the mandate addressed by the United Nations Convention against Corruption, of 31.10.2003, to States Parties, including Spain.[4] The prevention of corruption entails attention to various fields, such as public sector transparency or the proper management of conflicts of interest[5] which, despite being well known from the political-administrative tradition, are in need of a diagnosis, now imperative, on the real extent of the issue in Catalonia. We also need to check what tools are currently available to the system to deal with conflicts of interest, decide whether or not they are appropriate

2 Specifically, this report has been undertaken in response to the request of the Catalan Parliament by means of Resolution 1150/X of 21.07.2015, approving the Opinion of the Commission of Investigation of Fraud and Tax Evasion and Political Corruption Practices.

3 Article 21.4.

4 See Articles 6 & 8.5 of the Convention.

5 Manuel Villoria affirms «It should also be understood that conflict of interest is not the same as corruption. [...].However, it is also true that, most of the time, corruption appears where was a prior private interest improperly influenced the performance of the public official. This is the reason why it would be wise to consider conflict of interest prevention as a part of a broader policy to prevent and combat corruption. Situated in this context, conflict of interest policies are an important instrument for building public sector integrity and for defending and promoting democracy». OECD. «Conflict of Interest Policies and Practices in Nine EU Member States: A Comparative Review». *SIGMA Papers*, no. 36. OECD Publishing, 2005, page 6.

or sufficient and finally propose and recommend, if necessary, the measures we deem to be required.

This exercise of analysis and recommendation has a precedent in a special report on transparency and the right of access to information. This was addressed to the Catalan Parliament specifically at the time it was developing the current Law 19/2014, 29 December, on transparency, access to public information and good governance.

1.2. Purpose and subject

This document is intended as a response to the shortcomings detected by the Anti-Fraud Office, as a control institution, regarding the regulation and use of tools for the prevention of conflicts of interest. The analysis that is required becomes even more necessary in a context where in the majority of public corruption cases there is a personal interest that improperly influences the fulfilment of public duty.

The Anti-Fraud Office is aware that, given the complexity of the issue, the results of this report —the findings and recommendations presented— cannot be fully comprehensive in terms of the subject or its analysis. Rather, they are aimed at opening up a subsequent public debate involving all the stakeholders.

As a starting point, and before examining specific aspects of the regulation and treatment of conflicts of interest, we identify, by way of a hypothesis, two issues that are currently hindering the management of the issue.

— The first one is that institutions and their representatives seem to view the tools for managing conflicts of interest simply as formal obligations, rather than real tools for guaranteeing the impartiality and objectivity of public servants and, therefore, the integrity the institution they represent.

— The second is that there is a lack of an overall vision of the toolkit available to the public authorities to deal with conflicts of interest, and a lack of awareness of the purpose of each of these tools.

The subject of this study comprises all the individuals who exercise public functions —elected representatives, senior officials, public servants and other individuals working for public authorities—, who we will herein refer to as *public servants,* since all are affected to a greater or lesser extent by the issue of conflicts of interest. There are 320,000 people working in the Catalan public sector, according to the Department of the Interior, Public Administration and Housing Public Employment Database, dated 1.01.2015, which highlights the scale of the issue the management system has to deal with. This figure does not include groups such as MPs and local elected representatives, to name just a few, therefore the total number of public servants is even greater.

In effect, with the aim of covering the whole public sector in Catalonia, this report encompasses what Law 14/2008 of 5 November defines as the public sector of Catalonia, i.e. the Catalan Government Administration, the bodies that make up the local authorities and public universities in Catalonia, plus Parliament and its dependent bodies. The judiciary and the Spanish State Administration in Catalonia are excluded as they are at a Spain-wide level.

Lastly, the activity carried out by special interest groups or lobbyists is excluded from this report, given that these will never be in a conflict of interest situation. They could, in any event, cause a conflict of interest situation for a public servant, as explained in the second section. Some of the tools presented here are in fact aimed at preventing those situations (policy on gifts and other benefits and control of interests after leaving public office).

1.3. The content

The report starts with an executive summary, which follows this introduction. The analysis and research carried out to develop this document are structured below in five sections and several annexes.

— The first section deals with the concept of conflict of interest. Far from being evident, the idea leads to a great deal of confusion. Perhaps most notably, conflict of interest tends to be equated with the act of corruption.

— The second section explains the paradigm of prevention of corruption risks. This reveals why it is so difficult to regulate risks such as conflicts of interest for each professional group.

— The third section discusses several general considerations about the current regulation of conflicts of interest, distinguishing between the subjective and objective scope, while pointing out its weaknesses.

— The fourth section contains a detailed and systematic analysis of the various preventive tools for managing conflicts of interest. It details the purpose of each tool from a preventive standpoint; it describes the current legal system; identifies the most common breaches and irregularities; and highlights benchmark practices. Lastly, we present specific recommendations for each tool, aimed at the pertinent public authorities, irrespective of the legislative or organisational nature of the measures needed to implement them, or the assignment of powers in order to enforce them.

— The last section completes the report by setting out a series of considerations as a result of the work that has been carried out.

To confirm the two initial hypotheses, the Anti-Fraud Office decided to supplement the legislative analysis work and research on best practices with a field study in the form of a survey, aimed at gaining an overview, as realistic as possible, of the real use of the tools for managing the most common conflicts of interest. The study included the 947 municipalities of Catalonia, the seven public universities plus the Open University of Catalonia (UOC) and the Catalan Government Administration. The questionnaires were processed online, between 6 October and 9 December 2015. The questions related to the last completed parliamentary term or the last four years.[6] The results for each question in the field study are presented alongside their corresponding tool.

6 For the town and city councils, the questions referred to the last term of municipal office (2011-2015); for the Catalan Government, they referred to the last term of government office (2012-2015); and for public universities, to the last four years

2. Conflict of interest, a confusing concept

Conflicts of interest are a major problem for any constitutional State, because they endanger key principles of democratic management: the objectivity and impartiality of public servants, and public trust. Conflicts of interest are not the only source of risk to these principles. The personal ideological convictions of public servants (religious beliefs, race, gender...), for instance, can create ethical dilemmas that compromise these principles; but they do not necessarily constitute what we technically refer to as conflicts of interest unless, as we will explain below, they involve a private interest.

Similarly, in public life there are many situations of conflicting interests that do not constitute conflicts of interest. Whenever, in the process of defining public policy, there are stakeholders with differing interests (e.g. represented by lobbyists),[7] the public decision-maker will obviously be handling conflicting interests, but there will not necessarily be a *conflict of interest* situation.

> Conflicts of interest are not the same as corruption.

These are just a few examples of what happens when dealing with conflicts of interest as a subject of study: the term is used loosely and often leads to confusion. Its use in the sense that we use it today, of the situation of an individual who has an interest that improperly influences them in their professional duty, seems to have first appeared in the 1950s.[8] Since then, there have been various definitions as well as uses, to the point that conflict of interest is now often confused with conflicting interests and, even more often, with real acts of corruption. Having seen just how widespread this confusion is, it seems important to begin by clarifying what is and what is not a conflict of interest.

7 The activity of lobbies does not form the specific objective of this report, but possible manifestations of their activity are covered indirectly by some of the proposed tools (Measures of transparency and publicity, Policy on gifts and other benefits, Control of interests after leaving public office).

8 Gingras & Gosselin attribute the first coining of the term to the journal Science in 1947, but the real emergence of the word to the 1950s. Gingras, Y. & Gosselin, P. «The Emergence and Evolution of the Expression "Conflict of Interests" in Science: A Historical Overview, 1880–2006». *Science & Engineering Ethics*, 14 (3), 2008, page 338. Whereas Davis & Stark state that the first time the term was used in the sense of its standard definition in a court case was in 1949; the first time it appeared as an entry in the *Index of Legal Periodicals* was in 1967 and it was not until 1979 that it was included in *Black's Law Dictionary*. Davis, M. & Stark, A. (ed.). *Conflict of interests in the professions*. New York: Oxford University Press, 2001, page 17. According to the authors, in the most important English dictionaries the term conflict of interest did not appear as an entry before 1971 and the first philosophical discussions of this concept also date to the 1970s.

2.1. What is and what is not a conflict of interest?

The Anti-Fraud Office considers that a person is in a conflict of interest situation when:

— he or she must exercise their professional judgement or discernment (assess a bid in a tendering procedure, prepare a medical diagnosis, mark an examination, appraise proof in a trial, audit financial statements, etc.)

— for, or on behalf of, another person (a patient, a client, a student, a citizen or group or a public institution) who legitimately places their trust in them

— and he or she has a private interest (personal or professional)

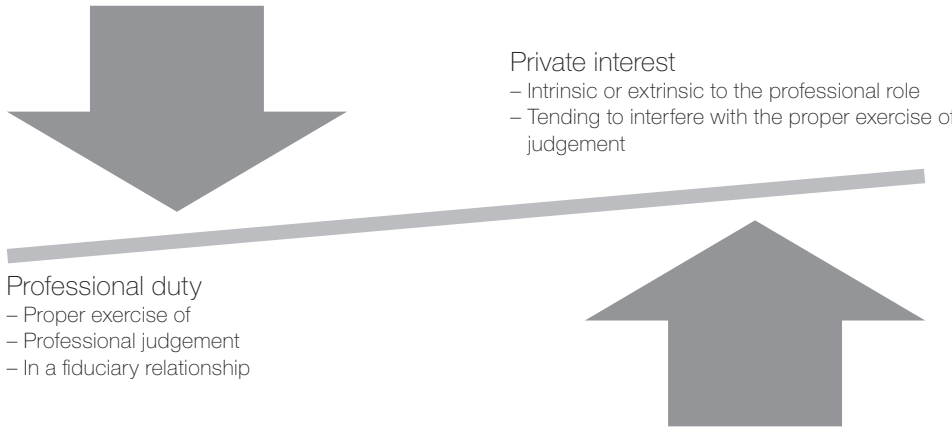
— that could interfere with the proper exercise of their professional responsibility.

This definition is the result of the study of scientific publications on the scope and limits of the concept from various disciplines (law, economics, political science, psychology, etc.). This definition brings to light ten reflections which are particularly significant for a full understanding of this issue.

1. Conflicts of interest are *circumstantial situations* that may occur in the exercise of most professions. In the course of professional practice, anyone may find themselves, at a given time, in a situation where they have a private interest that could influence their impartiality and objectivity.

2. These situations are characterised by the conflict of *professional duty* with private interest. In fact, to emphasise the conflict between duty and interest, throughout this report we have chosen to use the term *conflict of interest* and not *interests*.

Figure 1. Private interest versus professional duty



3. This conflict occurs when the person is in the position of having to provide their *professional judgement*, understood as the ability to make certain kinds of decisions correctly.[9]

9 See the definition of professional judgement and reflexion on its impact in *op. cit* Davis, M. & Stark, A., 2001, page 8. In the introduction to the book, Davis puts forward a standard definition of conflict of interest for all the professions, which has become the benchmark definition in the academic world since then and a guide also adopted and justified by the Anti-Fraud Office in this report. His definition is: «A conflict of interest is a situation where a person P (whether an individual or corporate body) stands in a certain relation to one or more decisions. On the standard view, P has a conflict of interest if, and only if, (1) P is in a relationship with another requiring P to exercise judgement on the other's behalf and (2) P has a (special) interest tending to interfere with the proper exercise of judgement in that relationship.»

Therefore, these are not mechanical, routine or automatic decisions, such as, for example, an account adjustment, in which any trained and informed professional would make the same decision and, consequently, it is much easier to identify whether the private interest really influenced the decision. When the decision requires judgement, it is no longer a routine decision and the professional should offer their knowledge, skill and insight. Each profession requires a technical or other kind of discernment: civil engineers are particularly adept at predicting the likely use or service of physical structures; a teacher, in assessing the academic progress of students and the same goes for other professions. For this reason, in the exercise of most professions, a person may face a conflict of interest situation. Whether the individual is or is not yet in a position to issue this professional judgement is, as we will explain in the next section, the key to distinguishing real conflicts of interest from potential conflicts.

4. But the reason why conflicts of interest are a problem is because this professional judgement is given on someone else's behalf. Therefore there is a broad scientific consensus that the professional relationship should be fiduciary in nature in the broad sense of the term.[10] This fiduciary nature means that the person who is being provided with the professional judgement trusts —or is entitled to trust— the professional who has to do something for him or her or in his or her name.[11] In the specific case of professions that are exercised in the public sector, this fiduciary relationship is so clear that the OECD, in its guidelines for the management of conflicts of interest, defines public servants as «those receiving the trust of the State and citizens».[12]

5. Neither is the concept of *private interest* easy to define. Of course, financial interests will undoubtedly come into play, but there are other private interests such as love, friendship or gratitude. Thus it is widely accepted that family connections are one of the most common sources of conflicts of interest. In short, we could understand private interest as being any influence, loyalty, emotion or other characteristic of a situation [13] that tends to make the professional judgement less reliable than it would normally be because it could involve some kind of personal or professional benefit or advantage, directly or indirectly, in the present or future, of a pecuniary or another nature.

10 We agree with Andrew Stark when in his article «Why Are (Some) Conflicts of Interest in Medicine so Uniquely Vexing?» he insists on the need to not interpret the term fiduciary in a legal sense: «By "fiduciary" or "trust" obligations, I mean simply a heightened duty of commitment or devotion, a duty that one assumes to particular principals by entering certain professional roles, a duty that goes beyond the ordinary moral obligations that we bear toward anyone, no matter what role we assume.» Moore, D., Cain, D., Loewenstein, G. & Bazerman, M. *Conflicts of interest. Challenges & Solutions in Business, Law, Medicine & Public Policy*. New York: Cambridge University Press, 2005, page 153.

11 Anne Peters notes that, in the public sphere, this fiduciary duty flows from the constitution, from law, or from the concept of public office; from the obligation, in short, of people who occupy public offices and positions to serve the general interest. In the private law world, the fiduciary duty may arise from law, from contract or flow from professional standards (self-regulation of the profession). See Peters, A. & Handschin, L. *Conflict of Interest in Global, Public and Corporate Governance*. New York: Cambridge University Press, 2012, page 13.

12 OECD. *Managing Conflicts of Interest. A Toolkit*. Paris: OECD Publishing, 2005, page 16. See figure 2.2. «Public office is a public trust» and the accompanying notes.

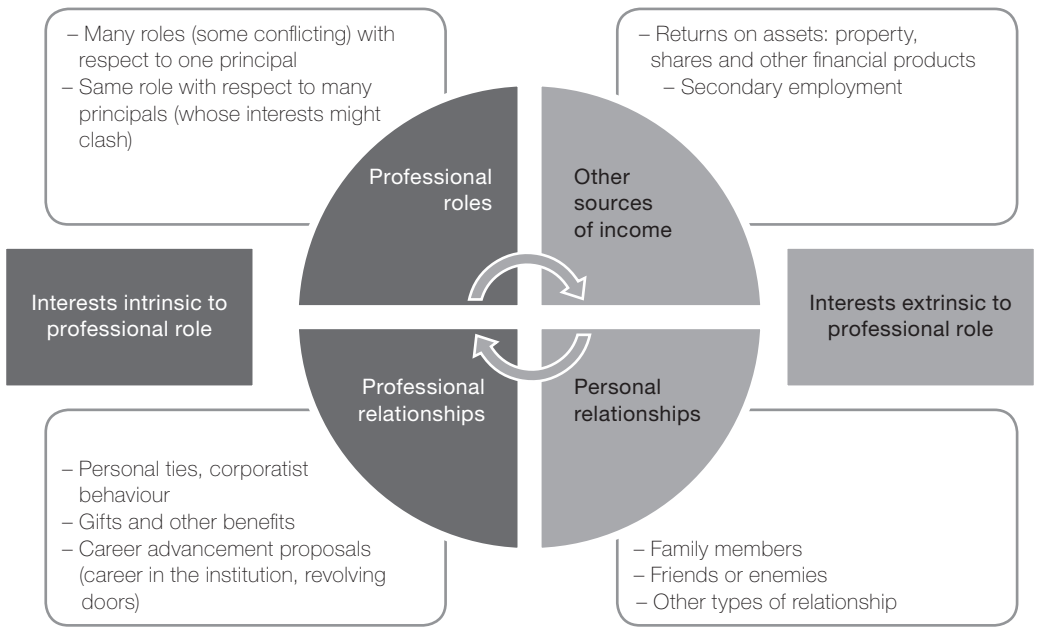
13 Davis defines interest as «any influence, loyalty, concern, emotion, or other feature of a situation tending to make P's judgement in that situation less reliable than it would normally be, without rendering P incompetent.» *Op. cit.* Davis & Stark, 2001, page 9. He argues, moreover, that there cannot be a closed list of what is considered as interest because it varies from one profession to another and changes over time.

6. All the interests described to this point are outside the professional role, but private interests *can also arise within the professional role*. In 2001, Andrew Stark [14] highlighted that in-role or «professional» conflicts of interest tend to arise in two situations:

a. The professional occupies more than one role with respect to the same client, superior or principal, which requires him to assume the roles of buyer and seller of services to that principal (*diagnostic and service-provision roles*), or an impartial and a partial role (*judging and advocating roles)* in the work he does for the principal. Public servants who may find themselves in this kind of conflict of interest are members of town councils who have some latitude in determining their own salary level; or public servants who make the proposal for procurement and define the tender specifications and then form part of the contracting committee where the decisions are taken.

b. The professional occupies the same role with respect to many principals. They could be in a position where some principals compete for the same professional item or service. In this scenario it would be difficult, if not impossible, to properly fulfil their obligations and responsibilities to two clients. In the case of a municipal engineer or architect or authorised state employees in a local public body, who, on a part-time basis, offer their services to more than one council (for small municipalities), which, at a particular time, have conflicting interests, for example regarding the demarcation of the municipality or in the definition of joint services.

Figure 2. Origin of private interests



14 See «Comparing Conflict Of Interest Across The Professions» *op. cit.* Davis & Stark, 2001, page 335-351.

7. But the simple fact that two interests clash in some way does not mean, from a technical standpoint, that the term *conflict of interest* is necessarily implied; a*ll the elements of the definition must be present*. Professor Michael Coleman gives a simple but useful example:

> *My interest in spending time with my children may conflict with my interest in writing this paper, but this does not constitute a conflict of interest, for I am not required to exercise judgement on another person's behalf.* [15]

Indeed, that Coleman finished writing the article was a matter of professional ethics, but not a conflict of interest. Conflicts of interest arise only when a person is required to exercise judgement on behalf of another.

8. All these private interests are undoubtedly legitimate, however, in this situation, their very existence brings into question the impartiality and objectivity of professionals who are required to exercise a judgement, i.e. they make it less reliable. A very simple and well-known example is as follows:

> *I would* [...] *have a conflict of interest if I had to referee at my son's soccer game. I would find it harder than a stranger to judge accurately when my son had committed a foul.* [...] *I do not know whether I would be harder on him than an impartial referee would be, easier, or just the same. What I do know is that* [...] *I could not be as reliable* [...].[16]

And this is the first consequence of conflicts of interest: the private interest may or may not exert an influence, *it is a tendency*, *a risk*; but its very existence brings our judgement into question.

9. For this reason, we say that a conflict of interest is the risk that the private interest will influence or bias the judgement the professional must exercise; i.e. *it is a corruption risk*. Andrew Stark summarises this complexity in the following reflection, referring specifically to conflict of interest in the public sector.

> *The «conflict» in «conflict of interest» takes place entirely in the mind. The term «conflicted» refers exclusively to the official's impaired capacity for judgement. The problem, though, is that we cannot directly peer into an office holder's mental state as she comes to judgment, cannot gauge the extent to which she remained admirably impervious to—or else was all too-fallibly mindful of— her own interests.* [...] *Because we cannot directly view mental states, in other words, conflict of interest structures remain concerned not with what "really happened" in the official's mind but with «what might have happened»; they make it illegal not to «succumb to temptation» but «to enter into relationships which are fraught with temptation.»*[17]

15 Coleman, S. «When conflicts of interest are an unavoidable problem». Australian Association for Professional and Applied Ethics 12th Annual Conference, 28-30 September 2005, Adelaide.

16 *Op. cit.* Davis & Stark, 2001, page 16.

17 Stark, A. Conflicts of Interest in American Public Life. Cambridge: Harvard University Press, 2000, page 4. In relation to this «illegalisation», the article by Kevin C. McMunigal is of interest, «Conflicts of Interest as Risk Analysis» (*op. cit.* Davis & Stark, 2001, page 61-70), which states that the problem of legal doctrine on conflict of interest is that it confuses the ideas of harm and risk, two concepts that have different rules and objectives, also different from the point of view of prevention.

Indeed, in any conflict of interest situation where there has not yet been this «succumbing to temptation» that Stark graphically describes, there is only the risk. [18]

10. However, *we cannot confuse corruption risk with real corruption*. If the private interest effectively ends up biasing the professional judgement of that individual, the latter would obtain a personal benefit (direct or indirect, financial or other, present or future) abusing their professional position (their decision-making ability and the resources under their control), therefore we would say that it had become an act of corruption. We affirm, therefore, that conflicts of interest are a corruption risk. In the words of Professor Agustí Cerrillo: «Conflicts of interest may be a indicator, a precursor or even an engine that ends up generating a case of corruption if nothing is done to prevent it.» [19]

Table 1. Differentiation between conflict of interest and corruption

	Conflict of interest (risk of corruption)	Corruption
What is it?	A *situation*	A voluntary *action* (or omission)
Why does it happen?	Because there is a private (legitimate) *interest*	To obtain a private (illegitimate) *benefit*
What does it produce?	A tendency or *risk of bias* in the professional judgement	A *biased decision* (product of the abuse of the public position)

This identification of conflicts of interest and risks takes us directly to the *paradigm of prevention*: corruption risks cannot be entirely avoided, but they can be identified and managed. If the conflict of interest situation is correctly managed, i.e. once the relevant private interest is detected, it is either eliminated, wherever possible, or this interest is prevented from having an effective influence on professional judgement, it should not necessarily lead to any problems. However, if nothing is done, both the direct recipients of the professional judgement of the individuals and the organisations where they work or professional groups to which they belong, may be affected.

> Conflict of interest is any situation of risk in which a person's private interest could interfere with the proper exercise of their professional judgement on behalf of another who legitimately trusts their judgement.

In view of the above, we could summarize the concept of conflict of interest as the situation of risk in which a person's private interest could interfere with the proper exercise of their professional judgement on behalf of another person who legitimately places their trust in that judgement.

18 Bernard Lo defines conflict of interest precisely, stressing the idea of risk: «A conflict of interest is a set of circumstances that creates a risk that professional judgment or actions regarding a primary interest will be unduly influenced by a secondary interest.» (Lo, B. & Field, M. J. «Conflict of Interest in Medical Research, Education and Practice». Washington: The National Academy Press, 2009, page 46).

19 Cerrillo, A. «Aproximación a la integridad en la contratación pública». A: *Aranzadi Insignis*, BIB 2013\16146 page 7, extract from the monograph *The principle of integrity in public procurement*. Ed. Aranzadi SA, January 2014.

2.2. Real, potential and apparent conflicts of interest

Having clarified the concept of conflict of interest, the other issue on which there is often confusion is the distinction between real, potential and apparent conflicts of interest. The most likely cause of this confusion is that the idea of conflict of interest describes a situation of risk, and to distinguish real, potential and apparent risks, requires abstraction. But the key to determining what kind of conflict it is is to decide whether or not the situation of risk has already been made effective, or whether there simply appears to be a conflict of interest.

2.2.1. Real conflict of interest

The conflict of interest is real (or actual) if the individual has a private interest in relation to a particular professional judgement or discernment and is already effectively in a situation in which they are required to provide this judgement. Therefore we could say that real conflicts of interest are *real risks*.

One very clear example is that of a public servant who has been appointed as a member of a public procurement committee where one of the final tendering companies is the company where his wife works. This public servant will be required to objectively assess all the bids submitted and the fact that his wife works in one of these companies could influence or affect his judgement (either for or against the company). Therefore this is a real conflict of interest. Obviously, we do not know whether this influence will come into play or not, but the reliability of his professional judgement may reasonably be questioned. The legislator regards this risk as sufficiently serious, and therefore requires public servants who are members of procurement committees to declare the existence of a private interest and abstain from taking part in assessing the bids.

2.2.2. Potential conflict of interest

A conflict of interest is potential if the individual has a private interest that could influence them in making a professional judgement in their job or position, but they are not yet in a situation where this judgement has to be made. Therefore, the difficulty in realising that this kind of conflict of interest exists is in identifying a potential risk, a risk that may or may not occur. This is why the management of this type of conflict of interest is so controversial.

> A conflict of interest is potential if the individual has a private interest that could influence them in making a professional judgement, but they are not yet in a situation where this judgement has to be made.

Let us examine an example in the same vein as the previous one. An engineer specialising in information and communications technology (ICT) has just won a merit-based competition for the position of head of information and communication systems of a public university, and is about to take up the position. Among the responsibilities of the new position is to chair the committee for procurement of the ICT goods and services for the

university. Her husband is a partner in a technology consulting consultancy. At present the company has no (existing) contract in operation with the public university in question and neither is there a tender process underway for which it has submitted a bid. Therefore, when the engineer takes up the position she has no real conflict of interest, because at that time she is not in a position of having to give her professional judgement. However, given the responsibilities she will have in the new job, she has a private interest that could affect this in the future: as head of systems she will have to decide whether or not to procure certain technological services and how to do so (diagnosis); and as chair of the permanent committee for procurement of ICT goods and services, she will have to assess the bids in future tenders and her husband's company could submit a bid (she will participate in the decision as to who will be the supplier). Therefore, the engineer, on taking up the position of head of systems with the current job description, will be in a potential conflict of interest situation (conflict of diagnostic/service-provision, since her private interest would be the service-provision).

In order to properly manage this specific risk, the university would need to establish a requirement to submit a declaration of interests which was sufficiently broad to detect this particular interest. Only then could they decide what other risk management mechanisms should be implemented in the case of this potential conflict of interest: separate the decision-making responsibilities from the job of head of systems (diagnostic) from the assessment responsibilities of the permanent procurement committee (service-provision), and ensure that different people are made responsible for them; make a list or establish in some way the type of technological products or services in the procurement of which the engineer should abstain from participating, etc.

Potential conflicts of interest are, in the words of Andrew Stark, like time bombs: they may or may not go off, but the risk is there. In his opinion, they are more easily accepted than real conflicts of interest. Possibly for this reason, there are fewer jobs and organisations that deal broadly and consistently with the management of these risks.

2.2.3. Apparent conflict of interest

A conflict of interest is only apparent when the person does not have a real or potential conflict of interest, but someone else could reasonably conclude, if only tentatively, that they do. We know that a conflict of interest is apparent when it is resolved simply by providing all the necessary information to show that there is no conflict of interest, real or potential.

A simple example, in line with the previous ones, is the award of a public contract to a company whose legal representative coincidentally has the same surname as the head of the procurement body. It turns out, however, that the individuals are not siblings nor do they have any family relationship or acquaintance. A third party might think that they are related on seeing they have the same surname, but this apparent conflict of interest can be easily resolved by presenting the documentation showing that they are not related.

Apparent conflicts of interest, although not exactly corruption risks, are *reputational* risks for the institution: they confuse people or give them the wrong idea about the secu-

rity or reliability of a particular professional activity (hence the possible damage to public trust). We must therefore always detect them and provide the public and users with the necessary information to clarify the apparent conflict of interest.

According to the Organisation for Economic Cooperation and Development (OECD), they should be included in the concept of conflict of interest; therefore both apparent and potential conflict of interest should be subject to regulation, although neither represents a real or current conflict.

2.3. Why are conflicts of interest a problem?

The increasing public sensitivity towards corruption has also led to greater citizen awareness of the distortions that conflicts of interest may and often do cause in decision-making by professionals. We know that these distortions produce inappropriate results that undermine the proper running of public institutions and erode public confidence. Therefore, the public expects professionals who assume the responsibility to act on their behalf to be aware of the limits of their professional judgement or discretion. But in any conflict of interest situation, the professional can be negligent and not respond adequately: this is the risk.

Inadequate management of conflicts of interest directly damages the people who rely on or trust the professionals in question, but also the organisations in which they work and, indirectly, the professional groups to which they belong.

The immediate consequences are:

1. *Disloyalty or betrayal of the trust placed in that person*. If the people who, justifiably, depend on the judgement of a professional do not know they have a conflict of interest, they are led to believe that their professional judgement is more objective and impartial than it really is. In fact, the professional is deceiving them, betraying the trust placed in them. In the specific case of professions that are exercised in the public sector, as the OECD states, «Trust in the integrity of the official and the organisation can be seriously damaged by suspicion that the public official's performance of official duties could be affected by a personal conflict of interest.».[20] It is for this reason that instruments such as declarations of interests are so important in prevention strategies, as a means of early detection.

2. *Undermining of professional reliability*. Even if the public servant who has the conflict of interest informs those who justifiably trust them (i.e. declares or makes their private interest transparent), their professional judgement will still be less reliable than it usually is. Therefore, as we will see later, it is not enough just to declare an interest: something must be done to remove it, whenever possible, or to avoid it influencing or biasing professional judgement.

3. *Risk* that the interest really biases the professional discernment and the conflict of interest situation becomes an act of corruption. In other words, the interest creating the con-

20 *Op. cit.* OECD, 2005, page 17.

flict of interest situation ends up improperly influencing professional responsibility, which would turn the corruption risk into real corruption.

4. There is obvious damage to organisations where this happens if they do not have preventive measures to detect and respond to these conflicts of interest. The *damage to* affected *citizens and users* or other stakeholders involves complaints, prosecutions and even compensation or other restitutive actions and the image of the institution is damaged, apart from the obvious loss of resources (material and financial) as a result of the abuse of a public position by those professionals.

The failure to deal with or inadequate treatment of conflicts of interest can be considered from another perspective: as a manifestation of maladministration.[21] In this regard, it should be noted that Article 30.2 of Catalonia's Statute of Autonomy recognises the right to good management, not only as a guiding principle of Catalan public law, but as a genuine subjective right: «All citizens have the right that the public authorities of Catalonia deal with the matters affecting them in an impartial and objective way [...].»

> The failure to deal with conflicts of interest is a manifestation of maladministration.

Professor Francesc Mancilla, who has discussed extensively the issue of the right to good administration, has affirmed «if it does not meet the standard of "unbiased and equitable treatment", there is no administrative procedure or rule of law, given that this is a real *prius* or prerequisite for all administrative action.»[22]

As a counterpart to this right, the Administration has the duty of good administration. This grants the public authorities and, in particular, the legislator, the responsibility for establishing a suitable regulatory framework to preserve the impartiality of public servants in the exercise of their functions, a task not without difficulties, as we discuss below.

21 *Op. cit.* Cerrillo, 2013, page 5.

22 Mancilla & Muntada, F. *La recepció a Catalunya del dret a una bona administració: la governança i el bon govern*. Barcelona: Institut d'Estudis Autonòmics, 2014, page 878.

3. The difficulty of regulating risks

We have already established that the phenomenon known as conflict of interest refers to a corruption risk and not an act of corruption. The risk we are concerned with is the danger that the private interest might influence the impartiality and objectivity of a public servant in the performance of their professional duties. Once a private interest is really influencing professional judgement, the bias and damage to the impartiality and objectivity has already occurred and it is a case of corruption, or abuse of a public position in private interest.

If conflicts of interest are viewed as corruption risks, one can move from a treatment that is merely reactive to one which is preventive. Prevention involves identifying the corruption risk in order to analyse the factors or the probable reasons why we believe the risk may arise. *Preventive actions* need to be planned for each of these risk factors, i.e. actions that help to reduce the likelihood of the act of corruption occurring. In conflicts of interest, for example, one risk factor is the fact that public servants have private interests of which institutions are not aware. To combat this risk factor, a preventive action would be to establish an obligation to notify institutions of these interests.

It is important to be aware, however, that the likelihood of the act of corruption taking place can be reduced but will probably never be completely eliminated. Therefore, the analysis must be continued to identify what the consequences of the act of corruption would be if it were to take place, and for each foreseen consequence, plan *contingent actions*, i.e. actions to minimise the severity of the consequences if corruption really takes place. Therefore, an example of contingent action would be the control mechanisms put in place to detect corruption cases: they do not prevent acts of corruption but are designed to detect them and respond as soon as possible, thereby reducing the seriousness of the consequences.

Figure 3. Analysis of corruption risks [23]

23 Inspired by Charles H. Kepner & Matthys J. Fourie's risk analysis methodology.

How does the legislator respond when this issue must be regulated? Regulation of real corruption situations is in principle simpler, since there is overall consensus that certain evils or damages must be stopped —corruption , influence peddling, etc.—, and must be regulated to deter people from becoming involved in these situations and providing tools to detect, penalise and repair the damage they produce.

Whereas when regulating corruption risk situations, however, no real harm has taken place and it may not take place at all. As a result, there are conflicting views as to how permissively or strictly they should be regulated. It is easy to infer, therefore, that corruption risks and actual corruption should be regulated based on differing criteria.

3.1. How does risk regulation work?

To regulate conflicts of interest, the first point to define is which legal interests the legislator seeks to protect. The impartiality and objectivity of any professional judgement that must be issued in the exercise of public duty are the rights that instinctively spring to mind. According to the *Dictionary of the Royal Spanish Academy of Language*, impartiality can be defined as the absence of premeditation or preventive action in favour or against someone or something that allows honest judgement or action. It is, therefore, a state of mind, and a necessary prerequisite for objectivity. However, to be objective requires taking into account all the elements involved and adequately weighing them up, regardless of your personal views or sentiments.

However, we must not forget another, equally important right: the public trust in public authorities and institutions. In fact, the OECD and the European Union (EU) include apparent influence in their definitions of conflict of interest. Thus, the system does not require an effective loss of impartiality but that the impartiality may be reasonably questioned in the eyes of others.[24]

Finally, it is important to bear in mind when regulating conflicts of interest that the ultimate goal is to *reduce the likelihood* that professional judgement may be influenced or biased by a private interest.

3.1.1. Operating model

Having noted the above, the key question would be how the regulation of risks in the specific area of conflicts of interest works. It operates by establishing mandates or prohibitions that:

— Give visibility to interests that could potentially generate conflicts of interest so that public institutions are able to detect and manage them.

— Withdraw public servants from issuing judgement (duty of abstention) and prevent damage to the protected legal interests, to impartiality, due to the possible influence of a private interest in current or real conflicts of interest.

24 In this regard, see the Ruling of the European Court of Justice, case T-89/01, Claude Willeme v. Commission.

— Eliminate or reduce, as appropriate, the chances of harming the legal principle in potential conflicts of interest (incompatibility, limitations after leaving office, etc.).

It is easy to see that most of the rules governing conflicts of interest are, therefore, rules governing risk (and not the act of corruption). They establish obligations to declare personal or family assets and other activities or interests that could affect the decisions that will have to be taken in public office or employment; they regulate the possibility of taking secondary employment or other sources of income and under what conditions; they determine the obligations to abstain from public decision-making; establish limits and conditions for accepting gifts, customary favours and other benefits; or they establish obligations and limitations on professional employment after leaving public office, to mention just a few examples.

3.1.2. Consequences

When a risk rule is breached:

— It increases the likelihood of the risk becoming corruption. For example, failure to meet the obligation to declare interests makes it more difficult for the institution to detect conflicts of interest that may arise and act accordingly, which increases the probability of risk.

— In certain rules, it may mean the risk turning into an act of corruption, for example, failure to meet the obligation to abstain. It is true, however, that non-abstention does not automatically imply damage to impartiality, as an individual could fail to fulfil the duty to abstain in a public decision that affects a relative but could give an impartial professional judgement in the end. But the likelihood of them not being impartial is so high (risk quantification) that the legislator decides to regulate mandatory abstention.

— Public confidence is *always* harmed. This would be exactly the case in the example above: even if the individual ends up giving an impartial professional judgement, the decision taken would inevitably be distrusted.

Therefore it is important that in the regulation of these risks, mechanisms for detection and penalisation are incorporated as deterrents. From that point, the correct use of these tools to manage the conflicts of interest that arise will depend on each institution.

The table below sums up the different characteristics of corruption risk and acts of corruption, and their regulatory treatment.

> It is essential to analyse the risks of conflicts of interest for each professional group before regulating them.

Table 2. Characteristics and regulatory treatment of conflict of interest versus acts of corruption

	Conflict of interest (Risk of corruption)	Corruption (Damage: partiality due to the influence of a private interest)
Nature of actions	Preventive (intended to *avoid* the damage)	Contingent (do not avoid the damage, they *treat* it)
Aim of actions	Reduce the likelihood of the risk becoming corruption	Reduce the severity of the consequences if the act of corruption takes place
Protected legal rights	Public confidence, always; Impartiality and objectivity depending on the case	Impartiality, objectivity and public confidence
Type of regulation used	Risk rules	Damage (corruption) rules
How the regulation works	– Disqualify the individual from acting when they have a private interest – Establish prohibitions, limitations or conditions in certain situations to reduce the chances of the interest influencing – Give visibility to private interests	– Establish as an offence (prohibit) conduct that damages impartiality – Repair the consequences of the damage
Examples of the regulation	Art. 28.2 Law 40/2015 (abstention); Art. 7 Law 13/2005 (prohibition of involvement in private activities after termination of employment); Art. Criminal Code 422 and 423 (prohibition on accepting gifts), Art. 441 Criminal Code (private professional activity in matters where there was or will be involvement as a public servant). Codes of conduct (by reference to Art. 55 of Law 19/2014).	– Art. 428 CP (influence peddling); in certain cases Art. 404 CP (prevarication) could be applied Reasons for voidness and voidability (Art. 47 & 48, Law 39/2015) – Accounting responsibility – Restitution action in financial responsibility (Art. 36., Law 40/2015)
Effects if it is breached	– Damage public confidence – Increase the likelihood of corruption risk – In certain rules, they imply the act of corruption is committed	They damage impartiality, objectivity and public confidence
Legal consequences	– Sanctioning: administrative or penal – Exceptionally, ex officio review of void or voidable acts (Art. 76 LRBRL: local elected representatives) and, if applicable, restitution (return)	– Sanctioning: administrative or penal – Restitution: administrative (return action), accounting or civil – Ex officio review of void or voidable acts

Above, we have established which legal interests must be protected by regulation on conflicts of interest. The controversial question is: to what extent should they be protected? In other words, how far is one willing to go in establishing mandates and prohibitions to determine people's conduct? For example, is it reasonable to require a public servant's assets declaration to include family members? Logic would lead us intuitively to answer that it depends on the public servant. Therefore, simple intuition suggests that, before regulating, it is essential to analyse conflict of interest risks for each professional group, in order to quantify and justify the acceptable level of risk.

3.2. Risk analysis: quantifying and justifying the acceptable level of risk

The type of public functions of each professional group and the respective level of responsibility are the starting point for this risk analysis, which we consider indispensable for regulating risks for any public servant. The aim is to distinguish, in each case, which risks are acceptable and which are unacceptable.[25]

The analysis, explained in a simplified way, revolves around two key questions:

— How much risk is acceptable for each professional group in light of the respective public responsibilities? The quantification of risk is complex, but, to put it succinctly, is assessed by considering at least two fundamental criteria:

– the *probability* of the risk occurring and

– the *severity* of the consequences if the risk occurs (regardless of the probability established above).

The resulting quantification could be completed, of course, using other criteria which apply to each group of public servants.

— What reasons for assuming this risk are acceptable or even legitimate? This question justifies and drives the regulator's decision as to how far mandates or prohibitions should go, particularly with regard to potential conflicts of interest. And sometimes, the context itself can add additional complications in reasoning what is a legitimate or acceptable risk, for example when there are events (corruption scandals or crises) or changes taking place in the level of tolerance in society regarding particular conduct that previously was simply considered to be improper.

The result of this conflict of interest risk analysis will enable regulation the following tools:

— *Risk detection tools* of varying degrees of rigour (some of the tools highlight personal data and information). For example, in this professional group does the likelihood and severity of risk justify the obligation to submit a declaration of interests? Should only the public servant be required to make it? Or also their family members?

— *Risk management tools* of varying degrees of rigour (both tools which remove the private interest, where possible, and those that simply avoid the interest influencing professional judgement). For example, for this particular professional group, should any secondary employment be prohibited, or is it sufficient to establish certain limitations and authorisation to be given on a case-by-case basis?

— *Tools to guarantee the efficiency of the tools of detection and management* of conflicts of interests, i.e. mechanisms to detect breaches of regulation in the use of the tools detailed above, to penalise such breaches and, if appropriate, to repair any possible damages to public confidence that may have been caused.

In analysing the regulation governing conflicts of interest for the various professional groups forming the public sector in Catalonia, with the aim of studying how this analysis

25 "Conflict-of-interest analysis is an exercise in defining acceptable risk levels." McMunigal, K. C. "Conflicts of Interest as Risk Analysis". A: *op. cit.* Davis & Stark, 2001, page 68

was carried out and evaluate the suitability of the measures, we encountered these initial difficulties:

— *Subjective scope*: the regulation governing conflicts of interest is so fragmented that it is challenging to identify the applicable law in each case. Moreover, the regulation for certain public positions and functions does not account for the level of risk arising from the nature of their public functions or the level of responsibility and, certain public positions and functions are outside the scope of this regulation, as we shall see in the next section.

— *Objective scope*: There is no overview of all the available tools of risk detection and management and how they relate to each other. And sometimes it appears that the treatment of some of these tools overlooks their purpose or the real preventive role they must play in public institutions.

4. General weaknesses of conflicts of interest regulation in the public sector

In the Spanish system, the legal rules governing conflicts of interest are mainly channelled through the regulation on incompatibility, which does not incorporate a definition of conflict of interest and does not apply to all professional groups, as described below. This applies to all public servants, both public employees and local elected representatives and political appointees, although in these cases specific (and fragmented) laws have been developed.

The incompatibility regulation was originally a response to the mandate that the Constitution addressed to the Public Administration to serve the public interest objectively (Art. 103.1). The third paragraph of the same article refers to the law to regulate the Statute of Public Employment (EBEP), the entry to public appointments based on the principles of merit and ability, the incompatibility regulation and the guarantees of impartiality in the exercise of their functions.

In the same vein, Articles 52 and 53.2 of the Basic Statute of Public Employment require public employees to diligently perform the tasks assigned to them, uphold the general interests and act in accordance with the principles of objectivity, integrity, neutrality and impartiality, among others.

As for the senior officials of the Catalan Government, the preamble of Law 13/2005, of 27 December, states that «they must demonstrate the impartiality of their actions through absolute dedication to the duties assigned to them, which should not be seen to be influenced by other activities or interests, to serve with maximum effectiveness, efficiency and objectivity the general interests of citizens.»

Pursuant to this required impartiality and objectivity, all public servants have the duty to prevent private interests improperly influencing the performance of their duties and responsibilities. The term *private interests* is understood as both their own and their families' interests, and situations of friendship, enmity, litigation or professional or business connections. In this regard, the system regulating conflicts of interest is also based on the principle of co-responsibility, which requires individuals accepting an office or position to assume the Government's objectives and priorities, insofar as they take part in decision-making.

Apart from the above, in the regulation of conflicts of interest, as well as impartiality and objectivity, the legislator must maintain the protection of other principles, such as

efficiency, transparency and separation of functions.[26] All these principles undoubtedly play a part in attaining the right of good administration, despite making it more difficult to regulate.

4.1. Absence of a conflict of interest legal concept

There is no *over-arching* legal definition of conflicts of interest in the legal system applicable to the public sector in Catalonia.

By the same token, the Code of Conduct for Senior Officials and Senior Managers of the Administration of the Catalan Government and its public sector entities (CCSO) in point 5.15 defines conflicts of interest as follows:

"There is a conflict of interest when a situation of interference arises between one or several public interests and the private interests of a senior official or public senior manager, so that they may compromise or give the impression of compromising the independent performance of the public service.

At the parliamentary level, Article 16 of the RPC, as part of Title II on the Statute for Members of Parliament, among the obligations it establishes for them, contains the following provision:

> *There is a conflict of interest when a Member has a direct or indirect personal interest that may improperly influence his or her obligations as a Member in full. Personal interests are understood to be those of the Member and secondary interests, such as those of their families, friendships and of legal entities, organisations and private entities with which they have had a working relationship whether professional, voluntary or defending corporate interests that could compromise their freedom to vote.*

This definition is completed with that offered by article 14.2 of the Code of Conduct for Members of the Catalan Parliament (CCMCP), which, in turn, refers to article 15 of the CCMCP which lists the "personal interests" of MPs. .

In terms of senior positions in the Spanish State public sector, Law 5/2006 of 10 April, regulating conflicts of interest of members of the Government and senior officials of the Central State Administration, explicitly defines the notion of *conflict of interest* as the intervention of senior officials in «decisions related to matters where the interests of their public position come into conflict with their own or their families' private interests, or interests shared with third parties.»

> There is no over-arching legal definition of conflicts of interest in the legal system applicable to the public sector in Catalonia.

This definition has been replaced by Article 11.2 of Law 3/2015, according to which «a senior official faces a conflict of interest when the decision to be adopted [...] may affect

26 This is recognised by the Constitutional Court doctrine (STC no. 178/1989, of 2 November and no. 155/2014 of 25 September), but is essentially limited to the incompatibility regulation for members of the constitutional and statutory bodies.

their private interests, of a financial or professional nature, because it will be beneficial or detrimental to those interests.»

Apart from the fact that this regulation is not applicable to the public sector in Catalonia, the concept of conflict of interest it uses is not in line with the concept we have advocated in paragraph one of this report. Moreover, the second law cited does not seem to focus on how private interests can affect public decisions, but just the opposite, on how public decisions affect private interest.

For its part, in respect of the field of public procurement, Article 24 of Directive 2014/24/EU, of 26 February 2014, understands conflict of interest as «any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.» [27]

According to the considerations set out under heading 2.1 and, in view of the weakness we have referred to, we suggest that the general legislation applicable to public servants in Catalonia establishes an unequivocal regulatory concept of conflict of interest in line with the definition set out above, i.e. any situation in which a public servant has private interests which could influence, or appear to influence the exercise of their professional judgement on behalf of another person who has legitimately placed their trust in them.

4.2. Subjective scope: fragmented regulation and positions not covered

The issue of conflict of interest is not exclusive to a particular group of public servants, but is applicable across the board, to all public servants, because it encompasses all sectors, especially those involved in the exercise of public powers.

Based on the approach provided by current legal regulation on this issue, we can infer the existence of the following groups of public servants:

1. Political offices, which include

a. Elected representatives. Directly representing society, this category includes:

i. Members of the Catalan Parliament (MPs)

ii. members of the local authorities.

b. Political appointees. Individuals who occupy a post that is elective and politically appointed, and carry out functions in the Government involving decision-making:

i. the President and members of the Catalan Government;

ii. Other senior officials and similar posts working for the Catalan Government.

27 The time-frame for the Spanish government to transpose this rule ended on 18 April, therefore if it has not been transposed, it is automatically applicable.

> The regulation governing conflicts of interest is so highly fragmented that it is challenging to identify the applicable law for each professional group, which produces legal uncertainty.

2. Public sector employees, a category that includes all public employees who, regardless of the nature of their relationship (civil servant, employment contract or temporary staff), provide professional services in the public sector and enter through a process based on equality, merit and ability. In addition to the general rules applicable to public administration personnel in Catalonia, specific regulation is established for the following groups:

a. Catalan Parliament personnel;

b. senior managers of local authorities;

c. authorised state employees in a local public body.

Regarding the variable rigour of the regulation, we can conclude that there is a dual treatment of political offices and staff positions, with regard to the declarations of interests, regulation of secondary activities and limitations on activities after leaving the office or job, or transparency and publicity.

4.2.1. Fragmentation of regulation due to the plurality of subjective categories

The legal framework governing conflicts of interest is comprised of various regulations, applied to the groups described in the previous section, as illustrated in the table below. [28]

28 This table does not include other rules containing specific schemes for special groups or bodies (the Catalan regional police force, the Catalan Government lawyers, etc.). Neither does it include Law 6/2003 of 22 April, of the Statute of the ex-Presidents of the Catalan Government as, although Article 4 refers to incompatibility, they are aimed at avoiding the payment of the established monthly allowance or pension annuity if other professional activities are carried out, rather than safeguarding impartiality.

Table 3. Overview of the regulation governing conflicts of interest in the Catalan public sector

Legislation regulating conflicts of interest	Elected representatives/political appointees					Public sector personnel			
	Members of the Catalan Parliament	President & members of the Catalan Government	Government senior officials and similar	Local public represent-atives	Board members university society	Catalan Parliament personnel	Public Admin-istration personnel	Senior managers local authorities	Authorised State employee (freely selected)
Law 13/2005, of 27 December (on the regulation governing incompatibility of senior officials of the Catalan Government)		●	●						
Law 13/2008, of 5 November (on the Presidency and politicians of the Catalan Government)		⊙							
Law 3/1982, of 23 March Art. 11.1-2 (on the Parliament, President and Executive Council)		⊙							
Legislative decree 2/2002, of 24 December (Catalan Public Enterprise Statute)	⊙		⊙				⊙		
Organic law 5/1985, of 19 June (on the general electoral system, LOREG)				⊙					
Law 7/1985, of 2 April (regulating the rules of local government, LRBRL)				⊙				⊙	⊙
Law 3/2015, of 30 March (regulating the exercise of senior positions in the Central State Administration				⊙				⊙	
Law 19/2013, of 9 December (on transparency, access to information and good governance)		⊙	⊙	⊙				⊙	
Law 19/2014, of 29 December (on transparency, access to information and good governance)		⊙	⊙	⊙				⊙	
Law 1/2003, of 19 February (on Catalan universities)					⊙				
Law 53/1984, of 26 December (on incompatibility of public administration personnel)	⊙			⊙		●	●	●	●
Law 21/1987, of 26 November (on incompatibility of Catalan Government Administration personnel	⊙			⊙		●	●	●	●
Royal Legislative Decree 5/2015, de 30 October (Basic Statute of Public Employment, EBEP)						⊙	⊙	⊙	⊙
Law 14/2005, of 27 December (on hearings in Parliament)			●				●		
Catalan Parliament Regulation (RPC)	●								
Statute of the regime and internal governance of the Catalan Parliament (ERGI)						●			

Key: ● Total application of the regulation; ⊙ Partial application of the regulation

Moreover, on the basis of their independent categorisation, we have considered it appropriate to include another table with the regulation —self-regulation or by reference— of the rules governing incompatibility and conflicts of interest within public regulatory bodies, which control or oversee independently of the public administration.

Table 4. Legal regime of other bodies and institutions, independent of the Catalan Government that have control and regulatory functions

Other bodies and institutions	Public offices	Employees
Anti-Fraud Office of Catalonia	Director and Assistant Director. Reference to Law 13/2005 (Art. 10.2 and 25.1 LOAC)	Reference to ERGI (Art. 26.1 LOAC and Art. 39.2 and 3 NARI) Specific regulation on conflicts of interest (Art. 46 to 49 NARI)
Catalan Data Protection Agency	Director: – Reference to Law 13/2005 (Art. 7.7 Law 32/2010) – Specific causes of incompatibility (Art. 7.7 Law 32/2010)	Reference to Law 21/1987 (Art. 27.2 Law 32/2010)
Catalan Audiovisual Council	Members: – Reference to Law 13/2005 (Art. 6.2 Law 2/2000) – Specific regulation (Art. 6.2 & 3 Law 2/2000 and Art. 10.2 e EOFCAC) Secretary-General: reference to Art. 10 EOFCAC (Art. 19.2 EOFCAC)	Reference to Law 21/1987 (Art. 17.5 EOFCAC)
Council for Statutory Guarantees	Members: – Partial reference to Law 13/2005 (Art. 12.2 Law 2/2009) – Specific regulation (Art. 10-12 Law 2/2009 and Art. 20-22 and 28 ROFCGE)	Reference to Law 21/1987 (Art. 49.1 ROFCGE) Exceptional rule (Art. 49.2 ROFCGE)
Anti-Fraud Office of Catalonia	Director and Assistant Director. Reference to Law 13/2005 (Art. 10.2 and 25.1 LOAC)	Reference to ERGI (Art. 26.1 LOAC and Art. 39.2 and 3 NARI) Specific regulation on conflicts of interest (Art. 46 to 49 NARI)
Ombudsman of Catalonia	Director (and heads of areas, by reference to Art. 86.2 Law 24/2009): – Specific causes of incompatibility (Art. 7 Law 24/2009) – Specific regulation on declarations (Art. 11 Law 24/2009)	Specific system for incompatibility (Art. 74 RORISG) Supplementary reference to ERGI (Art. 86.5 Law 24/2009 and Art. 12 RORISG)
Public Audit Office of Catalonia	Directors: – Specific regulation on incompatibility (arts. 20 to 22 Law 18/2010 and Art. 6 RRISC) – Register and declarations of interests (Art. 7 and 8 RRISC) Secretary-General: reference to Law 13/2005 (Art. 31.2 Law 18/2010)	Reference to ERGI (Art. 50 Law 18/2010 and Art. 50.1 RRISC) Accounts auditors, legal advisors and supervisors, auditors and assistants to auditors: reference to the respective specific systems (Art. 50 Law 18/2010 and Art. 50.2 RRISC)

The tables above illustrate the fragmentation characteristic of the current legislation on conflicts of interest. This fragmentation is not only due to the different regulation relating to each group of public servants, but also various sources of regulations which, in certain cases, comprise the rules governing conflicts of interest within some of the groups. This is the case, for example, of local elected representatives, for which the conflicts of interest consist of at least seven different standards that are also not applicable to them in their entirety, as highlighted in table 3.

While it is true that, as has been established above, different professional roles justify different approaches, from low to high intensity in the application of the available tools for managing conflicts of interest, depending on the level of responsibility of each group, it is also true that the diversity of the groups and the resulting need to provide for different approaches to the issues should not lead to the existence of a plurality of legislation as there is at present, which makes it challenging to identify the applicable law and therefore is contrary to the principle of legal certainty and simplification of regulation.

The latter point relates directly to the principle of better regulation, which expressly refers to Law 19/2014, which, in Articles 62 and 63 of Title V (Of good governance), provides the mandate to the public administration to «take the regulatory initiative to create a regulatory framework that is predictable, as stable as possible and easy to be get to know and understand by the people and social actors» and «the adoption of a new standard entails, as a rule, a simplification of the current legal system.» Moreover, it states that regulatory initiatives «should refer to homogeneous material objectives or sectors, and must be clear and consistent with the rest of the legal system.»

In this regard, the *Good practice guide for the preparation and review of legislation affecting financial activity,* approved by the Catalan Government,[29] determined that «the criterion of regulatory simplification refers to, firstly, the rationality of the regulatory framework in the sense of reducing the number of existing laws and regulations and, secondly, the need to simplify or reduce the content of legislative texts, to draw up rules that are clearer, simpler and in a language accessible to the recipients and those affected by the measures that are established and facilitate their compliance.» The recommendations made therein include the reference to «assessing the ability to consolidate, codify or revise a particular regulatory framework in cases where a rule has been successively modified» or «avoid fragmentation, which can produce inequality, complications and slow access to updated information.»

— Therefore we should develop a single regulatory code or rulebook to provide a more coherent and comprehensive structure for regulating the fundamental aspects of the area of conflicts of interest. This would set out the rules and the essential principles, applicable across the board, to all public servants. This recommendation does not pre-

29 Catalan Government, Presidential Department, Directorate for the Quality of Regulation. *Guia de bones pràctiques per a l'elaboració i la revisió de normativa amb incidència en l'activitat econòmica* (http://portaljuridic.gencat.cat/web/.content/07_-_eines/documents/arxius/Guia_Bones_practiques_2010.pdf), 1st edition, November 2010, page 34 et seq.

clude, on the contrary it supports, a regulatory development that provides for different approaches to the issues according to the kind of functions and the level of responsibility of each of the groups of public servants.

The Anti-Fraud Office has previously presented this recommendation when we participated in the two democratic regeneration summits that took place in the Catalan Government headquarters on 6 and 22 February 2013. We advocated the need to adopt a «Code of integrity for public servants» which, among other issues, includes all the provisions relating to conflicts of interest.[30]

4.2.2. Public positions and functions outside the regulation governing conflicts of interest

In the course of our investigation, the Anti-Fraud Office has found that individuals who hold certain public offices with important management functions and other individuals who exercise public functions restricted to public servants are outside the scope of the current regulations governing conflicts of interest.

It has been found that no rules on incompatibility are applied to the Chairpersons of the Catalan Government companies included in the scope of the Catalan Public Enterprise Statute who do not occupy a position that has a fixed, periodic remuneration financed from the company's budget, nor do they have a working relationship included in the scope of Law 53/1984 of 26 December, on the incompatibility of public administration personnel and Law 21/1987 of 26 November, on the incompatibility of Catalan Government personnel.[31] The same situation occurs in the case of directors and managing directors of governing boards of municipal public companies when they have no other connection to the public sector.

To find any reference to conflicts of interest applicable to the directors of public companies, we have to look to company law. These administrators are subject to certain obligations arising from the duty of loyalty, which include the obligation to avoid situations of conflicts of interest.[32]

30 More recently, we reiterated this recommendation in the report dated 10.07.2015, which we undertook at the request of the Parliamentary Commission of Inquiry on Fraud and Tax Evasion and Practices of Political Corruption. It states that:

«We need to adopt a "Code of integrity for public servants" which clearly sets out all the duties that any individual who has public functions or services must comply with in order to avoid any conflict of interest, and particularly those related to the duties of abstention and declarations of assets and activities.

This code must provide for a unified regulation on prohibitions (incompatibilities) as well as compatible activities, subject to prior authorisation, applicable to anyone working for a public body.

The new code must fully integrate the definition of infringements and sanctions for this issue and also regulate the sanctioning procedure, including the possibility of publicly disclosing the sanctions imposed.

An independent and specialist public supervisory authority must centralise the functions of control and monitoring of compliance with the code and simultaneously assume the functions of authorisation, registration, recusal, penal, indicative and monitoring. The role of the Anti-Fraud Office of Catalonia needs to be taken into account for this purpose.»

31 The legislation does not prohibit the appointment of a person not bound by an employment relationship to the public administration and the public sector to the position of Chairperson of the governing board of a public company that is not a remunerated position. In this case, the individual appointed held the office of Chairperson of a collegiate body and received expenses or allowances for attending Board meetings approved by the government.

32 Articles 225 to 232 of the consolidated text of the Companies Act approved by Royal Legislative Decree 1/2010 of 2 July.

Moreover, at a local level, it has been found that certain public functions of a technical nature, restricted by law to civil servants —architects, engineers, etc.—, are carried out by individuals hired under administrative service contracts.[33] Therefore no rules for incompatibility can be applied as strictly speaking they are not in public employment.

The regulatory regime of conflicts of interest must be tied to the exercise of public functions, whether exercised from a public sector position or in a context of public-private partnership, such as the case of indirect management of public services. This way, no-one exercising public functions will be excluded from the regulatory regime of conflicts of interest.

4.3. Objective scope: Lack of an overall vision of the tools for managing conflicts of interest

Leading on from the analysis of the subjective scope in the previous section, and having noted the fragmentation of the existing regulation, we note, additionally, the lack of a systematic or comprehensive vision of the set of tools available to adequately manage conflicts of interest.

Similarly to our observations in relation to the subjective sphere, also from the perspective of the tools for managing conflicts of interest, currently the majority of the measures anticipated by the legislator are in the regulation on incompatibility.

Beyond the existing rules on incompatibility, all of the legislation in force in this area addresses to a greater or lesser extent, and with the strengths and weaknesses that will be discussed throughout this report, the tools for managing conflicts of interest that should necessarily be provided by any legislation on the subject, either to detect and remove the risk or prevent its influence, to detect and penalise non-compliance or repair damage to public confidence. However, the current regulation does not cover all the management tools, and when it does, it is not complete.

Again, the situation we have described suggests it would be advisable to develop a single regulatory code or rulebook which systematically integrates all the objectives covered by a comprehensive regulation of conflicts of interest, i.e. one that includes the catalogue of preventive tools.

The table below systematises in an illustrative way the group of measures and tools which, in the view of the Anti-Fraud Office, should be included in any regulation for the integrated management of conflicts of interest. The following section explains this classification of tools according to their purpose and the type of conflict of interest they deal with, carrying out a specific analysis of each from the perspective of the current regulation and implementation. In addition, proposals are included based on the most commonly detected breaches, highlighting the benchmark practices for each case.

33 These individuals' exercised functions described as of a permanent nature and as municipal whereas they were external to the municipal staff. This situation is entirely irregular. Firstly, there is a covert employment relationship as all the characteristics are present –it is carried out freely, is remunerated, on behalf of others and within the organisation's structure and management. Secondly, given that the functions exercised correspond to jobs that necessarily involve the exercise of the principle of authority, it must be considered whether they should be restricted to public servants. EBEP Article 9.2 expressly states that «in any case, the exercise of functions that involve direct or indirect participation in the exercise of public powers or safeguarding the general interests of the State and public administrations shall be carried out exclusively by public servants in the terms established in the implementation law of each public administration.»

Table 5. Catalogue of preventive tools for the three types of conflict of interest

Type of conflicts of interest	Risk detection tools	Risk management tools		Tools to guarantee the efficiency of risk detection and management tools		
		Remove the private interest causing the risk *(whenever possible)*	Avoid the private interest influencing professional duty	Communicate non-compliance in the use of the tools	Sanction non-compliance	Repair damage to public trust
Real *(Real risk: the professional judgement must already be made)*			Abstention (tool 5.5)	Recusal process (tool 5.5)		Transparency Public disclosure of sanctions Exceptionally, ex officio review (*)
Potential *(Future risk: a decision has to be taken or professional judgement made)*	**Raising awareness and training** (tool 5.1) **Declarations of interests** (tool 5.2.) **Transparency measures and publicity** (tool 5.3) **Tools for detecting conflicts before entering office** (tool 5.4)	Control of secondary employment and other sources of income (tool 5.6): *e.g.* prohibition of activities Policy on gifts and other benefits (tool 5.7): Prohibitions for certain at-risk groups Control of interests after leaving public office (tool 5.8): Prohibitions for certain at-risk groups	Control of secondary employment and other sources of income (tool 5.6): *e.g.* Limitations, such as transferring the management of financial assets to blind trusts Policy on gifts and other benefits (tool 5.7): conditions and limits Control of interests after leaving public office (tool 5.8): limitations on authorised activities	Control bodies (tool. 5.9) Internal reporting channels and whistleblower protection (tool 5.10) Appeals through administrative or jurisdictional channels (*) Citizens' mailboxes for complaints (*)	Penalty and restitution system (tool 5.11)	Transparency Public disclosure of sanctions Organisational review of work systems and processes (*)
Apparent *(Apparent risk)*		*(There is no private interest: transparency)*	*(There is no private interest: transparency)*			Transparency Accountability

(*) These tools are not developed in a specific section of this report, as they are designed for other purposes and in our view, although they have a complementary role in this model of prevention of corruption risks, they are widely known and do not need to be specifically described.

5. Catalogue of preventive tools

The tools described in Table 5 are classified into three groups according to their objective within the paradigm of risk prevention: tools for detection of conflicts of interest, tools for management and tools to ensure the effectiveness of the tools.

The conflict of interest *detection tools* enable public institutions to identify private interests, real, potential or apparent, that conflict with professional duty. They enable, therefore, the detection of all kinds of situations of conflict of interest, whether real, potential or apparent. Although the declaration of interests is the best-known tool, we would like to highlight three others that we consider to be particularly important for preventive work that can be carried out by the public authorities, since the primary responsibility does not lie with person in the conflict of interest situation, but with the institution. The first tool is training and providing advice to public servants so that they are able to detect such situations and manage them properly. This is an issue that is particularly important as scientific research over the last decade suggests that, despite being aware that they have private interests, people tend to substantially underestimate the extent to which their judgement becomes less reliable due to this conflict of interest. Secondly, the transparency measures and publicity that have been imposed in the public sector in recent years can be the vehicle for third parties (sometimes outside the institutions) to detect undeclared interests and bring them to the attention of organisations through the mechanisms of detection of breaches presented below. Finally, under the heading of *tools for detecting conflicts before entering office* we have grouped other tools that can assist institutions in detecting interests of certain special risk roles or groups before taking office.

> Despite being aware that they have private interests, people tend to substantially underestimate the extent to which their judgement becomes less reliable due to this conflict of interest.

The *management tools* are activated once the private interests have been detected and offer two main ways to redirect these situations of risk: removing, whenever possible, the interest that is causing the conflict of interest, or avoiding the influence of this interest on the professional judgement in the case of interests that cannot be removed, such as those arising from personal and professional relationships.

The tools for managing *potential conflicts of interest* focus on three of the four areas in which private interests most commonly arise: [34]

— *Sources of income other than the public position*, whether from other jobs or from personal or family assets. Management in these cases involves determining which secondary employment or sources of income are prohibited, which are authorised with certain restrictions, such as, for example, the ownership of an interest of over 10% in companies signing procurement contracts with the public sector, and those which are always permitted, such as creative writing. In terms of the prohibitions, the private interest which could cause the potential conflict would be removed. In the case of restrictions or authorisations, the management is focused on attempting to avoid the private interest from influencing the professional judgement, whilst damaging as little as possible the individual's basic rights and postponing the rectification of the situation to when the potential conflict of interest becomes real and the tool of abstention is used. Under the heading for the tool *Control of secondary employment and other sources of income* we will see how, within our legal system, these management tools are primarily regulated by the regulation governing incompatibility.

— *Duties inherent in the position* (inherently conflicting roles or the same role for different *principals*). In fact, administrations and public authorities' procedures aim to separate roles that are inherently in conflict, for example separating the roles of control or assessment from that of the day-to-day management of the administration, or the role of investigation from that of prosecution in the criminal jurisdiction. Since this separation of roles has long been established in the Spanish legal system, it is not discussed in this report as a specific tool.

— Interests arising from *professional relationships*, as these contacts often provide opportunities that may lead to private interests: gifts and other benefits offered by users, suppliers or others that relate to public servants or opportunities for future career advancement that influence current decisions (revolving doors). Tools such as *Policy on gifts* or *Control of interests after leaving public office* can redress these situations by removing the interest (for example, a total ban on accepting any gifts or benefits) or avoiding the influence of interest as far as possible (for example, not permitting particular activities to be performed until a certain period of time has passed after leaving the public office).

In *real conflicts of interest*, as the public servant is already in the position of having to make a professional judgement, currently the only tool for managing the situation is abstention (recusal/ order of abstention). In these situations, the interest cannot now be removed (first option) and the removal of the person is the only guaranteed way to avoid the interest influencing their professional judgement.

The management of *apparent conflicts of interest* depends fundamentally on transparency. If there only appears to be a private interest, this must be clarified in order to avoid damage to public confidence in the institution's professional judgements or deci-

34 See Figure 2 on the origin of private interests.

sions. Therefore, in this case transparency measures would not only be used to detect these types of conflicts of interest, but also to manage them.

Lastly, prevention should also include *tools to guarantee the efficiency of the above tools* (tools of detection and management), i.e. mechanisms to:

— Communicate non-compliance with the use of detection and management tools. This includes many different tools for detecting the breaches: from the process of recusal (if there has been failure to comply with the duty of abstention) to the reporting channels and protection of whistleblowers, to control bodies, administrative appeals or citizens' mailboxes for complaints.

— Penalise the non-compliance with administrative or penal punitive measures, as a tool of general prevention (deterrent).

— Repair damage to public confidence, which would include tools such as transparency and accountability (particularly when receiving complaints of apparent conflicts of interest), publicising of sanctions (to uphold the legal system and demonstrate institutional integrity to the public), ex officio review in some specific cases due to lack of abstention and other measures to review working processes and systems in public organisations (e.g. the segregation of duties or roles once potential conflicts of interest are detected).

5.1. Training and providing advice to public servants on conflicts of interest

5.1.1. What is the tool for?

The aim of *raising awareness* on conflicts of interest is that the individuals working for public institutions:

— Identify all personnel who have private interests, internal or external to the professional role, that might interfere with or influence their professional judgement. This is especially important because, as stated by professors Moore and Loewenstein in 2004:

> *Succumbing to a conflict of interest* [...] *has been viewed, in the media, by the public, and by academics, as a matter of deliberate corruption. The evidence reviewed here, however, is consistent with the conclusion from our earlier research that the violations of professionalism induced by conflicts of interest often occur automatically and without conscious awareness.* [35]

More recently, Professor Michael Davis has qualified this opinion:

> *My observation is that people are generally aware of their conflicts of interest; in other words, they know when financial matters, family relationships and other similar interests affect their judgment. What they do not appreciate* [...] *is how these influences affect*

35 See Moore, D. & Loewenstein, G. «Self-Interest, Automaticity, and the Psychology of Conflict of Interest». *Social Justice Research*, vol. 17, no. 2, 2004, page 199.

This line of investigation was confirmed in subsequent research: see Moore, D., Tetlock, P., Tanlu, L. & Bazerman, M. «Conflicts of Interest and the Case of Auditor Independence: Moral Seductions and Strategic Issue Cycling». *Academy of Management Review*, 2006, vol. 31, no. 1, page 10-29; and also Moore, D., Cain, D., Loewenstein, G. & Bazerman, M. *Conflicts of interest. Challenges & Solutions in Business, Law, Medicine & Public Policy*. New York: Cambridge University Press, 2005.

their judgment. People who are subject to a conflict of interest are likely to substantially underestimate the degree to which their judgment has become less reliable due to this conflict of interest. [36]

— Think about those professional situations where these conflicts of interest may arise and about the harmful consequences they could have for them, for those on behalf of whom they make professional decisions and for the organisations or professional groups to which they belong.

The aim of *training,* on the other hand, is that public employees and officials:

— Are aware of the standards of professional conduct expected in these situations (defined by current regulation but also by the organisations for which they work, by the ethical codes of the professional groups to which they belong, etc.).

— Have tools available to them to identify how to best manage this conflict if there are no clear rules or standards.

Lastly, *providing advice* is the means by which institutions can receive questions from public servants about their particular situations, help them to identify whether they are in situations of conflicts of interest and, if they are, guide them as regards to how they should be managed.

5.1.2. Current regulatory treatment

Currently, there is no explicit obligation to raise awareness of the impact of conflicts of interest in the everyday work of public employees and officials, or train them specifically on the conduct expected by the institution in the event of a conflict of interest,[37] nor to provide advice about specific situations where conflicts can arise.

Indirectly, in relation to public employees, Article 53.5 and 6 of EBEP establishes the duty to observe the requirements contained in the regulation of conflicts of interest, which is unlikely to be met without adequate awareness and prior training, in accordance with the mandate contained in Article 54.8 of the same regulation.

Law 19/2014 is more explicit in requiring the Catalan Government Administration to develop and adopt a specific training program for senior officials and other public servants relating to the rights and obligations established by law, which includes those relating to conflicts of interest.

For its part, the Anti-Fraud Office of Catalonia has the mission of upholding the transparency and integrity of the administration and the public sector employees in Catalonia, channelling this through the Prevention Department, based on training and

36 Davis, M. «Empirical Research on Conflict of Interest». A: Peters, A. i Handschin, L. *Conflict of Interest in Global, Public and Corporate Governance.* New York: Cambridge University Press, 2012, page 59.

37 However, in the prevention of occupational hazards, a subject that follows the same logic of prevention we advocate in this report, the legislator (Art. 19 of Law 31/1995 of 8 November on prevention of occupational hazards) has established the duty of the employer, as a mandatory requirement, to train employees, both at the time of recruitment and when changes occur in the functions performed or the conditions of provision. This training must continually be adapted in line with changes to the risks inherent in the duties of each job. Article 29.2 6th of the same regulation also includes the duty of employees to cooperate with the employer to ensure the safety and health of those working for them.

awareness-raising activities. In particular Article 4.1 b) provides for preventive actions concerning the «conduct of staff and senior officials that [...] involve conflict of interest.»

5.1.3. Benchmark practices

At a Spain-wide level, the National Institute of Public Administration offers an online course on conflicts of interest, the aim of which is «to enable organisations to detect situations involving conflicts of interest, real or apparent, as well as to manage them through the design and implementation of effective solutions.»

Internationally, the model developed by the US Office of Government Ethics (OGE) is of particular note. Created in 1978 following the Watergate scandal, OGE is a small federal agency whose mission is to develop public ethics policies in the area of executive power, as well as to develop, establish and monitor ethics programmes to be implemented by each federal agency and department, through ethics officials to be appointed by the head of each agency. The ethics officials carry out ordinary tasks resulting from the ethics programme and, therefore, are responsible for providing training, advice and counselling to the employees of their agency (which includes, collecting and reviewing the declarations of interests of employees or notifying the competent investigation authorities of any possible non-compliance with the codes of conduct or on conflicts of interest). The OGE supports these agencies by identifying and disseminating best practices, training the ethics officials of each agency and developing training materials that all the employees of the agencies may use. The OGE also monitors the process of implementing the ethical programmes in each agency and has the power to make recommendations and even impose corrective measures.

In France, the High Authority for Transparency in Public Life (Haute Autorité pour la Transparence de la Vie Publique) not only raises awareness and trains public servants but also has a non-binding consultation system, where individuals who are required to declare may seek advice on ethical issues regarding conflicts of interest. The High Authority also provides advice to institutions, which fall within the scope of the laws relating to transparency in public life. The requests for advice generally deal with ethical standards within the institution or the establishment of ethics committees.

In this regard, Paris City Council has, since October 2014, an Ethics Committee that, in addition to a role overseeing declarations of interests of local elected representatives, provides advice on ethical dilemmas and guidance on the management of potential conflicts of interest (for example, if they are offered free training courses by private companies, professional activities of the elected representatives themselves or their spouses). [38]

Lastly, the United Nations Office on Drugs and Crime should be highlighted, which has launched a free online training platform —UNODC Global eLearning Program— for awareness-raising of public servants in the area of integrity, in which conflicts of interest are discussed.[39] This training is compulsory for all its public servants.

38 Accessible at the web: http://www.paris.fr/deontologie.

39 Accessible at the web: http://golearn-integrity.unodc.org.

5.1.4. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

A legal requirement should be introduced for the training of public servants in applied public ethics, giving particular emphasis to the particular risks entailed by conflicts of interest and the tools for management available to public servants. This implies:

— the inclusion of the essential elements of conflicts of interest in the introductory programmes or subject matter for taking up public office.

— the obligation of the public institutions in Catalonia to raise awareness and train public employees on this issue, whether this is by using their own resources (allocating the corresponding budget for this purpose), or through specialised public agencies, such as the School of Public Administration in Catalonia, guaranteeing:

– the delivery of the training at the time of entering the position;

– the training contents are regularly updated to adapt to changes that may occur in the regulatory, organisational or functional sphere;

– the training is focused specifically on the risk profile of each professional group, according to the responsibilities entrusted to the individuals providing services in each institution.

Public organisations must offer advice to public servants, either through an ethical framework or ethics committee, or through internal control bodies, to resolve doubts in identifying conflict of interest situations and to be aware of how the organisation expects them to be handled. If a specialised conflicts of interest control authority were created, these functions could be carried out externally.

5.2. Declarations of interests

5.2.1. What is the tool for?

Due to the variety of terminology used in the existing regulatory framework, for the purposes of this report we use the term declarations of interests to refer, generically, to any declaration of circumstances that may constitute interests for a public servant.

Declarations of interest are the main tool for institutions to detect the interests of their public servants that could cause situations of conflict of interest in any of its forms: real, potential or apparent. They represent the clearest example of legal instruments for the prevention of conflict of interest that facilitate ex ante the required transparency regarding the public servant's private circumstances and assets.

For this purpose, the declarations formally document the statements of interests required from each professional group. It is, therefore, essential that they are complete, accurate and truthful. In the event of omissions or falsehoods, unintentional or deliberate, most countries that have reasonably developed systems of declaration of interests define breaches that include any of the above defects. Eleven of the twenty countries examined

by the OECD in its 2011 study provide sanctions, including criminal ones, for all these cases.[40]

In some cases, a simple declaration may be sufficient to manage the problems arising from a conflict of interest. This is the case of apparent conflicts in which the declaration itself has the ability to dispel doubts and, therefore, remove the conflict, which was only apparent but could undermine public confidence.

In real and potential conflicts, however, the declaration represents only a first step, the detection of the conflict which, although it is insufficient, is essential to manage it. In fact, in almost any public sector position, the mere revelation of the existence of a conflict of interest will not be a satisfactory solution and, therefore, the response to the conflict will require some type of subsequent management. Even taking this into account, the declaration or disclosure of conflict of interest is useful because:

— it avoids the betrayal of the trust which people are entitled to place in the discernment of the public servant;

— it avoids disloyalty to the organisation for which they work, and

— it opens the door to other response mechanisms, either the removal of the private interest (if plausible) or the avoidance of the influence of this on the professional duty.

> Assets or personal situations that could generate conflicts of interest are continually subject to change; therefore the content of the declarations of interest needs to be updated.

Conflicts of interest are not always initially disclosed on the appointment to a public office, but may arise subsequently, making them harder to detect. In this sense, given that the private situations or assets that can generate conflicts of interest are constantly subject to change, the instruments of preventive control need to be able to update and monitor information and, therefore, efficiently adopt the right measures for the change. This explains why it is necessary to update the contents of the declarations of assets and activities, whenever changes take place.

At the time of specifying the scope of the obligations to declare, it is essential to take into consideration, according to the risk analysis of each professional group, the following questions:

— Who should be obliged to declare? Must all the individuals in the organisation submit a declaration? Or only those who have certain responsibilities? Must first-degree family members declare? And second-degree?

— Scope of the declaration. What information should be declared? The OECD, in comparative research between countries, identifies six main areas of interest, some well-known (income, wealth or financial assets...) and others to be considered depending on the pro-

40 OECD. *Asset Declarations for Public Officials. A Tool to Prevent Corruption.* Paris: OECD Publishing, 2011, page 80-81. (*http://dx.doi.org/10.1787/9789264095281-en*)

fessional group concerned (e.g. gifts or identification of spouses, relatives and other related persons). [41]

— Time of declaration. Upon taking up office or on leaving office and when circumstances change? Or should the declaration be periodically updated?

— Control of declarations. Who should control the submission and the information contained in the declarations? For certain groups, might a comprehensive review system be viable? For others, could a system of checking by random sampling be sufficient?

— Transparency of the declarations. What degree of (active or passive) publicising should there be of the statements of each professional group which is subject to the obligation to declare?

5.2.2. Current regulatory treatment

In our regulatory framework, the obligation to declare interests mainly affects elected representatives and political appointees and excludes the vast majority of public employees. The content of the declarations and the time-frame for submitting them vary according to the group, and these differences do not seem to be accounted for by the risk criteria. Even the terminology used for each type of declaration is different according to the regulation —*declaration of activities*, *declaration of assets and interests*, and *supplementary declaration* under Law 13/2005; *declaration of assets and rights* and *declaration of possible causes of incompatibility and of activities that provide or could provide income* under the LRBRL and lastly declaration of assets situation under Law 19/2014— which makes comparison between groups difficult.

To enable a comparative overview, we detail the regulatory treatment of each group in the table below.

41 The OECD classifies all the types of items that may constitute interests: income, assets assets, gifts, expenses, pecuniary and non-pecuniary interests, and identification of spouses, relatives and other related persons.

Table 6. Comparison of the three current systems of declaration of interests

	Members of the Catalan Parliament (MPs)	President, members of the Government and other senior officials of the Catalan Government	Local elected representatives, senior managers and authorised state employees in a local public body
Name of declarations and content	**Declaration of professional activities** which they carry out and the public offices they hold.	**Declaration of activities:** declaration of professional, commercial or industrial activities, which could be a cause of incompatibility or otherwise a statement that they do not carry out any activities that could be considered incompatible, and of the activities that are compatible.	**Declaration of possible causes of incompatibility** and any activity that generates or could generate income for them.
	Declaration of assets, detailing the individual's assets.	**Declaration of assets and interests:** declaration of all assets, rights and obligations under the terms determined by regulation, which must also cover the assets, rights and obligations of spouses or cohabitants and other first-degree family members, provided that they give their consent.*	**Declaration of assets and equity participation in companies of all types**, including information on the companies and the personal income tax and property tax returns, and, if applicable, company income tax returns.
	Tax return: submission of a copy of the personal income tax and property tax returns filed with the Tax Office.		
	Declaration of economic interests, supplementing the declarations that are required on acquiring the status of MP. **Supplementary declaration**, submitted on a voluntary basis regarding professional activity prior to entering office and relating to the spouse or cohabitant.	**Supplementary declaration:** declaration stating any spouses or cohabitants and other family members (to the second degree by kinship and marriage) who are in positions in the Catalan Government Administration or bodies subject to the regime.	Ø
Frequency of submission	The declarations of activities and assets must be submitted by the MPs who have been elected in order to fully assume the status of MPs. They must inform the Commission of the Statute of MPs of any changes that have occurred in the activities or public positions declared within one month of the time they take place. Before 30 July each year, they must submit copies of the tax returns. They must submit the declaration of assets on finishing their term of office or on losing the status of MP. The declaration of economic interests must be submitted within a period of two months after acquiring the status of MP, and is updated within a month after the change of circumstances.	All declarations must be submitted within three months from the date of taking office; within three months from the date of termination; and within one month of any change to the circumstances declared.	The declarations must be made in the forms approved by the fully plenary sessions before taking up the position, at the time of termination, at the end of the term of office and when there are any changes to the circumstances, in this case within one month of the change. It also provides for annual declarations of assets and activities.
Register and publicising of the content	**Interests Register**, publicly accessible; it must be published on the transparency website, with certain restrictions on information regarding the assets declared. The declaration of economic interests is also published in the Catalan Parliament's transparency website.	**Activities Register,** publicly accessible. **Assets and Interests Register,** no public access/ restricted access.	**Activities Register,** public access. **Assets Register,** public access. The declarations of assets and activities are published annually and in addition on the termination of office.

* A copy of the last personal income tax and property tax returns filed by the individual making the declaration with the Tax Office. This declaration must contain at least the following information: 1. the assets, rights and obligations; 2. the securities and negotiable financial assets; 3. equity interests and the corporate purpose of the companies in which the interest is held, and 4. the corporate purpose of any type of company in which they have interests.

Members of the Catalan Parliament

The MPs must submit to Parliament, according to the model adopted by the plenary session:

— A *declaration of professional activities* which they carry out and the public offices they hold.

— An *assets declaration*, detailing the assets of the person who is declaring. This declaration must also be submitted on finishing the term of office or losing the status of MP. MPs must inform the Commission of the Statute of Members of Parliament of any changes that have occurred in the activities or public positions declared within one month of the time they take place, in order for the Commission to issue an opinion, if appropriate, regarding the new situation, within eight days. If the declared change concerns the cessation of a position or activity, the Commission is not required to issue an opinion.

— Before 30 July each year, a copy of the *personal income tax and property tax returns* filed with the Tax Office for the same financial year must be submitted; otherwise the certificate stating that they are exempt from filing a return.

The failure to communicate changes to the activities declared or to submit a copy of tax returns may result in the suspension of financial rights for a maximum period of one month, agreed by the plenary session of Parliament at the proposal of the Commission of the Statute of Members of Parliament, having examined the relevant file and having heard the MP concerned.

In addition, in accordance with the CCMCP, MPs must submit, within two months of the start of Parliament or the acquisition of the status of MP, a declaration of economic interests and, on a voluntary basis, a supplementary declaration on the professional activities carried out by the MP in the years immediately prior to their election, and the equivalent professional and business activities of their spouse or cohabitant, with whom they have a relationship akin to marriage.

The Bureau of Parliament may require the information referred to in the supplementary declaration to be provided when it is needed in order to ensure compliance with the CCMCP.

Senior officials of the Catalan Government

The following declarations must be submitted:

— *Declaration of activities*. Declaration of professional, commercial or industrial activities, which could be a cause of incompatibility (or otherwise a statement that they do not carry out any activities that could be considered incompatible), and of the activities that are compatible.

— *Assets and interests declarations*. A declaration of all assets, rights and obligations under the terms laid down by regulation, which must also make reference to the assets, rights and obligations of spouses or cohabitants and other first-degree family members, provided that the latter give their consent. A copy of the last personal income tax and property tax returns filed by the individual making the declaration with the Tax Office must be enclosed. This declaration must contain at least the following information:

– The assets, and capital rights and obligations.

– The securities and negotiable financial assets.
– Equity interests and the corporate purpose of the companies in which the interest is held.
– The corporate purpose of any type of company in which they have interests.
– However, there is no record of any approved regulation which determines the time-frames within which the assets, rights and obligations must be declared.
– On the other hand, the CCSO in point 5.6 recalls the obligation to submit the relevant declarations to the body competent for incompatibilty.

— *Supplementary declaration:* declaration stating any spouses or cohabitants and other family members (to the second degree by kinship and marriage) who are in positions in the Catalan Government Administration or bodies subject to the regime. The declarations must be submitted within the following time-frames:
– Within three months, from the date of entering office;
– Within three months, from the date of termination; and
– Within one month of any change to the circumstances declared.

Internal instruction 3/2006 on the application of Law 13/2005, of 27 December, approved by the Administration and Public Service Secretariat on 19 June 2006, develops certain aspects of this law and, in particular, those relating to the declarations of interests, and includes the model declarations in its annexes. This internal instruction enables senior management to choose not to submit their tax returns, if they give consent for the Catalan Government Administration «to obtain these tax returns from the competent Tax Office.»

Elected representatives, senior managers and authorised state employees in a local body

The following declarations must be submitted:

— Declaration on possible causes of incompatibility and any activity that generates or could generate income.

— Declaration of assets and equity participation in companies of all types, including information on the companies and the personal income tax and property tax returns, and, if applicable, company income tax returns. The declarations must be made in the models approved by the fully plenary sessions [42] and:
– before taking up the position,
– at the time of termination and at the end of the term of office, and
– and when there are any changes to the circumstances.
– Although the legislation also provides for a declaration after leaving public office, it is not a type of declaration of interest in the strict sense, denoting the finalisation of public accountability, but a request for authorisation of the activities they intend to carry out during the two years following the end of the term of office.

Unlike the Catalan Parliament MPs, it is not expressly established that the prior submission of the declarations is required in order to fully assume the rights of a councillor.

42 In this case, the declaration must be signed by the Secretary, as an attesting municipal official, together with the individual declaring. The document records the date, the identity of the declarer and of the content (Art. 31 of Royal Decree 2568/1986 of 28 November, approving the Regulation of organisation, operation and legal regime governing local bodies).

Public Administration personnel

Currently, public employees have no obligation to submit declarations of interests. Indeed, the regulation provides for a «declaration of activities» if they intend to carry out a secondary activity or take up another public or private position, but in fact this constitutes an application for authorisation and not a tool for the detection of interests per se.[43]

> The majority of public service personnel are not obliged to declare interests, regardless of their level of responsibility.

The table below gives an overview of the regulation governing the issues presented so far.

Table 7. Overview of the regulation governing types of declaration of interests[44] by groups

Senior officials	Elected representatives	Public administration personnel	Other groups
Declaration of activities: Art. 12 a) Law 13/2005, of 27 December Declaration of assets and interests: Art. 12 b) Law 13/2005 Supplementary declaration: (family members in public positions, Art. 12 c Law 13/2005)	**Members of the Catalan Parliament** Declaration of activities and assets: Art. 19 RPC Declaration of economic interests: Art. 17-20 CCMCP Supplementary declaration: Art. 21 CCMCP **Local public office holders** Declaration of activities and assets: Art. 75.7 LRBRL Art. 30-31 RD 2568/1986	**Authorised state employees freely selected for a local body** Declaration of activities and assets: Art. 75.7 by reference to DA. 15.2 LRBRL	**Local authorities senior managers** Declaration of activities and assets situation: Art. 75.7 by reference to DA 15ª.2 LRBRL Declaration of assets situation: Art. 56.2 Law 19/2014 Declaration of assets situation of incumbents or managers Art. 56.2 Law 19/2014 – Public universities – External regulatory or control bodies – Statutory institutions
Declaration of assets situation: Art. 56.2 Law 19/2014			

5.2.3. Results of the survey

In order to establish how the tools for preventing conflicts of interest are really working, the Anti-Fraud Office carried out, between October and December 2015, a field study aimed at the Catalan Government Administration and all the town and city councils and public universities. Responses were received from the Catalan Government, 329 of the 948 councils (representing 51.82% of the population) and seven universities.

43 Article 16 of Law 21/1987 states that «an individual wishing to carry out another activity or take up a public or private position must previously submit the corresponding prior declaration of activities, according to the model established by regulation.»

44 For the reasons set out above, this table does not include the declaration of activities prior to the carrying out of activities after leaving a local representive office (art . 15.6 Law 3/2015 , by reference to art . 75.8 LRBRL) or the declaration of prior activities before the compatible activity of public sector employees in Catalonia (Art. 16 Law 21/1987).

The Catalan Government and local authorities were asked several questions about the specific declarations of interest tool. The survey provided the following results:

— *Regarding the number of declarations and the time of submission:* the table below sets out the number of declarations submitted by those who are required to (within the Catalan Government and local authorities), the type of declaration and the time of submission.

Table 8. Number of declarations submitted by individuals required to declare, type and time of submission, according to the findings of the survey

		Time of submission				
Individuals obliged to declare	Type of declaration	Taking up the position	Change to declared circumstances	Termination	End of term of office	Annual
Senior officials Catalan Government (2012-2015)	Activities	324	17	116	N/A	N/A
	Assets and interests	326	10			
	Supplementary	43	1			
Local elected representatives and all other positions required to declare (2011-2015)	Possible incompatibility and interests	3,715	123	576	2,396	160
	Assets	3,709	172	561	2,402	171
	Total no. of declarations submitted	8,117	323	6,051		331

Note: The figures for the Catalan Government refer to the parliamentary term 2012-2015, updated on 29 October 2015, except for the date for declaration on termination in employment or office, not detailed here, which is 31 March 2016. The figures from the local authorities relate to the parliamentary term 2011-2015 and responses obtained from 327 councils (excluding the response of the two councils due to abnormalities in the data provided). N/A means not applicable.

On an aggregate basis, the senior officials of the Catalan Government and those required to declare from local authorities submitted a total of 8,117 declarations on taking up their position, in relation to which during the period studied, only 323 have submitted declarations of changes to their circumstances, representing 4% of the total.

Regarding the Catalan Government, during the parliamentary term 2012-2015, the 375 senior officials recorded by the Directorate General of Public Service submitted 324 declarations of activities, 326 declarations of assets and interests on taking up their position and 116 declarations due to termination in the post, for which we were not provided with any breakdown. The difference between the number of senior officials and the number of declarations submitted on taking up posts may be due to senior officials who have taken on more than one position, or have held different positions during the same parliamentary term. The big difference between the number of senior officials and the number of declarations due to termination in the post is firstly because many senior officials in the parliamentary term studied still occupy senior offices in the current parliamentary term, and also because after termination in the post there is a three-month period in which to submit declarations of termination (the majority of the terminations took place between January and March 2016).

With regard specifically to the local authorities, the number of returns filed for termination and end of term of office (5935) is much lower than the number submitted on taking up the position (7424), and the number of annual declarations is extremely low (331) .

— *Regarding the existence of approved model declarations*: while the Catalan Government have approved model declarations in a circular of 2006,[45] 80 local councils of the 329 who responded to the survey report do not have an approved model of declaration of interests.

The survey results show that municipalities that have approved model declarations have a much higher level of compliance in the submission of declarations by elected representatives than those without approved model declarations. This is especially clear-cut in the declaration at the time of termination of employment and at the end of the term of office, as shown in the table below.

Table 9. Relationship between the approval of model declarations and the submission of declaration of termination or end of office

			Declarations of incompatibility and activities		Declarations of assets	
Has approved model declarations?	Municipalities	No. of public office holders	Submitted on termination of employment and end of term of office	% of total office holders	Submitted on termination of employment and end of term of office	% of total office holders
No	80	699	350	50.07%	356	50.93%
Yes	246	2,590	2.602	100.46%	2,587	99.88%

Note: This table does not include the results of one council, since they did not report whether or not they had approved model declarations, on the same principle as in Table 8, where the responses of the two councils showing abnormalities in the data provided were not included. It should also be highlighted that the number of declarations submitted was greater than the number of elected representatives because during the parliamentary term there were terminations and new appointments that increased the number of declarations above the total number of elected representatives.

The table shows that the municipalities that have approved model declarations have almost 100% submission of declarations of termination of employment and of the end of the term of office, whereas those without approved model declarations have around a 50% submission rate.

> Municipalities with approved model declarations achieve a level of compliance of nearly 100% with the duty to declare interests.

— *Regarding the timely submission of the declarations and the checking that they are complete and truthful*. The Catalan Government has confirmed that it checks that the declarations of their senior officials are submitted on time and are complete, but it does not check the truthfulness of the information. Of the municipalities that responded to the survey, 63% reported that they check the declarations are submitted on time and 34% only the submission of declarations on entry into office. As regards the accuracy and completeness of the data, 80% do not carry out any checks.

— *Regarding requests to access the declarations*: the Catalan Government has not received a single request to access the declarations submitted in the period 2012-2015. In the case of municipalities for the period 2011-2015, 220 have been requested, of which 88% were requested by members of the same town council.

45 Model declarations adopted on 19 June 2006 by the Administration and Public Service Secretariat of the Catalan Government's Department of Governance and Institutional Relations through Internal regulation 13/2006 on the application of Law 13/2005, of 27 December.

Based on the results of the survey, it was concluded that public institutions attach insufficient importance to declarations of interests as a tool for managing conflicts of interest for the following reasons:

1. One in four municipalities indicated that it does not have a model declaration approved in a plenary session; in the case of the Catalan Government, although the models have been approved, this has been communicated just through an internal circular and they have not been made public.[46]

2. Effective compliance with the requirement to submit declarations is only found when there are rights at stake, such as the declarations required by new councillors on taking up the office in order to gain full rights in the position.

3. There are no checks, in general, on the accuracy of the data provided in the declarations.

> Public institutions do not attach the necessary importance to declarations of interests as tool for management of conflicts of interest.

Because it was noted that there was a very low number of applications to access the information in the declarations, it does not appear that this means of social control can offset the weaknesses identified.

In connection with this observation, it is of interest that in 2013 the French Constitutional Council stated, in relation to the important role of citizens in the control of elected representatives «[the publishing of declarations allows] every citizen to ensure for themselves the enforcement of the guarantees of probity and integrity of elected representatives, the prevention of conflicts of interests and the fight against them.»[47]

5.2.4. Irregularities observed by the Anti-Fraud Office

The main and recurrent irregularity identified by the Anti-Fraud Office in our research is that local elected representatives submit incomplete declarations and they do not submit declarations of changes to previously declared circumstances. It was often impossible to pinpoint when the declarations were presented, as it was not recorded in the entry register in the town council.

Both the Central Electoral Commission, in numerous agreements, and the jurisprudence of the High Courts of Justice have determined that the failure to submit declarations of interest should prevent councillors from taking office. They do not lose the office, but they cannot assume the full status of councillor, with all the rights associated with the position. Therefore non-compliance with this duty prevents them from exercising the public functions inherent in the position and postpones the act of taking up duties in the office concerned.

However, neither local legislation nor the general electoral legislation provide for any specific legal consequences or any specific effect resulting from the breach of the requirement to notify any changes that may occur in the circumstances contained in the initial

46 These models can only be accessed through the ATRI platform, the Catalan Government information and services website for staff.

47 French Constitutional Council, decision no. 2013-676 DC of 9 October 2013, cons. 19.

declaration, or in the event of a refusal to declare or update the data, or non-submission of the declaration at the time of termination of employment or at the end of the term of office. Therefore, the law establishes a duty for which there is no penalty or consequence for non-compliance.

The Penal Code, for its part, does not establish any specific provisions for false declarations or omissions in the information included in the declarations of interest. The current description of the form of criminal misrepresentation, under Article 390.1.4 CP, can lead to interpretations that exclude omission or misrepresentation in declarations of interests, which prevent this conduct being penalised. [48]

Moreover, in the course of various investigations carried out on senior officials of the Catalan Government in which their declarations of interests have been examined, it has been found that, when the individuals have authorised the Government to obtain them from the competent Tax Office, rather than submitting them themselves, there is no record in the related files of these having been requested or obtained.

5.2.5. Benchmark practices

Declarations of interest as a tool for detection are widely used in neighbouring countries. In this regard, the 2014 report *Good practices in asset disclosure systems in G20 countries* shows that 91% of G20 member countries establish a requirement to submit disclosures of shares, interests and securities. Below we set out some of the best practices regarding the individuals required to submit declarations, the time-period for which they declare interests and the control and management of the declarations.

Some countries, aware of the importance of this instrument, have decided to raise the level of protection of the legal rights concerned and have provided for penal consequences in the case of non-declaration or false declaration, such as France, Italy, Poland and United Kingdom. [49]

Other groups required to declare

Although in our model the individuals who are required to declare are mainly elected representatives or political appointees, in other countries the requirement to declare encompasses other groups of public servants.

In France, Law no. 2016-843 of 20 April 2016 on ethics and the rights and obligations of public servants stipulates that the appointment to a public position, where justified by

48 The Public Prosecutor, in the Decree of 10 June 2013 on the shelving of some investigations initiated following a communication from the Anti-Fraud Office, gave the following explanation for the specific case:

[...] *while our jurisprudence acknowledges that the omission of information may incorporate the crime of false declaration, and without overlooking the fact that these omissions may damage the spirit of transparency that should govern the functioning of the Administration and public bodies and the exercise of the public employees' activities, one cannot automatically establish, from these omissions, the offence of false statement* [...] *considering that, undoubtedly, the definitions provided for in any of the paragraphs of Art. 390 CP correspond to the indirect protection of the rights which the legitimacy of the document in question serves to safeguard, so that the existence of crime should be rejected in cases where there is no evidence that the underlying interests in the document have undergone any risk, […] without undermining in any way the relevance of the declarations referred to* [...]

49 *Op. cit.* OECD, 2011, page 81. For more information about the penalties system, see Section 11.4. Penalty and restitution system.

the hierarchical level or the nature of the duties, described in a decree of the State Council, shall be conditional upon the submission of a comprehensive and truthful declaration of interests by the public servant.

In general, in the Central and Eastern European countries the majority of public servants are required to declare. For example, in Bosnia and Herzegovina the public servant's spouse, parents, parents-in-law and children are considered to be «close relatives» and are required to declare. [50]

In the European Union, the interests of all public servants are checked, although this obligation to declare at the time of taking up the position may be replaced by a check before they are appointed.[51] In addition, some European Union agencies have decided that their members must also submit an annual declaration of interests. [52]

In Brazil, the rules of conflict of interest apply to senior officials but also to public servants who *on the basis of their position have access to privileged information*, which could generate economic or financial benefits to the server or a third party (Law 12813 of 16 May 2013).

Information regarding activities prior to taking office

The CCMCP now requires as part of the declaration of economic interests and supplementary declaration to provide information regarding the professional activities conducted by the MPs in the years immediately prior their election.

Article 16.1 of the Law 3/2015, of 30 March, regulating the exercise of the senior officials of the Central State Administration establishes that the declarations of activities shall include activities that they have developed during the two years prior to the taking of office.

In the same vein, the French Commission on Renewal and Ethics in Public Life (France, 2012) recommended extending the period of declaration of activities to five years. Currently in France, subjects are required to submit declarations within two months of the appointment and declare their current interests and those for the five years prior to taking office. Also, public office holders in Paris City Council declare their previous activities of advice, participation in public and private management bodies, charitable activities, and the functions, terms of office and professional activities of the spouse or partner up to the time of taking office.

Checking that the declarations are truthful and complete

The exercise of checking the content of the declaration requires co-operation with other control bodies that have comparable data, in particular the Tax Office, as well as other information contained in public registers (property, commercial, etc.).

50 Dunga, E. & Aleksandrov, S. (coord.) *Rules and Experiences on Integrity issues, A comparative study of rules, experiences and good practices on integrity issues focused mainly on conflict of interest prevention and assets declaration areas*, by the member institutions of the Integrity Experts Network (IEN), February 2012.

51 See the section on Benchmark practices for Tools for detecting conflicts before entering office.

52 For instance, the European Environment Agency establishes the obligation for the scientific committee members to file an annual declaration of interest. (http://www.eea.europa.eu/about-us/governance/scientific-committee/sc-annual-declaration-on-conflict/view)

In France, the obligation to collaborate was recently implemented by the Transparency Act of 2013.[53] The French High Authority for Transparency in Public Life plays an active role in examining the content of declarations. The High Authority sends to the Tax Office the Ministers' and MPs' declarations of assets. Within 30 days of receiving them, the Tax Office pass on to the High Authority all the information that they have in order to check that the declarations are complete, accurate and truthful. When it is detected that a declaration is not entirely accurate or is not comprehensive, it issues an opinion of public importance (accessible on the website for three months) and if it considers that the facts may constitute a criminal offence, the Public Prosecutor is notified. [54]

Computerised management of declarations of interests

The OECD recommends declarations of interest are electronically processed to facilitate the transfer of content to the database of the control body. In turn, the French High Authority, in its first annual report, for 2015, recommended that declarations are compulsorily made electronically (*télédéclarations*) with the aim of simplifying and improving the list of information requested.

Some countries are already implementing these recommendations. Denmark and Sweden have introduced electronic databases in their management systems, in which data is put together in a draft declaration, taken from different sources of information, so that the subject is simply required to verify it and add to or modify the information that is incomplete or erroneous.

5.2.6. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

The current regulation of the system of declarations of interest should be modified, taking into account the risk analysis for all the groups of public servants, focused on the nature of the functions they carry out and their level of responsibility.

This risk analysis will enable us to:

— *Identify new positions that need to submit statements*. Certain public employees with high responsibilities who until now were not required to declare will therefore be included in the compulsory declaration system.

— *Vary the content of the declaration of interest* to make it more or less comprehensive and always using uniform criteria for each risk level. This will involve assessing the option of the interests of family members or cohabitants being included for higher risk profiles.

— *Extend the time-frame* of the declarations of activities to include the key activities over their professional career prior to their present position, taking as a reference the best practices set out above (two to five years).

53 Law no. 2013-907, of 11 October 2013, on transparency in public life, Article 5.

54 See the benchmark practices in the section on Control Bodies.

— *Make the contents of the declarations more accessible to the public*, establishing uniform criteria for groups with similar levels of risk.

In terms of the model declarations, we recommend:

— Standardising the nomenclature of the declaration types, irrespective of the group which is required to make the declaration.

— Approving model declarations through provisions of a general nature, to be officially published.

— Enabling the declarations to be completed online, facilitating their subsequent treatment by the control bodies.

— Making the declarations accessible to the public in the transparency websites established in the law.

As for the model declaration of activities, we recommend that it also includes other sources of income, such as equity interests. This would be aimed not at finding out the amounts involved (this would be more appropriately included in the declaration of assets situation), but the name of the source, since they are relevant interests which could generate significant potential conflicts of interest.

When the individuals who are required to submit tax returns together with the declarations of interests choose to authorise the public bodies to obtain them directly from the applicable Tax Office, this must always be carried out, and diligently.

Lastly, the legislation, administrative or penal, needs to establish a specific legal consequence to penalise non-compliance with the duty to declare, in a timely and truthful manner, all interests at the time of taking up office or termination of employment and in the case of changes in previously declared circumstances. In this regard, we note the penalty system established by the CCMCP for the Catalan Parliament MPs for non-compliance with the obligation to declare.

5.3. Transparency measures and publicity

5.3.1. What is the tool for?

Transparency is a transverse principle that can be applied across all the areas of public management. However, transparency measures can represent a tool for the detection of interests through four channels: active public disclosure, the right of access to information, public register access and publication in Official Gazettes. [55]

The general applicability of the transparency principle explains how, in the discussion of other tools in this report, there are aspects relating to this principle, such as now when we refer here to publicly disclosing sanctions or authorisations of compatibility, where transparency has other aims than the detection of interests: accountability, restoring public confidence and deterring non-compliance, among others.

55 This report does not discuss public disclosure in official gazettes, as these are designed primarily to ensure knowledge of the legal system in force, which makes it difficult for citizens who are not familiar with the legal-technical language to use them as a tool to detect these risks.

The transparency measures and publicity, together with the declarations, act as an instrument to ensure the impartiality of public servants, as a preventive risk-detection tool for any conflict of interest, apparent, potential or real, and «take the form of the creation of registers of assets and activities, communication of data and information, the creation of ad hoc bodies, etc.»[56]

However, while declarations constitute a formal duty, which public servants are required to comply with, compliance with transparency measures or registry management is the responsibility of the public entity or body, as the party under obligation by the rules on transparency and access to public information.

5.3.2. Current regulatory treatment

The new laws enacted in both the Spanish and Catalan Parliaments on transparency contain a series of duties and provisions in order to promote and foster transparency and publicity in the management of incompatibility of public servants. These new duties and requirements go beyond the requirements of transparency previously established in the legislation, such as the annual publication of declarations of activities and assets for senior managers, authorised state employees freely selected for a local body and local elected representatives (Art. 75.7 LRBRL) or the public availability of the activities and assets registers for local elected representatives and public servants with a State qualification (Art. 75.7 LRBRL) and the activities register for senior officials of the Catalan Government (Art. 14.4 Law 13/2005).

In particular, Law 19/2014 orders the inclusion on the Catalan Government transparency website, both of its rulings on incompatibility (Art. 9.1 m) and rulings on declarations (Art. 11.1 d) referring to senior officials of the Catalan Government and public office holders, incumbents or directors of local bodies and public universities, external control or control bodies and statutory institutions, while it expressly stipulates the public nature of the «declaration of assets situation» which these public servants must make in accordance with Article 56.2. Regarding the declarations of MPs, although initially only the declarations of activities were to be made public, following the amendment of the regulation of Parliament, of 8 July 2015, the assets declaration would also be made public, and both are published on the transparency website in Parliament. Whereas Art. 19 of the CCPMC expressly states the public nature of the information included in the economic declaration of interests that is accessible through the Catalan Parliament's transparency website.

The activities register and the assets register relate to different content, as we have already mentioned, but have very different implications, therefore their respective content conditions the system of public disclosure and access applicable to each. The degree of public exposure of the information recorded will vary according to each case, therefore the more sensitive the information contained in the registry, the more controversial it will be. Thus, the restriction of access to certain content seeks to reconcile the aim pursued by

56 Meseguer Yebra, J. *Régimen de conflictos de intereses e incompatibilidades de los miembros del Gobierno y altos cargos de la Administración*, Barcelona: Bosch, 2007, page 44.

the regulation on incompatibility of combating the production of conflicts of interest while preserving the right to privacy. [57]

— As noted above, our legal system recognises the public availability of the registers both of activities and assets for local elected representatives and authorised state employees in a local body (Art. 75.7 LRBRL), but only recognises the public nature of the Activities Register for senior officials of the Catalan Government (Art. 14.4 Law 13/2005). In particular, point 5.5 CCSO requires full publicity to be given to the public agenda of the senior officials of the Catalan Government with regard to all matters concerning the meetings with their stakeholders, Similarly, Art. 9 CCMCP establishes for the Catalan Parliament MPs the obligation to make public the parliamentary agenda on the Catalan Parliament's transparency website.

For its part, Law 3/2015 of 30 March, regulating the exercise of senior officials of the Central State Administration, although it establishes the confidential nature of the Assets and Property Rights Register, provides for publication of the content of the declarations in the Spanish Official Gazette, and also for the public disclosure of the comprehensive declaration of the assets situation of senior officials (Art. 21).

For senior Catalan Government senior officials, Internal instruction 3/2006 establishes that the data contained in the registers are to be cancelled two years after the termination of the office. In the same time-frame, the documentation provided shall be destroyed, unless the senior official requests the return of the documents. This provision substantially limits the ability to access this information, and on top of that, it is set down in a circular, which has no regulatory value.

Special mention should be made of the creation of Law 19/2004, on the Lobby Register. The scope of the registration includes all activities carried out by individuals, organisations or platforms, in order to influence directly or indirectly the process of developing and implementing policies and decisions, regardless of the channel or medium used, including contacts with the authorities and public officials, MPs, public servants and staff in the institutions.

The information from the registers to be made public ranges from the activities carried out by lobbyists, their clients, the sums received and the expenses, to the identification of the legally responsible individual. In particular, the register must publicise the lobbyists' activities, especially the meetings and hearings held with authorities, public officials, public office holders or MPs and the communications, reports and other contributions in connection with the subjects covered.

57 Some authors (García Mexía. *Los conflictos de intereses y la corrupción contemporània*. Colección Divulgación Jurídica, Aranzadi, 2001), in line with the legal systems of some other countries –the US, Italy, Portugal– who consider declarations should be publicly available as a general rule, advocate the public availability of the material which has been registered, as a deterrent to the illicit temptations of the use of office for personal gain, therefore the access to registered information should be a priority. On this basis, it is argued that public access to registers increases public confidence in the institutions, the establishment of high standards of integrity in most positions, avoids the emergence of conflicts of interest and, ultimately, enables citizens to more satisfactorily judge the performance of their public office holders and public servants. According to this current doctrine, denying access to registers could violate the fundamental right to freely communicate or receive information (Art. 21 and EC) and would be contrary to Article 105 EC, to the extent that none of the enforceable exceptions to accessing the register appears to fit the circumstances that the supreme law determines as restrictions on access to files and records (security and defence of the State, criminal investigation and personal privacy).

The transparency of the official agenda of senior officers is specifically established as a principle to be respected in Article 55.1c) of Law 19/2014, for public availability in the Lobby Register.

Moreover, the regulation developing the Lobby Register in the area of the Catalan Parliament states that parliamentary officials are required to report the contacts and meetings held with lobbyists to the Register. Insofar as this information is included in the transparency website in the process of application of the regulation, it will undoubtedly be a preventive tool to detect risks in the area of conflicts of interest.

Table 10. Regulation governing measures of public disclosure of interests

<table>
<tr><th>Senior officials</th><th>Elected representatives</th><th>Public administration personnel</th><th>Other groups</th></tr>
<tr><td rowspan="3">Law 13/2005, of 27 December:
– Activities Register (public): Art. 4
– Assets and Interests Register (restricted access): Art. 14.5</td><td>Members of Parliament
– Interests Register: Art. 19.6 RPC
– Publicity of parliamentary agenda: Art. 9 CCMCP
– Publicity of declaration of economic interests: Art. 19 CCMCP
– Provision of information regarding compliance with requirement to declare (DA. 5.2 Law 19/2014)</td><td rowspan="4">Authorised state employees in a local public body
– Activities Register (public): Art. 75.7 LRBRL
– Assets Register (public): Art. 75.7 LRBRL
– Annual publication of declarations of interests and assets: Art. 75.7 LRBRL</td><td rowspan="4">Transparency website (Incumbents or directors of local bodies, public universities, external control or control bodies, statutory institutions):
– Rulings on incompatibility (Art. 9.1 m Law 19/2014)
– Rulings on declarations (Art. 11.1 Law 19/2014)

Declaration of assets situation (public) (Art. 56.2 Law 19/2014)
– Directors of local public bodies
– Incumbents or directors of:
– Public universities
– External control or control bodies
– Statutory institutions

Local managers
– Annual publication of declarations of activities and assets: Art. 75.7 LRBRL</td></tr>
<tr><td colspan="2">Transparency website:
– Rulings on incompatibility (Art. 9.1 m Law 19/2014)
– Rulings on declarations (Art. 11.1 d Law 19/2014)</td></tr>
<tr><td colspan="2">Of property situation: Art. 56.2 Law 19/2014</td></tr>
<tr><td>Transparency (publicity agenda): point 5.5 CCSO</td><td>Local elected representatives
– Activities Register (public): Art. 75.7 LRBRL
– Assets Register (public): Art. 75.7 LRBRL
– Annual publication of declarations of interests and assets: Art. 75.7 LRBRL
– Declaration of interests: Art. 31 RD 2568/1986</td></tr>
</table>

Lastly, the OECD's 2015 study *Government at a Glance* sets out a comparative table of the public disclosure of private interests and the information related to conflicts of interest by country. In terms of the situation in Spain, it draws attention to the opacity regarding political appointees in the executive branch, since they are not required to declare income, debts, paid or unpaid external activities or gifts.

5.3.3. Benchmark practices

In the UK, the public have online access to the declarations of the MPs, members of the executive and some officials (senior officials, the Cabinet advisers, parliamentary assistants). For the members of the executive, the expenses and the gifts received are published online, as well as the meetings held by Cabinet advisers. Even journalists covering the Parliamentary news must publish their interests online. It also offers a platform for citizens to report irregularities and the investigations carried out by the parliamentary commissioner are published.

Canada also publicises the investigations carried out by its Conflict of Interest and Ethics Commissioner.

Last, with regard to the transparency of the declarations, the report *Best Practices in asset declarations systems in the G20 countries* in 2014 recommends promoting user-friendly systems of access.

5.3.4. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

As part of their institutional campaigns, the public authorities need to prioritise the raising of awareness and promotion among citizens of their right of access to public information and its guarantee mechanisms,[58] thus contributing to social control over the declared interests, which is currently lacking, as stated in section 4.2.3.

A rule must be introduced to guarantee that the information contained in the registers of interests is maintained and that there is permanent public access.

The maximum level of transparency must be established for those groups of public servants who, on the basis of their functions or responsibilities, have a higher level of risk of conflicts of interest, by ensuring, amongst other measures, the publication of the agenda of meetings of MPs, members of the Government and senior public authority officials.

5.4. Tools for detecting conflicts before entering office

5.4.1. What is the tool for?

The tools included in this section complement the previous three as a form of interest detection, although in this case they are applied before the individual takes office. This group of tools includes the practices primarily designed to carry out an advance suitability check (such as parliamentary hearings or screening or scrutiny of background in selection processes) which are particularly suitable contexts to detect interests that can put the future public servant's impartiality at risk.

58 This recommendation was included in the Report following up on the work of the Inquiry on the Commission of Investigation of Fraud and Tax Evasion and Practices of Political Corruption (CIFEF), developed by the Anti-Fraud Office, of 10 July 2015.

The main difference from the declarations of interests discussed above is that these tools function before taking up the position and the responsibility for its implementation does not fall on the declarant but on the body responsible for the suitability check.

Among these practices, the best-known in Catalonia are parliamentary hearings, which are structured as a preventive mechanism aimed at checking the suitability of the individuals who will take up certain high-ranking institutional positions.

> Hearings are ideal occasions to find out any interests the candidate has that could lead to potential conflicts of interest.

Although its main advantage is to ensure that all the requirements to hold an office are met, and also to check the knowledge and experience that determine the suitability of the candidate, the hearings could also be an invaluable opportunity to bring to light potential conflicts of interest that may affect the candidate. [59]

5.4.2. Current regulatory treatment

Hearings are a relatively little-known mechanism in the system, although they have a long tradition in comparative law. Therefore, they have not been widely introduced and are only exceptionally involved the procedure of appointment of incumbents for institutions and organisations that have some autonomy or independence.

Article 176 of the current Catalan Parliament Regulations regulates this procedure for the election of public representatives entrusted by law to Parliament. The provisions below are made for the candidate subject to the hearing:

> *1. For the election of public officials entrusted by law to Parliament, parliamentary groups may present candidates in accordance with the conditions established by each law.* [...] *The proposal must be accompanied by a detailed curriculum vitae for each proposed candidate, which shall specify their professional merits and other circumstances that are deemed necessary to assess the suitability for the position. The proposals, together with the curriculum vitae, must be immediately communicated to the parliamentary groups.*
>
> *2. Whenever a law so provides, or if one third of members or three parliamentary groups require the hearing of all or any candidates, Parliament's Bureau admits the requests and, having heard the Spokespersons Board, determines the competent committee or subcommittee that shall hold the hearing* [...]

Moreover, Law 14/2005, of 27 December, regulates the intervention of the Catalan Parliament in the appointment of the authorities and the offices elected by Parliament and on the criteria and procedures for assessing their suitability (Law 14/2005). In accordance with articles 1 f) and 2 of this Law, any parliamentarily appointed office must undergo a hearing before the parliamentary committee before being elected.

59 These hearings are, in the words of some of the members of the US Senate Judicial Committee, a body responsible for the hearings of candidates to the Supreme Court, the only opportunity for the public to examine what kind of justice is provided and the suitability of the candidate to be the final arbiter of the Constitution. The hearings are viewed as an open and honest exchange with the candidate, and represent an important part of this process to ensure their independence, and assess the character, integrity and temperament of the candidate to take up a position for life in the courts.

For this purpose, a parliamentary appointment must be understood as encompassing the scenarios of exercise by Parliament of its powers for making proposals or making proposals and appointments.

The regulation itself expressly specifies the offices of special institutional relevance which due to their appointment by Parliament must be subject to a hearing in Parliament before their election:

— Director Ombudsman of Catalonia
— Members of the Advisory Council (currently, Council of Statutory Guarantees)
— Members of the Public Audit Office of Catalonia
— Members of the Catalan Media Corporation
— Members of the Board of Directors of the Catalan TV and Radio Corporation (currently, the Governing Board of the Catalan Audiovisual Council)

This list above concludes with an open clause according to which offices of special institutional relevance due to their appointment by Parliament are considered to be any offices to which the law attributes this nature, and therefore they must be subject to a prior hearing in Parliament.

The legal provision referred to in the previous paragraph is complemented by any provisions expressly made by the respective regulatory law of particular institutions regarding hearings in Parliament to assess the suitability of candidates. There are offices from the following institutions in this situation:

— *Director of the Anti-Fraud Office*. It is the responsibility of the President of the Catalan Government, on behalf of the Government, to propose the candidate to Parliament. The candidate must attend a hearing of the appropriate parliamentary commission in order to be assessed in relation to the requirements for the position.

— *Ombudsman of Catalonia*. The proposed candidates appear before the Ombudsman Commission, which submits to Parliament's Bureau a report on the suitability of candidates and on any possible causes of incompatibility.

— *Senators representing the Catalan Government in the Spanish Senate*. The Commission of the Statute of Members of Parliament is responsible for issuing a ruling on the eligibility of candidates, and may request any documentation it deems necessary on them. The hearing of the proposed candidates at the Commission is not, however, mandatory.

— *Director of the Catalan Data Protection Agency*. The candidates proposed by the Advisory Board for Data Protection must appear before the relevant committee of the Catalan Parliament so that their members can request any clarifications or explanations required on any aspect of the alleged educational background, professional experience or merits.

— *Members of the Commission Guaranteeing the Right of Access to Public Information*. The members, compulsorily at least three and no more than five, appointed by a majority of three-fifths of the members of the Catalan Parliament, prior to their appointment, must appear before the pertinent parliamentary commission so that the latter may assess them in relation to the conditions required for the position.

— *Members of the Governing Board of the Catalan Media Corporation*. The Catalan Parliament must send the Catalan Media Corporation the list of candidates to form part of the Governing Board of the Catalan Media Corporation Council, of which there may be more than the existing vacancies. The Catalan Audiovisual Council Board must issue a report on each of the candidates regarding their suitability and capacity to take up the office, and these reports must be sent to the Catalan Parliament prior to the hearing and public examination of the candidates before the pertinent committee.

Table 11. Regulations governing parliamentary hearings to check suitability established by law

	Senior officials	Elected representatives	Public administration personnel
Anti-Fraud Office of Catalonia	**Director:** Art. 9.2 Law 14/2008, of 5 November, of the Anti-Fraud Office of Catalonia		
Catalan Audiovisual Council	**Members:** Art. 1 Law 14/2005		**Members:** Art. 1 Law 14/2005
Catalan Data Protection Agency	**Director:** Art. 7.4 Law 32/2010, of 1 October, of the Catalan Data Protection Agency		
Catalan Media Corporation	**Members of the Governing Board:** Art. 7 Law 11/2007, of 11 October, of Catalan Media Corporation and Art. 1 Law 14/2005		
Commission Guaranteeing the Right of Access to Public Information			**Members:** Art. 40.1 & 2 Law 19/2014, of 29 December, on transparency, access to public information and good governance
Council of Statutory Guarantees	**Members:** Art. 1 Law 14/2005		
Ombudsman of Catalonia	**Director:** Art. 8.1b Law 24/2009, of 23 December, on Ombudsman of Catalonia Art. 1 Law 14/2005		
Public Audit Office of Catalonia			**Members:** Art. 1 Law 14/2005
Senators		Art. 4.3 & 4 Law 6/2010, of 26 March, on the process for appointment of the Senators representing the Catalan Government in the Spanish Senate	

In addition to these offices, where the election is by Parliament, we note that there are still a significant number of positions (public senior managers, temporary appointments,

certain senior officials, etc.) who exercise public functions without their suitability having been checked in any way, either through a selection process based on the principles of merit and ability or a democratic process of election. Since there is no prior suitability check where interests may be detected, the risks associated with these potential conflicts of interest increase significantly.

In terms of the specific procedure, the same Article 176 continues:

> *4. During the hearing, which shall in no case be longer than an hour for each candidate, the members of the commission or subcommission may request clarifications and explanations required on any aspect of their education, career or professional merits. In no case may they ask any questions concerning the personal situation of the individual subject to the hearing or any other matter unrelated to their professional and academic background.*
>
> *5. For the purposes of 4., the Chairperson of the commission or subcommission should ensure the rights of the individual subject to the hearing, rejecting any questions that could represent a disregard of the candidate's honour or privacy, or violate a fundamental right.*
>
> *6. The hearings are always public.* [...]
>
> *8. Parliamentary groups, within two days after the hearing, may submit non-binding observations on the suitability of the proposed candidates regarding the nature of the position, their professional track record and action plans put forward by each candidate for the position.*

In view of the limitations, both material (no questions to be asked beyond professional and academic matters) and time (one hour maximum), contained in 4., it is observed that this procedure impedes the detection of private interests of the candidate, inextricably linked to the personal sphere, which could be the source of potential conflicts of interest.

5.4.3. Weaknesses observed

Parliamentary practice in Catalonia shows that, in the advance suitability checks carried out, there is no specific assessment of how conflicts of interest (including those arising from previous professional experience) could affect the performance of the assigned functions.

In this regard, except for very specific cases, it cannot be inferred from transcripts of previous sessions to check suitability that the situations of conflicts of interest have been specifically questioned in relation to the candidates' background. There is even a record of cases in which the suitability has been declared by the candidates themselves.

As noted, the current declarations system does not set the declaration of interests as a mandatory requirement to be met before the appointment to the senior office, nor declarations by spouses, cohabitants or other family members, at the time of appointment or at any other time or circumstances.

In relation to this issue, a noteworthy case was that investigated by the Anti-Fraud Office in 2011 in which a Catalan Government senior official unjustifiably delayed the opinion re-

garding an act, favourable to the interests of a particular businessperson. In the course of the investigations it was found that, until shortly before the appointment, the senior official had developed a business activity in direct competition with this businessperson, through a company that he sold a few days earlier to his spouse. The business interests of the senior official were not included in the declarations submitted when he was appointed, nor did he declare the interests of his spouse.

As a result of this case, the Anti-Fraud Office at that time recommended to the Catalan Government firstly, the possibility of incorporating a previous check on professional, commercial or employment activities before the appointment of senior officials, and secondly, that the Administration and Public Service Secretariat carries out checks and active control of the information declared by the former.

More recently, in 2016, the Anti-Fraud Office has investigated another case. On this occasion, it was found that the senior official of the Catalan Government improperly intervened in the public office in the signing of many contracts with the company where he had worked until he was appointed. The regulation governing incompatibility for the Catalan Government senior officials requires them, among other items, to abstain in matters where a company in which they have provided professional services in the last two years has a direct interest.

In both cases, the mandatory requirement to declare interests prior to the appointment of senior officials, both their own interests and those of others related to them, would have allowed us to detect conflicts of interest and prevent the subsequent partial actions described.

5.4.4. Benchmark practices

Regarding previous controls of interests aimed at the high-ranking positions in the public sphere, we highlight the following practices:

— In France, following the adoption of the Law of 11 March 1988 on the financial transparency of political life, candidates to the Presidency of the Republic must submit to the Constitutional Council a declaration of assets, at the risk that their candidacy will be cancelled, and commit to make, if elected, a second declaration at the end of the term of office. Only the declarations of the chosen candidate are published in the Official Journal of France. However, the Constitutional Council does not check the declaration, but simply issues the stamped declaration to the Official Gazette for publication. From 2013, these declarations are addressed to the French High Authority.

— The UK House of Commons, through the Committee of Selection, conducts hearings for candidates who are to occupy key positions in Government. These parliamentary hearings are public and, in assessing the suitability of the candidate, take into consideration, among other things, the interests they have declared. The hearings conclude with a report by the Committee addressed to the body responsible for making the appointment. If the recommendation made by the appointment committee is not followed, the minister responsible must justify their decision. Offices for which hearings are held include Chief Inspector of the Prosecutor's Office, the Chairpersons of the Council for Research, Chairperson of the

Committee on Standards in Public Life and the Chairperson of the Committee on Climatic Change, among others.

— For its part, the US Office of Government Ethics provides assistance to the President and the Senate in the procedure of appointment to political positions of trust that are made by the President, the Vice-President or the agency directors of the executive, and confirmed by the Senate. The Office previously reviews the declarations to detect possible conflicts of interest in the functions they will exercise after taking office and draws up an individual *ethics agreement*, which is signed before taking office. If a potential conflict of interest is detected, the Office identifies the remedies or preventive mechanisms to resolve it before they exercise these functions.

There are also interesting experiences of prior checks on interests of public employees of international organisations:

— In the framework of the European Union, Article 11 of the Statute of Public Employment stipulates that, before appointing a public official, the authority empowered to make the appointment must examine whether the candidate has a personal interest that could undermine their independence, or any other conflict of interest. For this purpose, the candidate, using a specific form, must report any real or potential conflict of interest to the authority authorised to make the appointment, which they must take into account in issuing a reasoned opinion. This provision applies by analogy to public officials who return after a leave of absence.

— Some international organisations have attached such importance to the interests arising from kinship that, in their internal regulations, they include a prohibition on family members of employees joining the organisation. To detect this interest, applicants are required to declare the non-existence of these ties. For example, Article 22 of the Rules of Procedure of the United Nations Development Programme (UNDP) states that «in order to avoid a real or apparent family influence or a conflict of interest, nobody can be appointed or hired who has one of these relationships with a member of the UNDP: father, mother, son, daughter, sister or brother. There are no exceptions to this rule.» In other international organisations (UN or OSCE), although this prohibition does not exist, this type of interest is detected through the application form included in the selection process, in which the applicant must state the existence of any kinship with people who are at the service of any international organisation, indicating the details of the family member, their family relationship and the organisation to which they belong.

5.4.5. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

A previous suitability check needs to be carried out for all those posts or positions of political appointment (public senior managers, temporary appointments, certain senior officials, etc.) who are not entering through a process based on equality, merit, ability and publicity, or with a representative function, which would allow interests that could lead to situations of potential conflicts of interest to be detected. For these cases, a prior suitability

check is deemed most appropriate, either in a parliamentary hearing, a municipal plenary session or in other venues guaranteeing the same transparency and plurality.

In the case of senior officials, it would be advisable for a specialised control authority to carry out a check on their professional background, with the aim of detecting possible interests affecting the office they would be taking up and proposing measures to manage any interests that could not be eliminated.

An assessment should be made of the opportunity for new public employees to submit information on their prior professional background before taking up their position. And, in any case, to standardise in selection or recruitment procedures the obligation for applicants to declare any family relationship[60] or previous employment relationship with members of the selection body and also any family connection with the employees of that organisation. This obligation should be reflected in the conditions of the selection, and, in addition, lay down the consequences of any misrepresentation of information or submission of incomplete information.

The current wording of Article 176 of the PRC, relating to the hearings of the parliamentary elected offices should be revised so that:

The hearing is always mandatory, whether or not it is provided for in the respective laws governing the institutions in which the office is intended to be carried out. In this way, the hearing does not depend on the wishes of the parliamentary groups;

— In addition to their CV, the applicant declares all their interests in writing and that, if they do not do so, or do so in an incomplete or inaccurate way, they are automatically excluded as a candidate, or, if this detected after they have taken up their duties, that Parliament requests the Government to terminate their position;

— The material and time limitations to asking questions beyond the strictly professional background are removed, enabling the identification of other personal interests that might lead to conflicts of interest if they took up the position.

5.5. Abstention and recusal

5.5.1. What is the tool for?

So far, we have looked at four tools that allow institutions to detect interests that can put their public servants into conflict of interest situations. By examining abstention and recusal, we start our analysis of instruments with which these situations can be managed, in order to remove the private interest, whenever possible, or to avoid it influencing professional judgement.

In situations of real conflict of interest, when the professional judgement must already be made and the interest cannot be removed, the only tool that can help manage them is abstention. In fact, careful analysis of the reasons for abstention set out in the legislation on the public sector legal system shows that the five circumstances foresee either inevi-

60 It should at least include the kinship established for abstention in the basic leglislation for the public sector legal system.

table personal relationships or professional relationships from which the person cannot be detached at that time. The duty of abstention is therefore a final barrier in cases where there is a conflict of interest and impartiality can only be preserved by removing the individual from the decision-making process. For other private interests (such as secondary employment, other sources of income, benefits from current professional relationships...), the conflict of interest is managed at a point at which it is still potential, using other tools that we will examine below (incompatibility, political gifts and control of interests after leaving public office).

> Abstention represents the final barrier for protection in cases where there is a conflict of interest and impartiality can only be preseved by removing the individual from the decision-making process.

For a situation of non-compliance with the duty of abstention, which must take place from the beginning of the decision-making process,[61] the legal system establishes the mechanism of *recusal*. Recusal is configured as the right of stakeholders in the administrative procedure to request the withdrawal of the public servant for the same reasons why this individual should have abstained. It is, therefore, clear that these two mechanisms are complementary. Therefore, although we separate them in the catalogue of preventive tools, they are discussed together in this section, meaning that the process of recusal has an added purpose: to detect non-compliance with abstention.

Finally, it should be noted that the duty of abstention and the right of recusal, although, like the regulation on incompatibility, have the aim of preserving fairness in the exercise of public functions (preventive tools), they differ from that regulation in that they operate at the level of a particular decision-making process.

5.5.2. Current regulatory treatment

The duty of abstention arises in the ordinary exercise of the functions assigned to the specific position that is developed, in other words, when impartiality may be compromised in a specific and defined case. The public servant is then required to withdraw from involvement in a matter which they would be involved in handling.

Recusal, on the other hand, has a subsidiary and complementary role to that of abstention, given that it operates when the latter does not take place, i.e. if the public servant, in a real conflict of interest, does not comply with the obligation to withdraw.[62]

> In the case of public servants, the decision to abstain falls exclusively on the individual who has the conflict of interest.

61 STS no. 1973/2005, of 4 April.

62 In the words of the ex-Supreme Court judge Francisco González Navarro, a distinction should be made in this respect between «two forms of abstention: voluntary and enforced, understanding that the scenario of enforced abstention, is somewhat different from the other way to make the public servant withdraw from the procedure, because they are in a situation that is a reason for abstention, is suspected of partiality, which is recusal, as the latter situation is posed by the party who sees a threat to their right to those involved in the procedure to act impartially.» (González Navarro, F. i González Pérez, J. *Comentarios a la Ley de Régimen Jurídico de las Administraciones Públicas y Procedimiento Administrativo Común, estudios y comentarios legislativos*. Navarra: Civitas, Aranzadi, 2007.)

For the same purpose, Article 6.2 of Law 13/2005 provides for *disqualification* as a specific tool in relation to two cases of breach of the duty of abstention by Ministers and senior officials of the Catalan Government, in which the Government, or the Minister concerned, respectively, must order the separation of the matter and inform the department responsible for public service. However, there is no provision made for superiors ordering the abstention for public sector staff, so that the decision to abstain falls exclusively on the individual who has the conflict of interest.

All three concepts operate on the basis of the same catalogue of causes of lack of impartiality under Article 23.2 of Law 40/2015, which lead back to personal or professional ties between the public servant and interested third parties, or to links to the decision-making process:

> *The following are reasons for abstention:*
> *a) Having a personal interest in the issue concerned or in another, the resolution of which may influence this one; being a director of an interested company or body, or having pending litigation with any interested party.*
> *b) Having a marital tie or equivalent and a relationship up to the fourth degree by kinship or the second degree by marriage with any of the interested persons, bodies or directors of interested companies and advisors, legal representatives or authorised agents involved in the procedure, or sharing a professional office or being associated with them for advisory services, legal representation or an agency relationship.*
> *c) Having an obvious close friendship with or clear hostility to any of the persons mentioned in the previous point.*
> *d) Having intervened as an expert or witness in the proceedings in question.*
> *e) Having a service relationship with an individual or company directly interested in the matter, or having provided them, over the last two years, with professional services of any kind and in any circumstance or place.*

> The current list of reasons for abstention does not include all the possible situations of private interests that can put at risk the impartiality of a public servant.

In accordance with the majority of views in jurisprudence, the reasons established for abstention are limited. However, this is not undisputed, as authoritative doctrine [63] argues that the sectoral or regional regulations could be broader in the situations considered, given that Law 40/2015 is a basic, essential or common rule. Indeed, the legislator in regulating the Basic Statute of Public Employment appears to build in a duty of abstention which is sufficiently broad to include other reasons for abstention. [64]

— The CCSO sets out in point 5.15 a specific treatment for scenarios of abstention:

— «Senior officials and senior management cannot be involved when any of the cases for abstention are present set out in the current regulation and when there is or it is

63 See STSJC no. 248/2014 of 3 April in relation to the interpretation of the reason for abstention currently contained in Art. 23.2 e) of Law 40/2015 («to have a service relationship»).

64 Article 53.5 of the EBEP states that public employees «must abstain on issues in which they have a personal interest, as well as any private activity or interest that may represent a risk of conflicts of interests with their public position.»

believed there could be a conflict of interest. Where there is any doubt regarding the existence of conflict of interests, the individual is obliged to abstain. The abstention shall be set down in writing and reported to the hierarchical superior or to the Catalan Government, which shall in turn be obliged to appoint another senior official who is not affected by these circumstances and who will substitute for them in the relevant acts or decision-taking.»

— It is of particular note that the solution provided for in Article 16.4 of RPC for members of the Catalan Parliament, which, in a situation of conflict of interest in a specific judgement (taking part in the debate or voting), only establishes the obligation to notify the conflict to the Parliamentary Bureau before the debate or vote. This provision is specified in Art. 14.4 of CCMCP insofar as it determines the duty of abstention of the MP in this situation of conflict of interest. For this purpose, Art. 15 of the CCMCP refers to "personal interests" that lead to a situation of conflict of interest and, therefore, would give rise to the obligation to abstain.

We also note that the courts often adopt a narrow interpretation of the reasons for abstention. In this regard, we should mention the recent STSJ in Galicia, 4 November 2015, in an administrative appeal against a decision of the University of Santiago de Compostela, which rejected the recusal petition against a member of the Technical Assessment Committee in a selection process for hiring a teacher due to «personal interest in the matter.» The reason for the recusal petition was based on the fact that one of the candidates in the process had had a relationship with the recused member, in that over 80% of their alleged scientific output had been in collaboration with the member of the Committee. The Supreme Court confirmed the dismissal of the recusal, taking the view that, in the university context, joint research activity is common, without this circumstance resulting in a reason for abstention contained in Article 28.2 a) of Law 30/1992 (currently, Art. 23 a) of Law 40/2015).

Whereas in contrast, we believe that the trend should be to interpret broadly the limited reasons for abstention and recusal, in order to protect in a more extensive and adequate way the impartiality of the public servant. In connection with the case exemplified in the preceding paragraph, Jesús María Chamorro González,[65] a judge specialising in administrative appeals, believes that, from the point of view of the appearance of impartiality, it would be more appropriate for members of the above-mentioned Technical Committee not to have any contact with the candidates, in order to generate greater confidence in the process. In this regard, the same writer points out that the entry to certain, mostly highly-skilled, public service groups warrants a more demanding composition of selection bodies in terms of impartiality. He recalls that it is not unusual for public servants in non-permanent posts to aspire to obtain permanent posts and for the selection committee to include some of their colleagues or superiors during the period they have worked in the non-permanent posts. In fact, a good example of the flexibility necessary in interpretation is the judgement of the High Court of Justice (STSJ) in Madrid, which, on 3 April 2002, when ruling on a case similar to the previous one,

65 Chamorro González, J. M. «Recusación y abstención de funcionarios públicos en procesos selectivos de acceso a la Función Pública». *Realidad administrativa,* núm. 3, març de 2016.

concluded that there was a reason for abstention, on the basis that extensive collaboration between the member of the assessment body and the candidate could reasonably result in personal ties, such as friendship, which could interfere with the member's impartiality.

Moreover, as a rule, the action of the authorities and public administration personnel in situations where there is a reason for abstention, and where they have not abstained nor have they been recused, does not necessarily imply the invalidity of the acts in which they participated. In this regard Article 23.4 of Law 40/2015 makes specific mention.

Exceptionally, however, when in the action of members of local authorities any of the reasons for abstention are present which are referred to in the legislation on the common administrative procedure, and once this has been determined, the acts in which they have intervened shall be invalidated, as provided for in Article 76 LRBRL.[66]

It is worth noting that this solution, which supports the invalidation of the action when there are reasons for the abstention of individuals involved in the decision-making process, is not unique to local authorities. In fact, in the judicial system it is the rule, since the intervention of a judge who should have abstained invalidates the proceedings due to the breach of the right to an impartial judge guaranteed by article 24 EC. [67]

The difference in the treatment of the organic judicial legislation and the Administration's legal system regarding abstention and recusal is not so much in the basis, since the institution was in fact created in the area of the exercise of judicial functions and both systems share procedural origin and the nature of the reasons, but in the strength of the view that the principle of impartiality must be protected when administering justice.

In the framework of the Transparency Law, regarding senior officials, professor Juli Ponce considers that the legislator «missed a good opportunity to better regulate the effects of the breach of the duty of abstention (Article 55, in connection with Article 28 of Law 30/1992) on the decision taken [...] in the sense of creating a presumption of illegality and reversing the burden of proof on the Administration and allowing it to be challenged without waiting for the end of the procedure, as well as to adapting them as necessary at a local level for elected representatives.» [68]

The table below summarises the regulation governing the duty of abstention and the recusal process, effective on the date of publication of this report.

66 «Article 76. Notwithstanding the grounds for incompatibility established by law, members of local authorities should abstain from participating in the deliberation, voting, decision and execution of any matter when any of the reasons are present referred to in the law on administrative procedure and public administration contracts. The action of the members when these grounds are present, once this has been determined, shall entail the invalidation of the acts in which they participated.»

67 STC no. 164/2008, of 15 December.

68 Ponce, J. «Bon govern, dret a una bona administració i prevenció de la corrupció». A: Cerrillo & Ponce (coord.). *Transparència, accés a la informació pública i bon govern a Catalunya*. Barcelona: UOC, 2015, page 193.

Table 12. Regulation governing the duty of abstention and the effects of non-compliance with this duty

	Senior officials	Elected representatives	Public administration personnel	Other groups
Duty of abstention	Art. 23.2 Law 40/2015 (by reference to Art. 6 Law 13/2005) Art. 26 a) 2n & b) 5è Law 19/2013 Art. 55 n) Law 19/2014 Point 5.15 CCSO	**Members of Parliament** Art. 16.4 RPC Art. 14.4 & 15 CCMCP **Local elected representatives** – Art. 23.2 Law 40/2015 (by reference Art. 76 LRBRL) – Art. 26 a) 2n & b) 5è Law 19/2013 – Art. 55 n) Law 19/2014	– Art. 23.2 Law 40/2015 – Art. 53.5 EBEP	**Parliamentary personnel** Art. 100 e) ERGI **Local managers** Art. 55 n) Law 19/2014
Effects of non-abstention	Recusal: Art. 23 & 24 Law 40/2015 (by reference to Art. 6.3 Law 13/2005) Order of prohibition: Art. 6 Law 13/2005		Recusal: Art. 24 Law 40/2015	

5.5.3. Weaknesses and irregularities identified

With regard to the causes of abstention defined in the legislation, as a result of various research initiatives, the Anti-Fraud Office has found that prolonged contact of public servants with contractors or individuals who wish to become public servants influences their impartiality and objectivity when assessing their bids and examinations, respectively, whereas this prolonged contact is not one of the circumstances expressly established as a reason for abstention.

Regarding the first case (procurement), following a complaint of alleged favouritism to a particular Catalan Government contractor, the Anti-Fraud Office found that between 2004 and 2012, a service contract was put out to tender five times, for a total value of 31 million euros, where the same tenderer was always awarded the contract. The tenders were the subject of significant litigation due to multiple administrative and jurisdictional appeals (administrative and criminal) submitted by the unsuccessful tenderers. Although the existence of possible influence peddling could not be proven or any other criminal offence, it was noted, for its relevance to this report, that the officials in charge of assessing the bids submitted in the successive tenders were always the same. This state of affairs could not be justified by these officials' specific knowledge of the subject matter of the contract, nor was this shortcoming offset by the assistance of expert consultants in the field. In this situation, the Anti-Fraud Office initiated an administrative inspection and recommended the estab-

lishment of mandatory periodic rotation of officials and other public employees in charge of public procurement.[69]

Regarding the second case (recruitment), the Anti-Fraud Office investigated a case of possible favourable treatment of a candidate in a selection process to enter public service, in which it was found that this candidate, who was awarded the position, had been the superior, in their position as a senior official, to the majority of the members of the selection board for a long period of time. Hierarchical relations do not necessarily imply the existence of close friendship with the favoured candidate, when, in addition, the service relationship in itself is not grounds for abstention. However, it is also true that these relationships, when they exist for a prolonged period of time, create familiarity, which in the case described, raised reasonable doubt regarding the impartiality and objectivity of the majority of the members of the selection board. In addition, in the selection process, no information was issued at any time on the members appointed to the selection board, which, in addition to violating the principle of publicity, greatly hindered the possibility of recusal by other applicants. As a result of these irregularities we recommend, among other things, that the members of a selection board should not all belong to the same public service body to avoid possible corporatist behaviour, which is far removed from the principles of impartiality and objectivity that must govern the performance of these bodies, and the publication of the names of the members of the selection board.[70]

We conclude, therefore, that beyond the specific, personal statement by the individual that they are not party to situation for abstention and the right to recusal, there is no specific control on compliance with the principles of impartiality and objectivity for the members of the contracting department and the recruitment board for entering public employment.

5.5.4. Benchmark practices

In some legal systems, the decision to abstain does not fall solely on the public servant, but is taken by their superior, the public servant together with their superior or the public servant together with an ethics officer.

In the US, public officials are responsible for knowing in which circumstances they must abstain, but they should not take this decision alone, but rather should seek advice from an ethics officer. It is recommended that the abstention be recorded in writing, but this evidence is not necessary for the decision to be valid.

Recently, in France, Law no. 2016-843 of 20 April 2016 on ethics and the rights and obligations of civil servants, established in Article 25 bis, officials who are in a situation of conflict of interest have to inform their superior. The latter, on receiving this communication or on their own initiative, entrusts the handling of the issue or the decision-making to another official.

In the case of Germany, the abstention system is chiefly based on the idea that every public servant, especially in the context of an administrative procedure, must declare or

69 http://www.antifrau.cat/images/web/docs/recomanacions/2014/2014_Recomanacions-traductors.pdf

70 http://www.antifrau.cat/images/web/docs/recomanacions/2011/2011_09_30_Personal_DI-DGRI.pdf

report any private interest (whether of a financial nature or not) that may reasonably be seen by a third person to be of sufficient substance to influence their actions. Only their superior or the head of a department can decide whether the public servant who has declared this interest should be excluded from the procedure or withdraw from participating in the specific activities that could bias their decision for that particular procedure.

Another example in this area is found in the Code of Conduct of the European Union Commissioners, Article 1.6 which states that a Commissioner should not deal with matters in which they have a personal interest, particularly a family or financial interest that could affect their independence. A Commissioner who is in this situation must immediately inform the President, who will take any measures they deem to be appropriate, including the reallocation of the matter. In any case, the President of the Commission informs the President of the European Parliament of the decision to reallocate the case to another Commission Member.

In other legal codes there are measures in which abstention is linked to the principle of transparency. In Canada, Article 25 of the Law on Conflicts of Interest provides that, if the holder of an important public office abstains to avoid a conflict of interest, during the 60 days following the abstention [71] they should issue a public statement which is sufficiently detailed to show the conflict of interest that has been avoided.

For its part, the EU does not provide for a closed list of reasons for abstention of their officials, only making a general reference to «private and financial interests.» [72]

5.5.5. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

The list of reasons for abstention established in the common administrative procedure needs to be completed with a scenario that encompasses any other circumstance constituting a conflict of interest, in accordance with the definition of conflict of interest proposed in this report. In this way no situation of conflict of interest would be able to influence any public decision. This new reason for abstention should also include the appearance of conflict of interest in line with the European trend of recent years.

— Where a public servant does not abstain in a potential conflict of interest, their immediate superior may order them to withdraw from the process, giving the grounds on which the order for abstention is based, notwithstanding the right of recusal. This measure is already established for senior officials of the Catalan Government. We recommend that any decision to remove a public servant from a decision-making process is made public.

— It should be assessed whether it should be made a general rule that acts or decisions are invalid if there is no abstention, when this is appropriate, for professional groups who have been determined as having a higher risk in situations of conflict of interest.

71 The Canadian law talks of recusing oneself (*se recuser* in the French version).

72 Article 11 bis. 1. of the EU Statute of Public Employment: «In the exercise of their functions, and with the exceptions below, the official shall not deal with any matter in which they have direct or indirect interests, in particular a family or financial interest, that may impair their independence.»

5.6. Control of secondary employment and other sources of income

5.6.1. What is the tool for?

Having discussed abstention as the only tool for managing real conflicts of interest, we move on to examine the tools for managing potential conflicts of interest. Among these, the most developed in our legal system is undoubtedly the regulation on secondary employment and other sources of income for public servants, mainly through the regulation on incompatibility.

> The aim of the regulation on incompatibility is to address potential conflicts of interest: either removing the private interest, or avoiding its influence on professional judgement.

The situations of conflict that may arise by doing other jobs or receiving income from sources other than the public one can be managed in two ways, depending on the type of interests causing the situation of conflict of interest and the level of risk it entails for the public functions of each group: firstly, where possible, by removing the private interest (prohibition of activities) or secondly, avoiding the influence of the interest on professional judgement (for example, limitations on authorised activities or maximum thresholds on ownership of equity interests in companies that are public sector contractors).

Therefore, the regulation on incompatibility determines:

— The prohibition of a second job, automatically or ad *hoc*, to remove the personal interest that could impair the impartiality of the public servant.

— Some limitations do not eliminate the interest but seek to avoid it influencing professional judgement, such as the limitations for senior officials with a regulatory role of control or control over companies that issue securities or negotiable financial assets in a market. The legislator does not prohibit the ownership of financial assets, but requires that their management and administration is carried out by a financial institution that may not receive their investment instructions.

— Authorisation *ex lege* when the legislator considers that certain activities do not interfere in the development of public functions (e.g. creative writing) or involve the exercise of the individual's basic rights (e.g. the management of public employees' personal assets). In this case, the legislator opts to defer the management of the conflict of interest until it is real, then providing specific reasons for abstention to avoid the influence of that interest in the judgement or decision.

5.6.2. Current regulatory treatment

The regulation of secondary employment and other sources of income is the primary concern of the regulation governing the incompatibilities affecting public servants. The incompatibility system was originally a response to the mandate that the Constitution addresses to the public administration to serve the public interest objectively (Article 103.1).

It is also one of the most complex areas of public function, given its expansive scale —the large number of individuals involved— and the multiplicity of rules, which converge and follow one another over time.

The Constitutional Court doctrine establishes the freedom of the legislator to define the regulation on incompatibility and guarantee the principles this system pursues, which includes not only impartiality but also others such as efficiency, total commitment, separation of functions or transparency. [73]

The regulation on incompatibility represents, in fact, the bulk of the current fragmented regulation on the management of conflicts of interest. This is true both for public servants and for elected representatives or senior officials, although in these cases there are specific and, again, fragmented laws.

In establishing the regulation on secondary employment, the legislator, in addition to guaranteeing impartiality, takes into account the protection of additional interests related to other principles that have little to do with the management of conflicts of interest. This is the case, for example, of the principle of full-time and exclusive commitment, aimed at safeguarding the effectiveness of the performance of public duties; or, limitations on receiving various payments from public budgets, for reasons of efficiency and of a financial and budgetary nature.

If the regulation governing incompatibility is reassigned to the role as a preventive tool for the management of conflicts of interest, its aim is then to deal with potential conflicts of character, either by removing the private interest or avoiding the interest influencing the performance of the duties forming part of the public office or position.

According to the third paragraph of Article 103 of the Spanish Constitution, the law shall regulate this matter, although it does not set out, however, any minimum requirements for the regulation.

For its part, Article 98.4 EC also establishes the legal mandate that the law shall govern «the Statute and the incompatibilities of members of the Government», which includes the constitutional tradition of differentiating the rules on the legal status of senior officials from the specific rules on incompatibilities that affect them.

In the description of the legal system set out below, we identify three types of administrative intervention on secondary activities: prohibition, automatic authorisation and submission for control and approval (authorisable activities). In general, while for political appointees, the premise of exclusive commitment makes compatible activities an exception, the public sector personnel can undertake second jobs providing they are not inconsistent with the duties of the public function.

Compatible secondary activities

The regulation on incompatibility applicable to public employees and offices in Catalonia firstly establishes an exhaustive list of activities that can be carried out *ex lege*, i.e.

73 The STC 178/1989, of 2nd November, following the appeal of unconstitutionality filed by the PP political party against Law 53/1984 of 26 December, on incompatibility of staff in public administration, recognised the considerable freedom of the ordinary legislator to establish a strict regulation on incompatibility of public sector employees, without this questioning the constitutionality, since the constituent legislator chose not to close the regulation on incompatibility.

do not require administrative approval or recognition of compatibility to be undertaken (usually referred to as activities not subject to incompatibility) providing the requirements are met in each case:

— *Catalan Government senior officials*. They may carry out private activities consisting of the management of their assets, participation in non-profit organisations and educational activities or creation of intellectual property. They can also participate in public activities as representatives of their institution or public services. This position is compatible with the status of elected members of local authorities.

— *Catalan Government President and Ministers.* The position is compatible with the status of MP.

— *MPs and local elected representatives.* The legislation refers to the «rules of incompatibility.» This reference does not lead to any specific regulation enabling the applicable regulation to be identified with any certainty.[74]

— *Public administration personnel.* They may carry out private activities consisting of the management of their assets, training activities for public officials in official centres (for a maximum of 75 hours per year and not regularly), participation in public administration recruitment bodies and governing bodies for public service mutual insurance companies or Boards (the latter being unpaid), or the creation of intellectual property. Their office is also compatible with the status of MP or member of the local authorities.

— *Parliamentary personnel.* They may carry out private activities consisting of the management of their assets; participate in seminars, courses and conferences for public officials in official centres (on a non-permanent basis and for a maximum of 75 hours per year); participate in courts or selection panels in public administration recruitment; participate in examinations, tests or assessments carried out on teaching staff that are different from the usual ones; occasionally participate in talks and programmes in any social medium and contribute to and occasionally attend congresses, seminars and conferences; hold positions of Chairperson, spokesperson or member of governing bodies for public service mutual insurance companies or Boards, if they are unpaid, produce or create intellectual property.

Authorisable secondary activities

— These activities can also be carried out, but require prior authorisation of compatibility. The administrative decision authorising compatible activities entails an abstract judgement and an hypothesis, in that an activity is only considered compatible if it meets certain conditions whereby the exercise of the second activity does not impede or undermine the strict compliance with the duties held by the individual who occupies a place or position in the public sector, without their objectivity and impartiality as a public servant being compromised.

74 At the time of writing of this report, the draft law to govern the regulation on inelegibility and incompatibilities and on conflicts of interests of Catalan Members of Parliament is under debate (BOPC no. 44 of 28 January 2016).

— *Catalan Government senior officials*. The position is compatible with the exercise of paid university teaching duties, with the prior approval of the Minister responsible for public office, provided that it is not carried on to the detriment of the commitment to the public office and is undertaken part-time, within a specific time-frame.

— *Public administration personnel*. They can develop private activities provided that they do not impede the fulfilment of public duties or compromise their impartiality and independence, and provided that they meet the following conditions: a) they hold a single position in the public sector, within the normal working day; b) the position held in the public sector requires their presence for a time equal to or greater than half the working day; and c) when a second public position or activity has been authorised as compatible, the two combined do not exceed the Administration's maximum working day. In any of the three scenarios, the sum of the working hours of the main public sector activity and the private activity cannot exceed the Administration's normal working day increased by 50%. They may also have a second activity in the public sector «if the interests of the same public service require it.» The Executive Council shall be responsible for determining whether this public interest exists, in the following cases: when it is a second position directly related to the subject they are teaching as their primary activity; if the teaching subject of the second activity is directly related to the function or activity that is considered primary; when teaching duties are habitually carried out for the training, selection or improvement of staff in public employee training centres; and when so determined by the Executive Board. Specifically, authorisable activities are: employment as an associate university lecturer, on a part-time and fixed-term basis; employment as a tenured lecturer or professor of universities and professors of colleges in a second job in the public healthcare field or exclusively in research in public research centres, within the area of specialism of their university department, providing that both institutions authorise part-time work; employment for those who have a job in the public healthcare field or exclusively in research in public research centres within the area of specialism of their university department, in a university teaching position as a professor or incumbent university lecturers and professors (provided that both institutions authorise part-time work); and employment of college of nursing incumbent lecturers in a second job in the public health sector. The competent Minister or the plenary session of the local authority may authorise the carrying out of research activities, non-permanent, or advisory services for specific cases.

— *Parliamentary personnel*. Their position is compatible, on authorisation from the Parliament's Bureau, with: another position of employment, either in the public or the private sector, teaching, research and advisory responsibilities, providing it is not exercised to the detriment of the commitment to Parliament; the position as a of member of boards, commissions or other collegiate bodies, on the basis of being a Parliamentary civil servant, provided that they do not receive any remuneration (excluding expenses or allowances for attending the body's meetings); private activities, professional or business, provided they are not exercised to the detriment of the commitment to Parliamentary administration and it does not affect the impartiality of the public servant in the performance of their duties or their work time.

Table 13. Regulation governing compatible and authorisable secondary activities

	Senior officials	Elected representatives	Public administration personnel	Other groups
Public sector activity	Reference to regulation on incompatibility: – Art. 26 b) 1r Law 19/2013, of 9 December – Art. 55 h) Law 19/2014, of 29 December – Art. 18.1 RPC; Art. 12 CCMCP		Public office holders as secondary employment: Art. 3 Law 21/1987, of 26 November Principle of objectivity: Art. 53.2 and 11 EBEP	**Parliamentary personnel** ERGI – Authorisable: Art. 102 (apt. 2, 3, 6 & 7) – Principle of objectivity: Art. 100 b) & k)
	General rule: Art. 9 Law 13/2005, of 27 December Compatibility with public offices: – Art. 10 Law 13/2005, of 27 December – Art. 9 and 22 Law 13/2008, of 5 November (President and Ministers)		Law 21/1987, of 26 November: – Authorisable in the interest of the first employment: Art. 4 (apt. 6 a 9) – Authorisable on the grounds of teaching: Art. 4 (apt. 2 a 5) – Authorisable on the grounds of research or advisory services: Art. 9 – Authorisation conditional on financial factors: Art. 5 and 6 – Regulation on authorisation: Art. 10, 17, 18, 19, 21 & 22 Law 21/1987, of 26 November: Membership of public sector representative bodies: Art. 7	**Senior managers of local bodies** Reference to regulation on incompatibility: Art. 55 h) Law 19/2014, of 29 December **Administrative and Service Personnel (PAS). Public universities** Reference to Law 21/1987, of 26 November (Art. 74.2 Law 1/2003, of 19 February)
Private activities	General rule (authorised): Art. 8 Law 13/2005, of 27 December University teaching: Art. 11 Law 13/2005, of 27 December Political party membership: Ap. 5.1. CBACGC		General rule (authorised): Art. 2 Law 21/1987, of 26 November Law 21/1987, of 26 November – Authorisable: Art. 11 – Authorisation conditional on working hours: Art. 12 – Regulation on authorisation: Art. 17, 20, 21 and 22	**MPs Spanish Parliament** University teaching: Art. 157.4 LOREG **Parliamentary personnel** ERGI – General rule (authorised): Art. 102 (apt. 5) – Authorisable: Art. 102 (apt. 4 and 6)

Incompatible secondary activities (prohibitions)

Catalan Government senior officials

— They may not, individually or jointly with their spouses, cohabitants or other relatives to the first degree by kinship or marriage, own interests representing a percentage equal to

or greater than 10% of the capital in companies with agreements or contracts of any kind with the state, regional, departmental or local public sector.

— They cannot belong to more than two boards or governing bodies, unless a law provides otherwise, on grounds of their position, or unless exceptionally authorised to do so by the Government by means of a resolution, if there are reasonable grounds.

— Their position is not compatible with that of Member of the Catalan Parliament (with the exception of the Catalan Government President and Ministers) nor the Congress of Deputies, nor with the position of Senator or Member of the European Parliament.

MPs and local elected representatives

— The legislation refers to «regulations on incompatibility.» Since this reference does not lead to any specific rules for Members of Parliament, they are simply regulated through the reasons for ineligibility which, according to LOREG are re-directed to reasons for incompatibility (Article 6.4) and are applicable to the electoral process for regional legislative assemblies (DA first, paragraph 2). [75]

— We can conclude that this regulation is insufficient, because it only deals with incompatibilities for the carrying out of *some* public offices and it makes no provision regarding possible secondary employment or sources of income of a private nature.

— A good example of these shortcomings is Motion 8/XI, approved by the Catalan Parliament on 3 March 2016, which in the fourth point states «[...] the need to reconsider the cases of compatibility of Members of Parliament in both public positions and with private activities and the consequences of these compatibilities for their remuneration system.»

— These inadequacies are one of the reasons why the process for applying for approval of compatibility becomes just a formality to obtain permission rather than a process of assessment and appraisal prior to the decision to authorise. In this regard, note the opinion of the Commission of the Statute of Members of Parliament, which «recommends to the plenary session the situation of compatibility» for 133 of the 135 deputies, *en masse*. [76]

— Incompatibilities which affect local public offices are also redirected to the reasons for ineligibility, referred to in Article 6 of the LOREG; and those affecting elected representatives in local bodies, to the reasons contained in Articles 177.2 and 178.2 of the same law. The same conclusions reached for the Members of Parliament are therefore applicable here.

Public administration personnel

— They may not carry out private activities, by themselves or through an intermediary, including those of a professional nature, whether they are self-employed or under the control or at the service of organisations or individuals that are directly related to those developed by the public department, body, entity or company in which they provide services (unless they are carried out by virtue of a legally recognised right and they do so for themselves,

75 As STC no. 155/2014 of 25 September notes, «[the] right to stand as a candidate is tightly linked to ineligibility; indeed, the latter is related to electoral law and, therefore, to the exercise of the right to stand as a candidate, but incompatibility, essentially, is unrelated to electoral law, rather it is connected to parliamentary law, given that it really affects the internal organisation of the parliamentary body.» At the same time it adds that while «the reasons for ineligibility set out in Article 6 of LOREG are governed by regional electoral processes, in application of the additional first provision, second paragraph, of this regulation, it is not so with the parliamentary regulation on incompatibilities, the establishment of which relates exclusively to the legislator of each autonomous community [...].»

76 BOPC no. 39, of 20 January 2016.

directly as the interested parties, or they are professional activities that must be provided to individuals with whom one is required to deal in the course of public office).

— They may not belong to the governing bodies or boards of directors of companies or private companies, if the organisation's activities are directly related to those developed by the public department, body, entity or company in which the staff concerned provide services.

— They may not carry out private activities, including those of a professional nature, whether they are self-employed or under the control or at the service of organisations or individuals in matters in which they are involved or have been involved over the past two years or in which they will be involved on the basis of their public position.

— They may not take on, by themselves or through intermediaries, any kind of positions in companies or concessionaire companies, works contractors, services or supplies, lessees or administrators of monopolies or that have participation or an endorsement from the public sector, regardless of the legal structure.

— They may not hold an interest greater than 10% in the capital of the above-mentioned companies or organisations.

— They may not belong to more than two boards or governing bodies representing the public sector, except where they do so by virtue of their office or it has been so determined by (i) the Government or (ii) the plenary session of the local authority.

— The carrying out of research activities, of a temporary nature, or the provision of advice for specific situations, cannot be authorised when the staff involved have a position in the department that is responsible for these tasks.

— In general, authorisation cannot be given or compatibility recognised to staff in jobs in which a specific bonus is paid for the incompatibility or for an equivalent item.

— The Executive Board may determine the positions that are incompatible with certain professions or private activities, «which could compromise the impartiality or independence of personnel, prevent or undermine the strict fulfilment of their duties or prejudice the public interest, and this must be stated in the public list of positions» (Art. 8.3. of Law 21/1987).

Parliamentary personnel

Their positions are not compatible with another job in another authority body, subject to the exceptions expressly established by the applicable general regulations.

Members of the Social Council of public universities

— They may not hold management positions in companies or organisations contracted by the university, either directly or through an intermediary.

— They may not hold an interest greater than 10% in the capital of the above-mentioned companies or organisations.

— Academic personnel who are in active and full-time service in the same university or another cannot be appointed as one of nine people representative of Catalan society on the Council.

— Agreements entered into by research groups recognised by the university or its faculty with individuals, public and private universities and bodies for the production of works of a

scientific, technical or artistic nature as well as the development of specialised education or specific training activities are excluded from these incompatibilities.

Table 14. Regulation governing incompatible activity (prohibitions)

	Senior officials	Elected representatives	Public administration personnel	Other groups
Public sector activities	**Principle of exclusive commitment:** Art. 3 Law 13/2005, of 27 December **Principle of independence:** – Art. 26 a) 3r Law 19/2013, of 9 December – Art. 55 d) Law 19/2014, of 29 December **Membership of more than two governing bodies:** Art. 9.2 Law 13/2005 **Spanish Parliament or European Parliament office holders:** Art. 10.4 Law 13/2005	**Reasons for ineligibility:** – Art. 6 (sections 1 and 3) LOREG – Art. 11.1-2 Law 3/1982 (MPs) **Principle of impartiality:** – Art. 55 d) Law 19/2014, of 29 December – Art. 18 RPC (MPs) – Art. 178 (apt. 2 b) & 4) LOREG (local public office holders)	**Law 21/1987, of 26 November** – Membership of more than two governing bodies: Art. 7.2 – Research or advice coinciding with the functions of the primary employment: Art. 9	**Parliamentary personnelf** Art. 102.1 ERGI **Local senior managers** **Law 19/2014, of 29 December:** Principle of independence: Art. 55 d)
Private activities	**Contrary to the public interest:** Art. 55 i) Law 19/2014, of 29 December **Interests in companies:** Art. 4.3 Law 13/2005, of 27 December	**Law 19/2014, of 29 December:** Against public interest: Art. 55 i) **Law 19/2013, of 9 December:** of Prohibition of the invocation of public status: Art. 26 b) 9è **Councillors** LOREG: Art. 178 [section 2 a), c), d) & e) & 3)] **Local elected representatives after leaving office.** Law 3/2015 (by reference DA 15a LRBRL): Art. 15	**Law 21/1987, of 26 November:** – On grounds of their relation with the functions of the authority or the position of the primary employment: Art. 11 – On grounds of a position where incompatibility is remunerated: Art. 14 – Established in the **RLT**: Art. 8.2 **EBEP:** Preferential treatment: Art 53.7 **Local directors after leaving office** Law 3/2015 (by reference DA 15a LRBRL): Art. 15	Members of the Social Council of public universities: Art. 86 Law 1/2003 **Local senior managers** **Law 19/2014, of 29 December:** – Principle of independence: Art. 55 d) – Against public interest: Art. 55 i) **Parliamentary personnel** **ERGI:** – Financial agreements: Art. 100 f) – Preferential treatment: Art. 100 g)
	Prohibitions on contracting: Art. 60.1 f) and g) TRLCSP			

5.6.3. Results of the survey

The survey that was carried out included questions to ascertain the number of single compatibility applications submitted by public servants of the Government in the 2012-2015 term, the local offices in 2011 -2015 and public universities in 2011-2015, and how many have been approved.

The table below details the figures for applications and authorisation, broken down by groups:

Table 15. Number of compatibility applications and authorisations

Public sub-sector	Type of relationship	Compatibility applications	Compatibility authorisations	% authorisations/ applications
Catalan Government 2012 - 2015	Senior officials	19	19	100.0%
	Staff	9,135	8,102	88.7%
Local authorities 2011 - 2015	Local elected representatives	169	136	80.5%
	Staff	983	676	68.8%
Universities 2011 - 2015	Members of Social Council	0	0	-
	Teaching and research personnel	3,641	3,205	88.0%
	Admin. & service personnel	702	657	93.6%
Total		14,649	12,795	87.34%

As can be observed, 87.34% of the applications submitted were approved. Of particular note, in terms of staff, the lowest percentage of compatibility authorisations is that of the local authorities, 68.8%, and the highest percentage is the administration and service personnel of public universities, 93.6%.

However, the comparative figure that stands out is the relative number of authorisations in each public sub-sector in relation to those working there: while in the Catalan Government the number of authorisations represents 4% of the entire employee group (8,121 authorisations for 201,161 employees) in the case of universities, the percentage increases to 16% (3,862 authorisations for 23,748 employees).[77] The municipalities cannot be included in the comparison because not all of them responded to the survey (329 responded).

The regular monitoring of these variables, and the relationships between them, would enable an assessment to be made of the degree of compliance with the regulation on secondary employment by areas and groups for all those providing public services in Catalonia. However, we are not aware of any public sector body that collects and assesses the data on applications and requests for authorisations, on a partial or aggregate basis.

5.6.4. Irregularities observed

The Anti-Fraud Office has found that the absence of an application for authorisation of a secondary activity is a breach of the incompatibility regulation frequently made by public servants but it is also the most difficult breach to detect for internal and external control bodies. It follows that all the cases investigated by the Anti-Fraud Office of undeclared secondary activities were initiated following a complaint.

77 Source of the figures on public servants: Public employment database, 1 January 2015.

> The absence of an application for secondary activities authorisation is one of the most common types of non-compliance wtih the regulation on incompatibility and one of the hardest to detect.

In a variant of this breach, in 2013 a case was investigated in which a Deputy Director of the Catalan Government obtained permission to carry out a secondary activity in order to conceal the activity they were really pursuing. Specifically, in 2004 the Deputy Director had obtained an authorisation to teach in a private foundation engaged in training in the field in which this individual carried out their public duties, when in fact they were in charge of the academic management of the foundation, which was significantly incompatible with their main responsibilities. The Deputy Director carried on this unauthorised activity until 2010 without it being detected by the Department.

In relation to the breaches due to lack of application for authorisation of a secondary activity, we should highlight two observations made by the Catalan Public Audit Office in two reports:

— In the Audit report of 20/2013 concerning the public hospital Corporació Sanitària Parc Taulí of Sabadell, for the period 2008 to 2011, the Catalan Public Audit Office stated there had been a *massive breach of the obligation to obtain authorisation* for a second activity in the following terms:

> *In the period audited, the company was aware that, between at least fifty and eighty employees, depending on the year, were carrying out a second activity, public or private, without having the mandatory prior authorisation of compatibility. In the case of a second public activity, the audit was able to verify that these were mostly teaching activities in public universities, where they taught courses and seminars, or they were medical or employment associate lecturers.*
>
> *The medical and nursing staff of the Corporation who held a position as lecturers at a university should have previously applied for approval of the compatibility of the two jobs.*

— In the Audit report of 3/2012 concerning the Catalan Audiovisual Council (CAC), 2010, the Catalan Public Audit Office declared the incompatibility of the Comptroller General of the Catalan Government, as follows:

> *In the year audited the Comptroller of the CAC was at the same time Comptroller General of the Catalan Government.*
>
> *According to Law 13/2005, of 27 December, on the regulation of the incompatibilities of Catalan Government senior officials, the Catalan Government Comptroller General is considered to be a senior post. Therefore, this law states that they must carry out their duties on a full-time and exclusive basis, and cannot combine their work with any other job, position, representation, profession or commercial activity, professional or industrial, of a public or private nature, self-employed or employed by others, with the exceptions set out in this law. It cannot be concluded, from any of the cases provided for in Article 9 of the above-mentioned law (public activities compatible with the exercise of the functions of a senior office) that the Catalan Government Comptroller General may be simultaneously Comptroller of the CAC. Therefore, the carrying out of the functions of Comptroller of the CAC is incompatible with the position held as Catalan Government Comptroller General.*

We conclude, therefore, that the operation of the current regulation on incompatibilities is based on the responsibility of public servants, who have the obligation to request the authorisation. If they do not comply with this requirement, the system is dependent on the effectiveness of control mechanisms.

5.6.5. Benchmark practices

The American legal system, as in other countries, includes the notion of *blind trust*, which is intended for a public office holder who owns securities and other negotiable financial assets where they are not permitted to manage or control them, insofar as the public office holder may have the ability to regulate, supervise or control the companies in which they hold those assets. This prevents commercial interests which exist at the time of entering office becoming a source of potential conflicts of interest.

«Qualified blind trust» is certified by the US Office of Government Ethics and consists of a trust that is managed by anonymous administrators, unknown to the owner, who do not have any relationship with the person who owns the property, while they develop their political career.

In France, the High Authority for Transparency in Public Life noted in its annual report of 2015[78] that it would be desirable for decisions on compatibility or incompatibility to be made public in order to help foster good practice and raise public awareness regarding ethical rules. However, the current legislation only requires that the decisions on incompatibility are notified to the individual applicant and the organisation or company in which they carry out their functions.

In the case of European Union officials, even the professional activity of their spouses is taken into account. Article 13 of the EU Statute of Public Employment states that if «the spouse of an official carries out a paid professional activity, the official shall inform the authority responsible for making appointments for the institution. If the nature of their activity is incompatible with the official's, and the latter cannot guarantee that [the spouse's work] will end in a certain period of time, the authority responsible for making appointments shall decide, in view of the opinion of the Joint Commission, whether the official should continue in their position or be transferred to another.»

Another example is found in Hungary, where a public servant cannot carry out their duties in an area or service in which there are family interests involved, in situations where the public servant has responsibilities for control or control in that activity. [79]

In Hungary, Poland and the UK, senior officials cannot hold positions in a political party.

In Portugal, within sixty days of taking up office, office holders must submit to the Constitutional Court a declaration of interests on their career and other relevant interests. The Court examines this and applies any sanctions provided for in the regulation on incompatibility. If no declaration is submitted, the deadline is extended for thirty days, after

78 See «Annual report», page 107.

79 http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=gov/sigma(2006)1/rev1

which, if the individual does not submit it, they lose their position. Previously, in order to increase the effectiveness of this control system, the secretariats where the office holders carry out their functions are required to inform the court of the names of the public servants under this obligation and the date on which they entered office.

The European Union Commissioners may not carry out any other professional activity, whether it is remunerated or not, apart from teaching courses related to European integration and other communication activities of European interest or holding honorary positions in charitable foundations and similar organisations. An honorary position is one in which no management decision-making role is exercised nor is the occupant able to control the body in question. The code of conduct for EU commissioners considered that there is a risk for the Commissioner of conflicts of interest if this body received any funding from the European budget. These situations must be declared on a form which includes all the activities carried out by the Commissioner in the last ten years, in which they must include those which they will continue to carry out after accepting the position.

Our legal system also encompasses some of these practices, although the provisions are made in relation to a specific area such as the judiciary. In this sense, Articles 389 to 397 of the Organic Law 6/1985 of 1 July on the judiciary include regulation on incompatibilities and prohibitions which makes particularly rigorous stipulations for interests linked to family relations or kinship.

5.6.6. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

The immediate superiors of public administration personnel must adopt a proactive role in the identification and management of the potential conflicts of interest in which the members of their staff may find themselves.

Legal provision must be made, for greater enforcement by the powers of control, for the entitlement to access the public servant's tax information in the event of a justified warning regarding the existence of an undeclared/unauthorised secondary employment or activity.

Legal provision must be made for the obligation, where the public servant has a secondary public sector employment, for the body in which this is carried out to request accreditation from the employee of the authorised compatibility. When the secondary employment is carried out in the private sector, measures to raise awareness should be implemented in order for the private organisation to request the individual for accreditation of approved compatibility.

Periodic monitoring is required of the degree of compliance with the secondary employment system by professional groups carrying out public functions in Catalonia in the three areas (Catalan Government, local authorities and universities). Given that there is no record of any public sector organisation collecting and assessing the data from requests and authorisations, either partially or fully, we recommend assessing the possibility of as-

signing this task to a specialised control body for conflicts of interest, as proposed in this report.

Legal provision must be made for specific regulation for the carrying out of secondary employment by the Members of the Catalan Parliament which broadens the bases for incompatibility beyond the current causes of ineligibility.[80]

The transparency of the procedure of authorisation of secondary employment for the Members of the Catalan Parliament must be reinforced through parliamentary regulation.

Legal provision must be made for local public office holders, for an extension of the situations of incompatibility beyond those currently set out in Organic Law 5/1985, of 19 June, on the LOREG.

5.7. Policy on gifts and other benefits

5.7.1. What is the tool for?

Often in the context of professional relations, public servants have contact with users, suppliers and other people who offer them gifts or other benefits, which can become private interests, influencing their professional judgement and generating, therefore, situations of potential conflict of interest.

The purpose of a gift policy is that, when a gift or other non-monetary benefits are to be offered, people who are part of a public institution are absolutely clear on their obligation as public servants and what procedures they must follow.

Gifts and other non-monetary benefits can be offered out of gratitude and a desire to recognise a job well done, especially in certain cultures. But they can also be given as a subtle way to influence, create a favourable impression and gain preferential treatment. How can we be sure that the gratitude felt by the individual who has accepted a certain gift or a benefit, such as a discount or special offer for the acquisition of goods and services or an offer of hospitality (meals, an invitation to a sports event or show, or any covering of travel expenses, will not produce a sense of obligation or just a different predisposition when assessing future proposals or applications from the person who has offered the gift?[81]

The gifts or benefits can, therefore, place a public servant in a situation of conflict of interest, because gratitude arising from the acceptance of the gift could influence the future independence and impartiality of the public servant recipient. And this is precisely

80 On closing this publication, the Catalan Parliament is processing the draft bill for regulation concerning the provisions for ineligibility and incompatibility and the conflicts of interests of the MPs of the Catalan Parliament (Exp. 202-00009/11).

81 «The biasing effect of accepting gifts is treated as a matter of deliberate choice. [...] This deliberate choice view is inconsistent with social science research, which shows that even when individuals try to be objective, their judgments are subject to an unconscious and unintentional self-serving bias. When individuals have a stake in reaching a particular conclusion, they weigh arguments in a biased fashion that favours a specific conclusion. Returning to the example of gift size, by subtly affecting the way the receiver evaluates claims made by the gift giver, small gifts may be surprisingly influential. Furthermore, individuals are generally unaware of the bias, so they do not make efforts to correct it or to avoid conflict of interest in the first place.» Dana, J. & loewenstein, G. «A Social Perspective on Gifts to Physicians From Industry». *Journal of the American Medical Association*, 2003. vol. 290, no. 2 (reprint), page 252.

the difference between a gift (a corruption risk classifiable as a conflict of interest, which is significant enough that the legislation provides for it in Article 422 CP, also known as *improper bribery*) and bribery (an act of corruption, aimed at securing a decision favourable[82] to private interests in exchange for what is offered).

Needless to say, not all gifts or benefits nor all contexts are the same. Therefore, most institutions concerned with managing this kind of conflict of interest already have sound gift policies, which take into account the following:

1. *The mission assigned to each public institution*. Certain institutions, such as anti-corruption agencies or institutions that audit the accounts of public bodies often have more restrictive gift policies (no gift is acceptable), since the very appearance of a potential influence could harm the image of independence and impartiality that is crucial for their public mission.

2. *The public functions developed by an individual or particular professional group.* Some public functions include jobs which are at special risk, such as those for the procurement of goods, services or supplies; those which develop internal or external control, inspection or investigation functions; those which carry out assessment functions; those which exercise sanctioning powers. In addition, positions of greater seniority and a higher level of responsibility often imply greater public decision-making capacity and greater access to public resources. For the combination of these two factors –functions entailing special risk with regard to gifts and more senior positions– there is not only an obligation to refuse gifts or preferential attention, but also the duty to inform all the people in these jobs of this gift policy.

3. *The value of the gift or benefit*. This criterion is the most widespread. It is very common to find amounts both to define what is or is not acceptable and to establish whether or not to register it. In these amounts there is quite commonly also an upper limit on the frequency with which they may be accepted (for example, *x* times a year). However, a considerable number of studies in various disciplines of social sciences indicate that even gifts of negligible value can influence the behaviour of the receiver without them being aware, and recommend reviewing the policies and guidelines on gifts that are based on arbitrary limits for value.[83]

4. *The time at which it is given*. It is not the same to receive a gift or benefit before making a public decision or delivery of a particular public good or service, than doing so after the decision has been taken or the public good or service has been delivered.

5. *The probability of future professional contact with the gift-giver.* Nor is it the same if the person who offers the gift is a regular user or supplier, as where the public goods or services are received as a single transaction.

Therefore, it is very important that all public institutions carry out this analysis (of their mission, context and circumstances, as well as the positions or professional groups at special risk when receiving gifts) and develop their own policy on gifts.

82 This *favourable decision* can consist either in modifying the decision itself to altering the procedures (unreasonably speeding up or delaying the proceedings) that lead to that decision.

83 Katz, D., Caplan A. L. & Merz, J. F. «All Gifts Large and Small». *American Journal of Bioethics*, vol. 3, no. 3, page. 39-46.

5.7.2. Current regulatory treatment

The current legal framework barely regulates the offering of gifts to public servants.

— *Catalan Government senior officials.* They must abstain from accepting any gift, value or service they may be offered on the basis of their office or that might compromise the performance of their duties. However, the CCSO exempts from this prohibition the acceptance of complimentary samples not offered for sale and commemorative, official protocol objects that could be given because of the office, which shall be deposited in the Ministry, which will establish the use and this will be published in the Catalan Government's transparency website. Also exempt is any hospitality arising from protocol hospitality or invitations to cultural events or public shows because of the office.

— *Public office holders.* MPs must abstain from accepting any gift, favour or service, except token gifts of mere courtesy or gifts that are given when they represent Parliament, which must be handed in. Local elected representatives are subject to the same provisions of Law 19/2014 for Catalan Government senior officials, whereas the Spanish Federation of Municipalities and Provinces allows gifts to be accepted when they do not go beyond the usual and social or courtesy practices and do not exceed the value of 150 euros. This provision has been specified by CCMCP, establishing a sum of €150€ as a threshold, above which the gift or token gift is of a value that requires its handing over to the Catalan Parliament. For this purpose there is a Register, publicly available on the transparency website. In addition, it provides that the gifts of value must be periodically disposed of, and the profits be allocated to social activities or services.

— *Public administration personnel.* They must refuse any gift, favour or service beyond the usual and social or courtesy practices.

— *Local senior managers.* The same provision applies to them as to the Catalan Government senior officials.

> The Catalan public institutions do not have gift policies nor are they legally required to have them.

The table below summaries the regulations described above.

Table 16. Regulation governing gifts

Senior officials	Elected representatives	Public administration	Other groups
– Art. 26 b) 6th Law 19/2013, of 9 December – Art. 55 m) Law 19/2014, of 29 December – Point 5.17 4.7 CCSO	**MPs** Art. 14.4 RPC; Art. 22 CCMCP **Councillors** – Art. 26 b) 6th Law 19/2013, of 9 December – Art. 55 m) Law 19/2014, of 29 December – CBGL FEMP of 24.3.2015	Art 54.6 EBEP	**Parliamentary personnel** Art. 101 f) ERGI **Local senior managers** – Art. 55 m) Law 19/2014, of 29 December – CBGL FEMP of 24.3.2015

5.7.3. Results of the survey

The survey shows that the public institutions who responded do not have their own gift policy. Aside from the generic references to the basic regulation, the institutions that have some guidelines have only partial ones, and do not cover all the items that an adequate gift policy should cover.

Catalan Government

In answering the question «[...] have you established any specific treatment on the issue of gifts (specific indications through regulations, codes of ethics, gifts policies...), beyond the provisions of the current legislation?», the Catalan Government made reference to Article 4.6 of the Code of Practice for Senior Officials of the Catalan Government Administration, according to which: «in addition to the legal provisions, senior officials of the Catalan Government must abstain from accepting gifts, donations or advantageous treatment not inherent to the performance of their duties, except those related to usual practices or complimentary samples delivered by reason of their position.» [84]

They then detailed some of their departments' specific treatment of gifts, including examples of good practice, such as the Department of Interior's treatment of gifts from suppliers:

> *Gifts from suppliers may not be accepted. You should never give a personal address to receive gifts at home. If any gifts are received, they must be delivered to the Department's Corporate Social Responsibility area, which will preferably send them to a charity. After receiving the gift, the supplier must be sent a letter in which they are thanked, requested to not to give any more gifts, and informed of where the gift was sent. You must send a copy of this letter to the Corporate Social Responsibility area, which will inform the Board.*

However, none of the departments referred to the directive included in section 4.2 c of the Code of Principles and Conduct recommended for public procurement, approved by the Government Agreement of 1 July 2014, whereby those subject to the code «shall reject obtaining personal or material advantages for themselves or for those in their family or social circles. Consequently, they shall return any donations and gifts they may receive.» [85]

We can conclude that there is no over-arching policy on gifts and that there is a lack of uniform criteria for the regulation and guidance to departments to develop their gift policies.

Local authorities

Of the 329 municipalities that responded to the Anti-Fraud Office survey on management of conflicts of interest, only 11 (3.65%) have (or are in the process of developing) any specific guidelines within their respective institutions on required conduct in gift-giving. Of the 11 municipalities that have in some way included specific indications beyond the legal provisions in force, one did not make it clear how they had conveyed these guidelines, whereas the other 10 municipalities did as follows:

84 Code approved by the Catalan Government agreement of 19 November 2013, in its turn repealed by the CCAC.

85 http://exteriors.gencat.cat/web/ca/ambits-dactuacio/contractacio-publica/direccio-general-de-contractacio-publica-/.content/osacp/baners/Aprovacio-Codi-conductes-recomanables.pdf

— Provisions in their respective codes of ethics (four of which are already in force and one is in the process of gaining approval).

— Provisions included in the organic municipal regulation (three). An ordinance regulating the municipal registration of gifts.

— A circular (action protocol).

In addition, one of the municipalities stated that the mayor had sent a letter to all the council's suppliers, informing them that the institution did not accept gifts of any kind.

Therefore, 96.35% of the municipalities that responded to the survey do not have any tools for guidance of the conduct expected of their public servants regarding gifts or other gestures of appreciation or non-monetary benefits.

Public universities

To the question «Does the University have any special treatment established for gifts (indications by means of statutes, regulations, ethical codes, protocol, gift policies...), beyond the provisions of the current legislation?" Four of the seven universities responding said they did, as follows:

— «Circular of protocol expenses and miscellaneous expenses for social courtesies» adopted by the Committee of Economy and Organisation of the Governing Council dated [...].

— Article [...] of the statutes of the [responding university] and the rules of precedence, honours, symbols and protocol approved by the governing Council on [date].

— Communication by the University Manager of [date] with instructions on how to act regarding Christmas gifts.

— [On the date of] 2015 [responding university] distributed the guidelines for the implementation and management of protocol expenses, and [...] has an [ethical code].

However, three of the four answers above are really indications regarding the *purchase* of gifts and *giving* of other benefits or protocol courtesies, rather than guidelines for the acceptance or rejection of those given to them. Therefore, the content of these responses shows that only one of the seven universities responding to the survey has provided guidance for a specific instance, such as Christmas gifts.

5.7.4. Benchmark practices

In the UK, Members of Parliament must declare any gift they or their spouses receive of a value of 1% of their salary. The concept of gift also includes services at a price lower than the market rate. The declaration must be made public.

In France, MPs must declare any gifts received, regardless of their value.

In the US, the gifts policy is widely and strictly regulated. The legislation establishes a prohibition on gifts from certain sources, even gifts between officials. [86] A gift is defined as anything of monetary value, including transport, accommodation and meal costs, pay-

86 Thus, a public servant cannot give a gift to their superior or receive a gift from an official of lower rank, or, in short, whenever they are of a different rank. In the latter case, it is only allowed if they are not in a direct subordinate relationship and there is a personal friendship to justify the gift. See: https://www.oge.gov/Web/oge.nsf/Resources/Gifts+Between+Employees.

ment in advance or reimbursement of expenses paid by an official. In any case, gifts are prohibited from anyone who has interests that may substantially affect the performance or omission of an official's duties. For instance, attendance at events must be authorised by the agency and may constitute, therefore, an exception to the regulation prohibiting gifts. If a gift is received, the acceptance of which is expressly prohibited in the regulations, the public employee must return it, pay its market value or, if it is a perishable good, share it with the agency, donate it to an NGO or destroy it. [87]

In Canada, the policy for gifts regarded as protocol or courtesy gifts requires them to be declared. In addition, all gifts received by senior officials (invitations to dinner, etc.) are published and are available on the website of the Office of the Canadian Conflict of Interest and Ethics Commissioner. [88]

In accordance with the OECD [89] report, it is better to have clear and strict regulation on gifts and benefits than to require their declaration. Gifts can be the first step to bribery, and consequently they should be completely forbidden, especially when given in appreciation for something done by a public official which could cast doubts on their impartiality. In any case, it is suggested that gifts received by members of Government and political appointees should become the property of the state and should only be accepted if their monetary value is very low.

5.7.5. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

The Catalan Parliament needs to legally establish the common ground for the regulation governing gift policies and also provide for the requirement of public bodies to develop, adopt and disseminate specific gift policies within their respective organisations, in accordance with the recommendations contained in this report, in order to prevent potential conflicts of interest arising from the social custom of giving of gifts and other courtesies as a token of appreciation towards public servants.

Each institution needs to define its own gift policy by means of a regulatory provision, after analysing the mission, the context and the circumstances, in addition to the risks of the various groups of professionals who work there.

In any event, the rules governing gift policies should always avoid using indeterminate legal concepts in their wording, such as «social uses and customs» or «complimentary gifts», among others, with the aim of introducing quantifiable and objective criteria, which very clearly specify the gift policies that are pursued while facilitating interpretation and application.

87 Contrary to the criteria of the OECD study on conflicts of interest (see above), in the US, in declarations of assets, declarants must declare gifts of a value of $ 140 or over, as well as tangible goods, transportation, accommodation, meals or entertainment expenses received by the individual, their spouse or children worth more than $ 350. At the same time, reimbursement of over $ 350 for travel must be declared, indicating the dates, itineraries and the nature of the expenses. This obligation excludes any government expenses or official trips.

88 http://ciec-ccie.parl.gc.ca/EN/PublicRegistries/Pages/Gifts.aspx

89 OECD. «Conflict of Interest Policies and Practices in Nine EU Member States: A Comparative Review». *SIGMA Papers*, núm. 36, 2005. OECD Publishing. (http://dx.doi.org/10.1787/5kml60r7g5zq-en)

An adequate gift policy must provide for the following:

— Give a reminder of the ban on accepting money and of asking for gifts or any other kind of benefits under any circumstances.

— Include a clear definition of gifts and consideration of gifts as a source of potential conflicts of interest and how it may jeopardise the impartiality and independence of public decisions.

— Set out the criteria adopted by the institution to explain what the public servant, directly or indirectly, should consider as acceptable gifts and what they should not (total prohibition on gifts, settling limits for value, for frequency...). If it is deemed necessary or appropriate, examples may be given of everyday situations specific to the institution or any of the professional groups working there.

— Identify functions or jobs that have restrictions or conditions different from the standard ones in terms of gifts and the obligations they involve.

— Create a public register of gifts, establish who shall be responsible for it and determine what does and does not need to be registered, and what the minimum necessary information that must be included is.

— Establish the procedures to be followed when:

– there are any doubts as to whether or not a gift or benefit that is offered may be accepted;

– gifts are accepted on behalf of the institution;

– gifts or other benefits offered are refused;

– there is no possibility of returning unacceptable gifts;

— Ensure training on the gift policy for everyone working in the organisation.

— Define groups outside the institution who should be informed of the gift policy.

— Establish a mechanism for periodic review of this policy to ensure maximum enforcement and suitability.

5.8. Control of interests after leaving public office

5.8.1. What is the tool for?

Control of interests after leaving public office refers to the prohibitions (to remove the private interest) or limitations (to avoid the influence of the interest) in post-office activities in order to preserve the impartiality of a public servant. This is aimed at avoiding partiality in the real professional judgement that unfairly favours a particular company or industry with the expectation of obtaining professional benefits after leaving their public position (contracts or a job).

Practical experience in neighbouring countries allows us to note once again the important connection between politics and business, the influence of which remains largely hidden, so that it represents a control risk for regulation and public policies. [90]

90 Transparency International reaches this conclusion in the study published in April 2015, «Lobbying in Europe. Hidden Influence, Privileged Access», which is based on an analysis of the situation in 19 European countries.

The growing movement of professionals who move into the private sector from the public sector or vice versa, known as *in-and-outers* shows that there is an increasingly fine line between the two areas.[91] This phenomenon, known by the term *revolving doors* or *pantouflage,* can compromise the integrity and impartiality of public servants.

Of particular concern is the movement from the public sector to the private sector of two specific groups. Firstly, those in senior positions in the public sector who have management and control duties which are carried out in areas where there is considerable interaction with private companies and businesses, in temporary positions that foster continuous changes both between different public responsibilities and between the public and the private sectors. Secondly, public servants who may misuse the experience, the inside information and the contacts obtained in the exercise of their public office to benefit their new employee or their corporate clients as a lobbyist.

As a result of these concerns, the legislature has banned or restricted, for a period of time known as abstention or *cooling-off,* any possible private activities of certain individuals who have held a public office or position. Thus, this is an *ex ante* precautionary measure to avoid apparent and reasonably potential later use of information, knowledge and contacts —acquired during the period in public office— improperly, i.e. to favour private interests. Specifically, the regulation of conflicts of interest regarding the activities developed after leaving public office has the following main objectives:

— Prevent public servants, during the time they hold the position, being influenced in their decisions by the possibility of obtaining any private benefits in the future as a result of the previous exercise of their public functions.

— Protect the Government and public administration from the use, by individuals who have held offices and public positions, of information acquired while providing public services in favour of private interests, to the detriment of the public interest.

The regulation of private activities after leaving office becomes a valuable preventive tool in the management of potential conflicts of interest, with the purpose of eliminating the interest which incurs the risk or preventing the interest from influencing the professional duty, by establishing restrictions or limitations on the exercise of activities.

5.8.2. Current regulatory treatment

The table below details and compares the limitations and prohibitions on the exercise of private activities after the termination of employment or end of office of senior officials of the Government, elected representatives[92] and senior managers of the local authorities.[93]

91 Finding of Transparency International in the working paper no. 6/2010 «Regulating the revolving door». See: https://www.transparency.org/whatwedo/publication/working_paper_06_2010_regulating_the_revolving_door

92 Town and city councils may set a financial compensation during this period for those individuals who, owing to the regulation on incompatibilities, cannot pursue their professional activity or receive remuneration from other economic activities.

93 Senior managers refers to directors of the higher management and operations bodies, which conform to the general guidelines set by the governing body of the authority, take the appropriate decisions and have, to this effect, a degree of autonomy within these general guidelines.

Table 17. Table comparing prohibitions or limitations after leaving office

Prohibitions or limitations, period and control body	Catalan Government senior officials (Art. 7 Law 13/2005)	Elected officials and local authority senior managers (Art. 8 & DA 15a LRBRL by reference to Law 5/2006)[94]
They may not, for a two-year period following termination of employment or end of office	Carry out private activities related to the matters in which they have been directly involved in the exercise of their senior office.	Provide services to companies or businesses directly *related to* the responsibilities of the position held. There is a direct relationship in any of the situations described below: – The senior officials or their superiors or the members of their subsidiary bodies on their proposal, by delegation or substitution, have issued resolutions regarding these companies or businesses. – They have taken part in sessions of collegiate bodies in which any agreement or resolution has been adopted in relation to these companies or businesses.
	Undertake (personally or through companies or businesses in which they have an interest of over 10% or are their subcontractors) any technical assistance or service or similar agreements with the Administration, public sector agencies, bodies or companies in which they have worked as senior officials.	Undertake (personally or through companies or businesses in which they directly or indirectly hold an interest of over 10%) any technical assistance or service or similar agreements with the public administration, directly or through contractors or subcontractors.
They may not, when in office or after leaving the office	Use or sell to their own advantage or a third person information they have obtained in the exercise of public office.	
Control body	Ø	Office of Conflicts of Interests (reports to the State Ministry of Finance and Public Administration)

Under the existing regulatory framework, the Anti-Fraud Office has found significant weaknesses with respect to the affected groups and the terminological accuracy of the prohibitions and their control.

Regarding the groups affected:

— Only certain prohibitions or limitations are established for the development of private activities after the termination of office for Catalan Government senior officials, elected representatives and local authority senior managers. The limitations exclude other public servants and any other persons carrying out relevant public functions. [95]

— The limitations on the carrying out of private activities established for members of the Catalan Government and the senior officials of the Central State Administration is only applicable to the members of local authorities who have had executive responsibilities in the various areas in which local government is organised within the geographical area of their responsibility.

94 The LRBRL maintains the reference to Law 5/2006, although the latter has been expressly repealed by Law 3/2015.

95 See the section in this report on public positions and responsibilities outside the regulation governing conflicts of interest.

> Some groups that have important public responsibilities or access to privileged information are outside the scope of the regulation on limitations or prohibitions after leaving office.

Regarding the accuracy and legal certainty of the prohibitions:

— The LRBRL maintains the reference to Law 5/2006 of 10th April, regulating conflicts of interest of members of Government and senior officials of the Central State Administration, although it has been specifically repealed by Law 3/2015, of 30 March, regulating the activity of senior officials from the Central State Administration. This second law has significantly changed the regulation restricting private activities.

— The regulation governing the prohibition of activities after leaving office for Catalan Government senior officials is more unclear than that applied to elected representatives and local authority senior managers. The former refers to «files in the resolution of which they have been directly involved», while the latter refers to the activities «directly related to the responsibilities of the public office held.» It is always more difficult to decide which files the individual has had involvement in than to decide on the powers which were exercised. In addition, the regulation applying to elected representatives specifies when there is this «direct relationship».

— The regulation on elected representatives and local authority senior managers does not establish a ban on the use or transfer for their own benefit or that of a third party any information they have obtained in the exercise of public office, whereas this is established for Catalan Government senior officials.

Regarding the control of the prohibitions and limitations:

— For Catalan Government senior officials, there is no specific control body to ensure their compliance with the regulation on prohibitions on involvement in private activities after leaving office.

— It appears that the control body for the limitations on the exercise of private activities of senior officials from the Central State Administration,[96] cannot carry out this function for elected officials and the local senior management. In this respect, in the absence of specific regulation, the respect for local self-government would stop this control.[97]

5.8.3. Results of the survey

In order to check the compliance with the regulation restricting activities in the two years after leaving office that affects elected representatives and local authority senior managers, the survey asked the town and city councils, firstly, how many files on declarations regarding the initiation of private activities were processed in 2011-2015, and, secondly, if they paid any financial compensation for the two years following the end of office to the

96 The Spanish State offices to which these limitations in the exercise of private activities are applicable after leaving office must submit, during the two years after leaving office, a declaration on the private activities they intend to carry out before initiating them, to the Office of Conflicts of Interests, which has a month to decide on the compatibility of the activity.

97 This impediment was noted by Manuel Villoria in the publication «Incompatibilidades y conflictos de interés en la Administración local». (http://cemical.diba.cat/publicacions/fitxers/Villoria_Incompatibilidades.pdf)

local elected officials who, as a result of the incompatibility regulation, could not pursue their professional activity nor received financial compensation for other activities.

None of the 329 councils responding to the survey had processed any files for declarations regarding the initiation of activities after leaving office nor paid any financial compensation for the inability to pursue a professional activity.

This result is consistent with the inadequacy of the regulation governing the control to be carried out by the Office of Conflicts of Interests on the local elected representatives.

5.8.4. Irregularities detected

In 2012, as part of an investigation of the alleged irregular activity after leaving office of a Catalan Government senior official, the Anti-Fraud Office noted that the rules governing the limitations after leaving office for the Catalan Government are based on vague concepts, comprising regulation which, in practice, is less restrictive than that established for senior officials from the Central State Administration. In this regard, the post-office activity that was investigated did not breach the prohibitions on leaving office of the Catalan system, but it would have breached the limitations applicable to the senior officials of the Central State Administration if they had been applied to the case.

As a result of these and other weaknesses in the regulation of activities after leaving office, the Anti-Fraud Office submitted to the Catalan Minister of Governance and Institutional Relations reasoned recommendations which, at the date of this report, have not been acted upon.[98]

Recently, the Catalan Public Audit Office has issued an audit report in which it highlights a weakness in the regulation of the interests after termination of employment regarding staff. In particular, it notes the irregularity of the situation of a public office holder who, exercising their public duties, took part in the tender and award of a contract to a private company of which they, at a later date, became the CEO.

We set out below an excerpt from the report 1/2016 concerning the Centre for Telecommunications and Information Technologies (CTTI), for 2010, 2011 and 2012, when the Public Audit Office describes this situation:

> *Finally, we note that in July 2012, the individual who had participated in the negotiation as a member of the Special Negotiating Committee and as leader of the Negotiation team became CEO of the company Xarxa Oberta de Comunicació i Tecnologia de Catalunya, SA.*

CTTI claimed that the professional in question did not have a high-ranking position in the Catalan Government and therefore was not subject to the restrictions after leaving office.

However, this particular case illustrates a situation of revolving doors, known in other sectoral areas, in which public officials who are not regarded as senior officials have relevant information obtained in the exercise of their functions that they can use in the private sector (through a leave of absence, for example) and which is not expressly limited in the regulation.

98 http://www.antifrau.cat/images/web/docs/recomanacions/2012/2012_07_26_Conflicte_DGIRI.pdf

5.8.5. Benchmark practices

Firstly, we must refer to the Office of Conflicts of Interest to which the senior officials from the Central State Administration must submit, within two years after termination in the position, a declaration of the private activities they are preparing to carry out, before starting them, so that this body can issue a decision, within a month, on the compatibility of the activity.

In turn, the National Commission on Markets and Competition has approved a code of conduct for its staff, which requires that:

> *To guarantee these principles of independence and objectivity, individuals who have provided professional services in organisations in a market or sector that is overseen by the National Commission of Markets and Competition, must notify the Board of any right or authority, whatever it is called, maintenance or resumption of previous professional relations, compensations, and any benefits in equity. In the case of Board members, this situation must be publicly disclosed.*[99]

In the UK, former Ministers must seek the view of the Advisory Committee on Business Appointments regarding any position they wish to take up within the two years after they leave the public office. The Committee must analyse the details of the appointment and the contacts maintained by the ex-Minister with the company that wants to hire them (or with their competitors), and to assess to what extent they may be receiving a reward for favours rendered in the past. [100]

In France, the High Authority for Transparency in Public Life must be consulted [101] by former Government members, the presidents of regional councils, presidents of departmental councils, mayors of municipalities with more than 20,000 inhabitants, the elected presidents of a public body for inter-municipal co-operation, who wish to enter the private sector during the three years following the termination of public office, to consider the case and issue a resolution determining their compatibility or incompatibility. It may also start an *ex-officio* procedure through its president within a period of two months from the time they know they will carry out a paid professional or private activity. If this post-office decision of incompatibility is not respected, the High Authority shall refer the case to the judicial system, which could lead to a punishment for this action.

Meanwhile, Article 16 of the European Union Statute of Public Employment states that any public official who intends to carry out a professional activity, paid or otherwise, within two years following the termination of their duties must notify their institution using a specific form. If this activity is related to the duties carried out by the applicant over the

99 Rule 3.1 of the Agreement of 18 March 2015, the full Board of the National Commission of Markets and Competition, which approves the Code of Conduct for the National Commission of Markets and Competition staff.

100 *Op. cit.* Transparency International working paper no. 06/2010.

101 This responsibility is shared with the Ethics Committee of Public Service, which is responsible for controlling the movement of officials and members of the cabinet and the senior management of local authorities to the private sector and other branches of the public sector. Members of the cabinet are required to consult this Committee, as are other public officials when they anticipate that they will become part of a company where they will have control or supervision, and when they have negotiated contracts of any nature with the company, issued a report on contracts, proposed decisions concerning transactions by this company or made a report on these decisions. In other cases consultation with this Commission is optional.

last three years of service and may be incompatible with the legitimate interests of the institution, the authority empowered to make appointments may, in the interest of the service, prohibit them from pursuing this activity, or make the authorisation conditional on whatever requirements they deem to be appropriate.[102]

In addition, Article 17 stipulates that public officials should refrain, unless they are so authorised, from disclosing any information they have received or gathered in the exercise of their duties, unless this information has been made public, right up to the time of termination.

In terms of the period of abstention after leaving office, International Transparency Spain recommends establishing a period of at least two years to mitigate the risk of potential conflicts of interest. However, in areas where the duration of the threat of use of privileged information is unpredictable, they consider that imposing a time limit is not the best option. Restrictions should take into account all the time that the issue continues to be relevant until the matter ends or is made public.[103]

Regarding the activity of lobbies, Transparency International, with the support of the European Commission, recently published a comparative study [104] of 19 European states, which concludes that none of the states which were assessed has a system of monitoring and effective implementation of the rules on revolving doors. They note that only one state (Slovenia) establishes a cooling-off period before members of the legislative authority can exert pressure on their former colleagues as lobbyists. The recommendations made by the report include the creation of an ethical firewall between lobbyists and the public sector, which establishes minimum cooling-off periods before former elected representatives or public officials can take up lobbying positions that could cause conflicts of interest. It also recommends subjecting to a prior authorisation system, regulated by the Office of Ethics, the possibility of former office holders holding meetings (both national and sub-national).

5.8.6. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

It should be determined, through risk analysis of the various types and groups of public servants:

— the individuals subject to the prohibitions or limitations on private activities and of use or communication of privileged information after leaving their public office;

— the kind of post-office private activities that must be prohibited or limited;

— the general «cooling-off period» within which these private activities are forbidden or limited; although on certain issues where the duration of the risk of use of privileged infor-

102 Moreover, in the case of former senior officials, the authority empowered to make appointments shall prohibit them, during the 12 months after they leave office, from carrying out activities of promotion or defence of their business against individuals from their former institution, clients or employers in relation to issues for which they were responsible for the last three years of service. In compliance with Regulation (EC) no. 45/2001 of the European Parliament, each institution shall publish information on the implementation of this measure on an annual basis, including a list of cases evaluated.

103 *Op. cit.* Transparency International working paper no. 06/2010.

104 *Op. cit.* Transparency International, 2015.

mation cannot be foreseen, this period may be extended until the issue is closed or made public (e.g. changes to urban planning), and

— the type of information that cannot be used or passed on after the conclusion of the public functions.

This risk analysis must take into account the level of responsibility and decision-making capability of each position or professional group, in addition to the privileged information and the contacts that could be made in carrying out the office. This will ensure that no individual who has held important public functions will be outside the scope of this system.

The policy regulating the prohibitions and limitations of the post-office private activities must avoid the use of vague legal concepts and, where this is not possible, making it as specific as possible in order to guarantee legal certainty.

The possibility should be studied of establishing a specialised control body to monitor compliance with the system on prohibitions or limitations on private activities by public servants terminating employment or leaving office. This body would have to issue a public statement regarding the compatibility of the private activities that the individuals subject to the post-office prohibitions or limitations wished to initiate. The latter, during the period of abstention that was established, would be obliged to declare any activity before starting it.

5.9. Control bodies [105]

5.9.1. What is the tool for?

We have looked at four tools that allow institutions to manage conflict of interest situations. We now analyse the tools which guarantee the efficiency of these tools for detection and management.

In terms of *preventive measures* for conflicts of interest, the role of the control bodies is to identify breaches by public servants of the regulation on risks of conflicts of interest and, if necessary, to correct them. Therefore, they guarantee the application and effectiveness of the various prevention tools currently regulating conflicts of interest (declarations of interests, regulation of secondary employment, limitations or duty of abstention after leaving office). In addition, given their expertise and experience in the field, control bodies can offer advice on these issues.

Within *contingency measures*, the control bodies also investigate partial actions by the public servant, i.e. those biased or influenced by a private interest (acts of corruption).

Independence is one of the essential characteristic for control bodies so that they can develop their functions effectively and without undue influence. In this sense, independence is not an end in itself but a guarantee of their commitment to impartiality with which they must carry out the functions assigned to them.

Control bodies fulfil their functions within the organisations themselves (internal control) or from the outside (external control), linked to the executive or legislative power, as

105 For the purposes of this report, the term of *control body* refers not only to administrative units , but also to other entities or bodies that have their own legal personality and autonomy.

appropriate. The institutional location of these bodies is an important factor for the independence and effectiveness of the implementation of their assigned functions, but it is not the only factor. The election system and the possible removal of the managers are also important factors, as is the autonomy it is given in terms of organisation and budget (specialised material and human resources).

The perceived effectiveness of these bodies in the enforcement of the use of tools to prevent conflicts of interest and the certainty of a punitive response discourage non-compliance.

> The certainty of effective detection and punishment by the control bodies is a deterrent for breach of the regulations of the tools of prevention of conflicts of interest.

5.9.2. Current regulatory treatment

Under the existing regulatory framework, in the Catalan public sector there are internal control bodies with management and inspection functions which are able to apply sanctions in conflicts of interest, and also external control bodies, that have supervisory functions but no power to impose sanctions in this area.

In the case of the Catalan Government, the internal control of compliance with tools of detection and management of conflicts of interest is the responsibility of the department responsible for public service. It has responsibility for declarations of interest submitted by senior officials and the processing of applications for authorisation of secondary activities, as well as authority to apply sanctions for the violation of regulations on incompatibility both by senior officials and staff.[106] The Inspectorate General for Personnel Services is responsible for ex officio monitoring and correcting the whole field of incompatibilities within the area of the Catalan Government Administration. Likewise, the Catalan Government Comptroller General's Office includes in its financial control reports the review of compliance with regulation on incompatibilities. With regard to the Catalan Government senior officials, the CCSO has created a Public Ethics Advisory Committee with indicative powers, which include, in particular, the power to "orientate and give guidelines as specifically as possible regarding any facts that could possibly be the cause of the initiation of a sanctioning procedure and of the relevant circumstances in the case".

Within the Catalan Parliament, internal control falls, according to Art. 25 CCMCP, to the Catalan Parliament Bureau, which for this purpose acts with the assistance of the Members Statute Committee. This provision grants to the Bureau broad powers to ensure the compliance with the code of conduct in general, and in particular to control the system of incompatibility, the obligations regarding declarations and also the other obligations arising from conflicts of interest.

In the case of local authorities, the plenary session must *ex officio* monitor and correct all matters relating to incompatibilities and should determine, where appropriate, according to the number of staff in each corporation, whether to establish a body with specific

106 In certain cases, the sanctioning power is held by the government itself or by bodies from other Departments (Health, Interior, Education).

responsibility in this area. Moreover, the plenary session of the authority is responsibility for making rulings on matters of compatibility.

In connection with the activities that the local representatives, who have held executive responsibilities in local government, intend to carry out during the two years following the end of their office, the limitations on the carrying out of private activities established by Law 3/2015, of 30 March, which regulates the activities of senior officers of the Central State Administration must be applied in the territory where they hold responsibility. However, in the absence of specific regulation, the respect for local self-government would prevent the control by the Office of Conflicts of Interest [107] on activities carried out by State senior officials after leaving office being extended to local representatives.[108]

In public universities, the authorisation of secondary activities is the responsibility of the Vice-Chancellors.

> In view of the survey and the Anti-Fraud Office and the Catalan Public Audit Office reports, the efficiency of the internal controls is questionable.

Both at the level of the Catalan Government and that of the local authorities and universities, the bodies in charge of the management, inspection or control of the various services should take care, under their responsibility, to prevent or correct where appropriate, any incompatibilities of their staff.

The effectiveness of the framework of internal controls on conflicts of interest is questionable in light of the survey results and the experiences of the Anti-Fraud Office and the Catalan Public Audit Office, which have been pointed out in this report under each of the prevention tools described.

In terms of external control, the Anti-Fraud Office and the Catalan Public Audit Office play a key role in the prevention and investigation or audit of conflict of interest situations and actions in which a private interest has had an undue influence. The Anti-Fraud Office has specifically been entrusted with the role to prevent and investigate possible cases of misappropriation arising from behaviour involving conflicts of interest, as well as to advise and make recommendations for measures to be adopted on the matter. According to the Anti-Fraud Office annual reports, situations of conflicts of interest were the number one reason for investigation, representing 16% of the cases investigated in 2013, 34% in 2014 and 17% in 2015. Although these percentages may seem low, the Anti-Fraud Office has found that conflict of interest situations are commonly the context that has produced the acts of corruption that have taken place in procurement, public duties, town planning and subsidies.

Although it is not a specific mandate for the Public Audit Office, the latter includes in their audit reports a review of compliance with regulation on incompatibilities, as noted in this report. The Catalan Parliament may request the Government to follow the recommendations in this area set out by the Public Audit Office in its reports.

107 Reports to the State Ministry of Finance and Public Administration.

108 This impediment has been noted by M. Villoria in the publication «Incompatibilidades y conflictos de interés en la Administración local». (http://cemical.diba.cat/publicacions/fitxers/Villoria_Incompatibilidades.pdf)

A special mention should be made of the checks which the Catalan Parliament can and does carry out occasionally on specific conflicts of interest situations in the executive, through questions addressed to the Government and requests for hearings. But above all, the parliamentary committees of inquiry should be highlighted, which indirectly tackle the problem of conflicts of interest in the public sector in Catalonia, where the Anti-Fraud Office has had the opportunity to collaborate: the Commission of Inquiry into Management in the Healthcare Sector and Relations between the Public Sector Health and Business (CIGAS, 2013) and the Commission of Inquiry into Fraud and Tax Evasion and Practices of Political Corruption (CIFEF, 2015). As a result of the work of these two committees, Parliament adopted two separate resolutions in which, among other items, a strengthening of the control bodies was recommended, giving them greater resources and depoliticising their senior management, and urged the Catalan Government to effectively comply with the laws on incompatibilities of its senior officials and staff and to initiate the procedure to present a reform of the regulation on incompatibilities.

As described above, the Catalan legal system has opted for a limited control, objectively, of certain management tools and, subjectively, restricted this to internal control, as in the Catalan public sector there is no independent authority with specialised functions in control and control of the various tools for managing conflicts of interest of public servants and that holds regulatory and sanctioning powers.[109]

The following table details the specific regulations governing internal control of activities and declarations of interests.

Table 18. Regulation governing the bodies controlling activities and declarations of interests

Senior officials	Elected representatives	Public administration personnel	Other groups
Administration and Public Service Secretariat (declarations and register): Art. 16 Law 13/2005	**Members of Parliament** Catalan Parliament Bureau, Art. 25 CCMCP Commission of the Statute of Members of Parliament (proposal for situation of compatibility): Art. 18.2, 3&5 RPC; (reporting functions), Art. 16 & 25.3 CCMCP **Local elected representatives** Office of Conflicts of Interest (requirements and registers): Art. 19 Law 3/2015	Functions of control, prevention or correction (Art. 24 Law 21/1987): – Management and Inspection of Services – Inspectorate General for Personnel Services (Catalan Government) – Ad hoc body, optional (local authorities)	**Parliamentary personnel** Parliament's Bureau (authorisation of compatibility): Art. 102.6 ERGI

109 Meseguer Yebra states that «the degree of autonomy can be appreciated when the powers conferred go beyond the mere management of the registers where the declarations are recorded, their monitoring, etc. The real decisive step towards an increased role and independence with substance would be the conferral of powers to impose penalties for conduct that does not conform to the provisions of the law.» *Op. cit*. Meseguer Yebra, 2007, page 250.

5.9.3. Benchmark practices and other observations

At the Spain-wide level, the Office of Conflicts of Interests is entrusted with the management of the system of incompatibility of State senior officials, the management of the registers of interests and is responsible for the safekeeping and security of documents, the writing of reports and co-operation with similar bodies. In addition, it may request files from public registers, particularly from the Tax Office and Social Security authorities. It also initiates disciplinary proceedings, although the sanctioning power is reserved for the Council of Ministers, the Minister of Finance and Public Administration and the Secretary of State for Public Administration, according to the gravity of the infringement.

Internationally, several committees of experts and organisations have discussed what would be the ideal control body on conflicts of interest.

The Reflection Commission on the Prevention of Conflicts of Interest in Public Life [110] (France, 2011), known as the Sauvé Commission, recommended a model in which there is a central authority to intervene at the time of the pre-office declaration of interests for those who are required to declare, and during the term of office and when it finishes. The authority should also have the mission to prevent conflicts of interest in the public sector and it would be articulated through a network of experienced ethicists placed in the various authorities, public institutions, companies and Government bodies. [111]

The ethicists would be a *local reference point* within the body, to resolve any doubts on the part of public officials and would be the point of contact with the central authority in the context of an enquiry. This proposed model is similar to the current model in the US, where the Office of Government Ethics has more than 5,000 ethics officers across over 130 agencies to implement the Strategic Plan and Ethics Programme approved by the Government for the period 2014-2018.

The Commission on Renewal and Ethics in Public Life (France, 2012), known as the Jospin Commission, proposed the advisability of externalising the control of the mandatory declarations of interests (to ensure that declarations are submitted but also to check their truthfulness). [112] The model proposed by the Renewal Commission (proposal no. 33) also chose, like the previous Reflection Commission to prevent conflicts of interest through an authority of ethics in public life with consultation and advisory functions, (resource centre with codes of practice, model declarations...) and control of declarations of interests and activities (submission of the declaration, its truthfulness and a check if any declared activity is likely to create a conflict of interest).

Based on the observations of these committees, a new independent administrative authority was created in France in 2014, the High Authority for Transparency in Public Life, which replaced the Commission for Financial Transparency in Political Life (created

110 Report of the Reflection Commission for the Prevention of Conflicts of Interest, towards a novel deontology of public life, sent to the President of the Republic on 26 January 2011, France, 2011, page 91. See: www.conflits-interets.fr

111 Of particular note in this regard is the creation of the Ethics Committee of Elected Officials in Paris in October 2014.

112 Report by the Commission on Renewal and Ethics in Public Life, France, 2012, page 89. See http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/124000596.pdf

in 1988). The Authority, subject to the control of Parliament and the Court of Auditors, checks the declarations of 10,000 senior officials [113] and issues a decision on the compatibility of independent exercise of a professional activity or a remunerated activity in the public sector either during the three years after Government office or local executive functions (*pantouflage,* which is covered in the French Criminal Code). It also has advisory functions on ethical issues raised by elected representatives regarding the exercise of their duties, issues recommendations on matters relating to conflicts of interest and presents an annual report to Parliament and the President of the Republic.

The OECD noted in 2012, in a survey of more than 30 countries, that 77% of the countries taking part in the survey had a central body responsible for developing policies on conflicts of interest. In the same vein,[114] in 2015 the Anti-Fraud Office issued a questionnaire to members of European Partners Against Corruption (EPAC), which requested information about the control bodies with responsibilities in the area of conflicts of interest.[115] The agencies who have responsibilities in this area are the Federal Bureau of Anti-Corruption of the Republic of Austria; the Commission for Prevention and Ascertainment of Conflicts of Interest of the Republic of Bulgaria; the Commission for Conflicts of Interest of the Republic of Croatia; the National Committee on Incompatibility of Functions in the Slovak Republic; the Anti-Corruption Committee of the Republic of Estonia; the Parliamentary Ombudsman of the Republic of Finland; the High Authority for Transparency in Public Life of the Republic of France; the Guarantor Authority for Competition and the Market in the Republic of Italy; the Anti-corruption Agency in the Republic of Serbia, and the National Integrity Agency of Romania. We should add to this list the US Office of Government Ethics, who also responded to the questionnaire.

> Austria, Finland, France and Italy are a few of the countries provided with control bodies for conflicts of interest.

In its report of 25 June 2014, the Open-Ended Intergovernmental Working Group on the Prevention of Corruption of the UN Convention [116] set out the various states that had extended or were considering extending the mandate of corruption prevention agencies, introducing functions of investigation and additional control. In this report, in connection with the resources that supervisory bodies must have in order to effectively comply with the functions assigned, of particular note is the Commission for the Prevention of the Corruption in Slovenia. The adoption in 2010 of the Law on integrity and prevention in Slovenia formally expanded its investigation powers. However, the new powers were

113 Members of the Government and Parliament, local elected representatives, staff of the President of the Republic, presidents of assemblies and Ministers, members of the independent administrative authorities, officials appointed by the Council of Ministers, leaders of public bodies and French representatives in the European Parliament. Also, the law provides that the High Authority may request the declarations of spouses or registered partners of the individuals required to declare.

114 Page 28 of the OECD report (2014) «Financing Democracy. Framework for supporting better public policies and averting policy capture». See: http://www.oecd.org/gov/ethics/financing-democracy-framework-document.pdf

115 The details of the information obtained from this questionnaire is contained in the annexes to this report.

116 http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2014-September-8-10/V1404321s.pdf

not supported by the necessary human and budgetary resources. The budget was only increased by 44,000 euros and just one additional public official joined the workforce, in charge of managing the new online system of declarations of interest of 10,000 public officials. An control body without adequate resources cannot effectively carry out the mission entrusted to them.

Benchmark practices in controlling declarations of interests

In 2011, the OECD published the report *Asset declarations for public officials, a tool to prevent corruption* concerning the control of declarations of interests by those individuals required to submit them, which indicated the existence of different models of control and checking of declarations: random checks, checks based on a risk analysis of the functions and responsibilities of positions, checks based on risks identified in the information included in declarations or checks resulting from an alert or complaint regarding alleged breaches of the rules on conflicts of interest or due to an unexplained lifestyle of an individual in public office. [117]

In the case of local elected representatives, Transparency International recommended, in 2014, that an independent control body check the declarations and they are published promptly and in an easily accessible form. [118]

Although it is difficult to determine which model of control of declarations of interests is the most effective, the Anti-Fraud Office considers that the functions of prevention, surveillance and ethical advice on conflicts of interest should be centralised in a specialised body. In relation to the control of the declarations of interest, this body should make checks when called for in cases of a justified complaint and, randomly, a percentage or absolute number of declarations should be checked to create the expectation in the individuals concerned that their statement may be checked at any time.

5.9.4. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

The bodies in charge of the management or leadership of the different services or units must, under their responsibility, prevent or correct the situations of possible conflicts of interest which their personnel may face. This duty, which is already established in regulation,[119] is based on the organisational and functional proximity that puts the directors of the units in an ideal position for the timely detection of possible situations of conflict for their personnel. Thus, the awareness-raising, involvement and leadership of these directors are essential in dealing with conflicts of interest.

The information contained in the declarations of interests must be checked: always for those positions that require checking based on the risk analysis; when called for in cases of

117 *Op. cit.* OECD, 2011, page 72.

118 http://www.transparency.org/files/content/corruptionqas/Local_integrity_allowances_interest_and_asset_declaration_and_revolving_door_2014.pdf

119 Art. 24.1 of Law 21/1987, of 26 November, on incompatibility of Catalan Government staff.

a justified allegation; and randomly for the rest. A percentage or absolute number of declarations should be checked to create the expectation in the individuals concerned that their statement may be checked at any time.

The existing control bodies must be strengthened, giving them greater autonomy, specialised material and human resources, and giving professional status to their officials or directors, in order to guarantee the independence and efficiency of the functions assigned regarding conflicts of interest.

The control bodies must establish partnership agreements with institutions that have relevant information for the detection of potential conflicts of interest. In this regard, co-operation with the Tax Office, the Social Security authorities and the public registers is essential for this task.

An assessment should be made of the opportunity to delegate the functions of prevention, surveillance, monitoring, evaluation and ethical advice on conflicts of interest within the Catalan public sector to a specialised control authority. The distancing that is characteristic of external control guarantees an independent and homogenous response to non-compliance on issues of conflicts of interest. Moreover, the parliamentary affiliation of the authority would reinforce this independence and would legitimate the accountability of all the public sector bodies or directors in Catalonia. Finally, the lack of social control of the declarations of interests found in the survey [120] is an additional argument in favour of the delegation of this control to a specialised independent body.

5.10. Internal reporting channels and whistleblower protection

5.10.1. What is the tool for?

Internal channels within public institutions facilitate the reporting of acts or conduct that could entail non-compliance with the preventive tools for managing conflicts of interest of public servants. These channels, also referred to as whistleblowing channels, are aimed at providing «a safe alternative to silence» [121] for both public servants and for citizens who, in good faith, wish to disclose potential conflict of interest situations or suspected acts of corruption.

The *ex officio* action of existing (internal or external) control bodies is not always enough to become aware of these situations, especially in the more serious cases. To be cautious and pragmatic, there is a need to recognise that, sometimes, we depend on knowledge which is only held by certain insiders of the events that determine the conflict of interest.

Unlike the existing mechanisms of communication or complaints directed at the competent bodies, the internal channels of complaint also offer a guarantee of confidentiality and protection for the individual disclosing the information and encourage the disclosure of situations that would otherwise remain hidden, often due to fear of reprisals. These

120 See the section on the results of the survey on declarations of interests.

121 This terminology is included in the report published by Transparency International «Alternative to silence: whistleblower protection in 10 European countries», 15 November 2009.

complaints may be justified allegations and trigger the mechanisms for protection and investigation of the information disclosed.

> Public institutions should regard whistleblowing as an act of loyalty: it gives them the opportunity to find out irregularities and remedy them.

At any event, the action of whistleblowers should not be regarded by public institutions as an act of disloyalty towards them. On the contrary, it is loyal behaviour that gives them the opportunity to find out the shortcomings of their internal operation and act accordingly to remedy them. In this sense, the better established the channels of complaint are, and the more guarantees of protection that are offered, the less chance there will be that whistleblowers in good faith report the information to the media [122] or the general public. If this happens, public institutions will have missed the opportunity to manage and correct the irregularities mentioned, to the detriment of public confidence and other concurrent legitimate rights and interests.

5.10.2. Current regulatory treatment

There is no provision made in the law applicable to the Catalan public sector for regulating the internal channels of complaint nor whistleblower protection, except for the reference to be found in the regulations of the Anti-Fraud Office of Catalonia, which in Article 25 of the Rules for Action and Internal Regulations establishes a system of protection of the individual reporting in good faith.

While it is not regulatory, regarding the Catalan Government senior officials, the CCSO provides for a computer mailbox with guaranteed confidentiality, in order for complaints to be presented to the Public Ethics Advisory Committee.

The Code of Principles and Conduct recommended in public procurement approved by the Government Agreement of 1 July 2014, contains a mandate for the bodies responsible for procurement of the Catalan Government Administration to establish systems and channels for reporting breaches in this particular area, and even provides for the filing of anonymous complaints.

The gap in regulation is covered, only in part, by other generic channels for communication, complaints, suggestions or accusations which public administrations have traditionally had, also for reporting irregularities in the field of conflicts of interest. In this regard, recently, the State Law 19/2013, of 9 December, on transparency, public access to information and good governance, includes among the principles applicable to the senior officials, the duty to report to the competent bodies any irregular action of which they have knowledge (Art. 26.2 b) 3rd).

Recently, there have also been initiatives at the local level. Barcelona Council have proposed regulation in which it is planned to set up a communication channel in the form of an ethics mailbox.

122 The European Court of Human Rights, in its rulings Guja against Moldàvia (2008) and Bucur and Toma against Romania (2013), among others, considered unlawful the deprivation of liberty of public servants who disclosed confidential information about certain irregularities to the media, since this information was communicated in good faith, highlighted damage caused to the public institution to which they belonged and was genuine and of public interest.

5.10.3. Benchmark practices

According to the OECD 2015 report *Government at Glance*, the importance of developing the necessary laws to protect whistleblowers can be seen by the increase in OECD countries which have developed a legal framework aimed at protecting employees who disclose wrongdoing in the workplace. Overall, 88% of OECD countries surveyed have a law which protects whistleblowers. Some countries, such as Australia, Belgium, South Korea and the USA have established incentive schemes for whistleblowers (either through financial rewards or follow up mechanisms).

In France, Article 25 of Law no. 2013-907 of 11 October 2013 regarding transparency in public life states:

> *No one can be removed from a selection process, or access to an internship or a period of professional training, nor be sanctioned, dismissed or subject to a discriminatory measure, directly or indirectly, particularly with regard to remuneration, treatment, training, promotion, reassignment of duties, transfer, change or renewal of contract, for having reported in good faith their company, to the authority responsible for ethics internally, to an appropriate anti-corruption association* [...] *or the judicial or administrative authorities, the facts relating to a conflict of interest* [...] *regarding any persons mentioned in Articles 4 and 11, of which they have become aware in the exercise of their functions. Any resulting dismissal* [...] *shall be null and void. In the event of litigation* [...] *from the time when the person establishes the facts to support their reporting in good faith all the facts relating to a conflict of interest, it shall be the responsibility of the accused, in view of the facts, to prove that their decision is justified by objective factors unrelated to the statement or testimony of the person concerned. The judge may grant any interim measures they deem necessary.*

5.10.4. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

A legal obligation must be established for all public institutions to have a secure reporting *channel* that guarantees the secrecy of the whistleblower's identity, if this has been provided. The existence and operation of these channels should encourage disclosure of irregular situations which, otherwise, would continue to be hidden, and enable the institution to manage and remedy those irregularities.

Protection mechanisms must be legally required to ensure «a safe alternative to silence» for individuals who, in good faith, disclose wrongdoing in the management of conflict of interest (including risks of corruption). These would be aimed at encouraging internal reporting and avoiding reprisals on individuals who co-operate in the detection and pursuit of wrongdoing. [123] In this regard, it is vital to ensure that the whistleblower cannot be subject, directly or indirectly, to acts of intimidation or reprisals, including being unjustifiably and illegally subject to dismissal, disqualification or impeachment, to a postponement of their career advancement, suspension, transfer, reassignment or removal of their responsibilities, negative records, qualifications or reports, loss of benefits they could be entitled

123 This recommendation was included in Resolution 1150/X of the Catalan Parliament, approving the Opinion of the Commission of Investigation of Fraud and Tax Evasion and Political Corruption Practices (CIFEF), published in the BOPC on 29 July 2015.

to or any form of punishment, sanction or discrimination as a result of having filed the complaint or communication.

5.11. Penalty and restitution system

5.11.1. What is the tool for?

This is the last of the tools that seek to ensure the effectiveness of the tools for detecting and managing conflicts of interest. The breach of any of the obligations arising from any of the preventive tools mentioned must have an administrative and even a penal response, understood as a contingent action to minimise the severity of the consequences of the breach, notwithstanding the inherent punitive value of a sanction.

The reaction, therefore, makes a decisive contribution to the effectiveness of the system, because it reaffirms the law from the point of view of the subject and of the public at large, while serving as a deterrent to future transgressions.

5.11.2. Current regulatory treatment

Senior officials

Catalan Government senior officials

In accordance with Article 83.2 of Law 19/2014, of 29th December, on transparency, access to public information and good governance,[124] non-compliance with the regulation on incompatibility or declarations required to be made by Catalan Government senior officials may be sanctioned in accordance with the specific rules established by legislation regarding the incompatibilities of Senior Officials, i.e. in accordance with the provisions of Articles 17 and following of the Law 13/2005, of 27 December, of the regulation on incompatibility of Catalan Government senior officials.

Minor infringements are defined as the non-declaration of activities or assets or interests in the pertinent registers and within the legal time-frames if it is modified within 15 days of the administrative requirement issued for this purpose.

These serious infringements are provided for:

— Non-compliance with the rules on incompatibilities established by this law.

— The omission of significant data and documents to be submitted in compliance with this law.

— The non-declaration of activities or assets or interests in the pertinent registers and within the legal time-frames if it is not modified within 15 days of the administrative requirement issued for this purpose.

— The committing of two minor offences within a one-year period.

— The breach of the duty of abstention in the situations established by the regulation governing the common administrative procedure.

124 Law 19/2013, of 9 December, makes a similar reference.

In terms of sanctions, a minor infringement may be punished with a warning, while serious infringements are sanctioned with immediate dismissal of the non-compliant senior officer by the competent body and publication in the Official Gazette of the Catalan Government of the declaration of the breach of this law.

Dismissal for a serious offence entails, as a legal consequence, the ban on appointment to any high-ranking office for a period of up to four years. In weighing up this measure, consideration should be given to: (i) whether any damage has been caused to the public interest, (ii) how the conduct has affected citizens and, if applicable, (iii) the misappropriation of funds due to the exercise of incompatible activities. The legal consequences applicable to the Catalan Government President and Ministers are governed by specific legislation.

In addition to the consequences set out up to this point, other liabilities are provided for:

— If proof is found of other liability, the Catalan Government Legal Counsel shall be petitioned to take the corresponding actions and should initiate the required actions to review the acts and contracts in which the senior official has improperly intervened to demand the appropriate compensation for damages in accordance with applicable law.

— If the offence constitutes a criminal offence, the Administration must inform the Public Prosecutor, who must be provided with all their existing documentation, and must abstain from the procedure until the judicial authority issue a resolution ending the criminal proceedings, notwithstanding the dismissal or suspension of the senior official.

— Any misappropriated funds must be returned.

Minor infringements shall be time-barred after six months; and serious infringements after two years. Minor penalties lapse after one year; and serious penalties after two years.

Article 21 of Law 13/2005 states that the procedure for sanctioning should be established in accordance with the sanctioning principles in force for that area and with the provisions of this law. To this end, the first final provision of Law No 13/2005 authorises the Government to, within three months from the entry into force of this law, enact the necessary regulation to deploy it. However, at the date of this report, the Catalan Government has not approved any decree establishing the sanctioning procedure for its senior officials.

Other senior officials (local authorities and other public bodies)

Article 77.3 e) of Law 19/2014 defines the violation of ethical principles and rules of conduct referred to in Article 55.2 of the same Act as a very serious infringement of good governance. These principles include:

— Impartiality in decision making, ensuring the necessary conditions for independent action, not influenced by conflicts of interest.

— Exercise of the office with exclusive commitment, in accordance with the provisions of the legislation on incompatibilities.

— Exercise of the office for the sole benefit of public interest, not carrying out any activity that might enter into conflict with this.

In turn, Article 78.3 establishes the following serious infringements regarding good governance:

— Adopting decisions or intervening in matters in which they have the obligation to refrain or if the legal circumstances of conflict of interest are present.

— Failing to comply with the principles of good conduct established by the laws and codes of conduct, provided that they do not constitute a very serious infringement.

In addition, Article 79.1 considers as minor offences the acts and omissions which constitute neglect or negligence of the obligations established by this law.

The sanctions applicable are the following:

— For very serious infringements:

1. Removal from office.
2. A fine of between 6,001 and 12,000 euros.
3. The loss of the compensatory benefit to which they are entitled upon leaving office
4. Disqualification from serving in a senior position for a period of between one and five years.

— For serious infringements:

1. The suspension from their office for a period of between three to six months.
2. A fine of between 600 and 6,000 euros.
3. The loss or reduction of up to 50% of the compensatory benefit to which they are entitled upon leaving office.
4. Disqualification from serving in a senior position for a maximum period of one year.

— For minor infringements:

1. A warning.
2. Public declaration of the non-compliance (publicised).

The sanctions of removal from office, suspension or disqualification are not applicable to elected senior officials.

In terms of the time limitation, very serious infringements shall become time-barred after three years; serious infringements, after two years; and minor infringements, after one year. Sanctions for very serious infringements shall become time-barred after three years; for serious infringements, after two years and for minor infringements, after one year.

Catalan Parliament MPs

In fulfilment of the reference set out in Art. 15.2 RPC, the CCMCP in its Chapter V (tools guaranteeing the Code of conduct) provides for a genuine sanctioning system. The Bureau has the responsiblity for initiation and resolution, while the MPs Statute Committee have the investigatory role. Infringements are classified as very serious, serious and minor and can range from a public reprimand to a fine of €600 to 2,000. For very serious infringements it provides for the possibility of the Catalan Parliament Bureau deciding upon the temprorary suspension of parliamentary duties "until the MP resolves the situation of non-compliance".

Both the reports of the MPs Statute Committee and the rulings of the Bureau must be published in the transparency website.

Catalan Parliament personnel

The disciplinary offences are the same as those generally established for public positions in the Catalan Government.

The following sanctions may be imposed: a) For minor infringements, a written warning or loss of one to five days' pay; b) For serious infringements, the loss of six to twenty days' pay or suspension from duties for up to six months; c) For very serious infringements, the suspension of duties for six months to two years or the definitive separation from service.

Very serious infringements become time-barred after six years; serious infringements, after two years; and minor infringements, after one month. The sanctions become time-barred in the time-frames established in accordance with the general regulation for public servants.

Criminal liability of public servants

The current Penal Code provides two rules that are directly related to conflicts of interest:

> *Article 422. An authority or public official who, for their own benefit or that of a third person accepts, directly or through an intermediary, any donation or gift offered to them due to their position or function, is liable to the term of detention of six months to one year and suspension from work and public office for one to three years.*

This definition of criminal offence provides for what is known as improper passive bribery in the sense of non-corrupting. As the Supreme Court has declared,[125] in general the legal right protected by the offense of bribery is to preserve the appearance that the exercise of the function is impartial, neutral and subject to the law.

As a requirement for the application of this type of criminal offence, case law requires a causal connection between the handing over of the donation or gift and the public function of the authority or official, so that the only plausible explanation for the donation or gift is the status of the subject.

> *Article 441. The authority or public officer who, except in the cases admitted by the laws or regulations, carries out, by themselves or through an intermediary, a professional activity or gives permanent or incidental advice, under the control or at the service of private bodies or individuals, on an issue where they were or would be involved by reason of their position, or which is processed, resolved or on which is reported to the office or management centre to which they are assigned or to which they report, are liable to a fine of six to twelve months and suspension from work or public office for a term of two to five years.*

The Supreme Court[126] notes that the offence defined in Article 441 CP is a conduct crime and describes behaviour in which non-compliance with the public official's duties of abstention and incompatibility is penalised, as a required for the duty of impartiality that must be required from the Administration and, therefore, the public officials who act on its behalf.

For the offence to be committed, therefore, it not necessary for there to be an real impact on public functions, the risk of this happening is sufficient, as, if it were really to happen, this would then be a crime of prevarication or some other crime committed by public of-

125 STS no. 478/2010, of 17 May.

126 STS no. 765/2014, of 4 November.

ficials. In other words, as stated by the STS of 23.9.2002: «This offence [...] does not require the perpetrator to have caused any damage other than legal damage, i.e. consisting of the breach of the duty of abstention, since this is a criminal offence which protects the transparency of the exercise of the function and the image of the Administration.»

The offence is committed as a result of the carrying out of the activity of professional advice or action by the public servant. A specific danger does not have to exist, as this is not included by the legislator in the defined offence as a regulatory element, nor even an abstract danger, since the *ratio essendi* of criminalisation of the behaviour is not the risk that the public interest is seen to be sacrificed to the private but directly the breach of the obligations of incompatibility, abstention and exclusivity.

The behaviour, therefore, ceases to be criminal if it is carried out in cases permitted by the law or regulations, i.e. if a there is an express rule that authorises or allows the public official to provide that professional or advisory activity to private organisations or individuals.

This is an offence referred to as *breach of duty*, one of those that especially highlight the ethical dimension of the regulatory system of criminal justice insofar as they involve the criminalisation of a duty of an extrapenal nature by a party occupying a certain position as guarantor regarding the inviolability of legal rights.[127]

The rule protects, ultimately, the status and objective impartiality of the Administration, and in as far as it is an offence of breach of duty, it damages the obligation of abstention and exclusivity, and the principles of legality and impartiality of Article 103 of the Constitution.

Table 19. Regulation governing the penalty and restitution system

<table>
<tr><th colspan="2">Nature</th><th>Senior officials</th><th>Elected representatives</th><th>Public administration personnel</th><th>Other groups</th></tr>
<tr><td rowspan="2">Sanctioning</td><td>Disciplinary</td><td>Art. 78.3 b) & g), 79.1 & 81 Law 19/2014
Non-compliance of incompatibilities and declarations of Catalan Government senior officials:
Art. 17 a 22 Law 13/2005
Art. 83.2 Law 19/2014 (reference)</td><td>Catalan Parliament MPs
Art. 15.2 RPC & Art. 26-29 CCMCP

Local representatives
Art. 78.3 b) & g), 79.1 & 81 Law 19/2014</td><td>Art. 93 to 98 EBEP & Art. 113 to 121 DL 1/1997 (by reference to Art. 23 Law 21/1987)

Art. 78 b) & g), 79.1 & 82 (reference to disciplinary regulation) Law 19/2014</td><td>Parliamentary personnel
Art. 103 - 107 ERGI</td></tr>
<tr><td>Penal</td><td colspan="4">Performance of professional activity or advising: Art. 41 CP
Acceptance of gifts: Art. 422 CP</td></tr>
<tr><td colspan="2">Restitution</td><td colspan="4">Restitution action: Art. 145.2 de la Law 30/1992[128]</td></tr>
</table>

127 STS no. 73/2001, of 19 January.

128 Art. 145.2 of Law 30/1992 of 26 November on the legal regime of public administrations and the common administrative procedure. «The Administration concerned, when it has compensated those suffering damages, should require de *officio*, the authorities and other staff working for them, liability due to deceit, or gross fault or negligence, with an enquiry carried out in the procedure as established by law. For the requirement of liability, the following criteria, among others, shall be appraised: the damage produced, whether or not it was intentional, professional responsibility of public administration personnel and the relationship to the damage produced.»

5.11.3. Results of the survey

To check the enforcement of the penalty system for infringement of the rules of incompatibility of the various Catalan authorities, we included two questions in the survey regarding the number of disciplinary files processed and the number of penalties imposed.

The table below sets out the results of these two questions:

Table 20. Number of disciplinary files and penalties imposed

Public subsector	Type of relationship	No. of disciplinary files	Penalties imposed
Catalan Government (2012-2015)	Senior officials	0	0
	Personnel	23	17
Local authorities (2011-2015)	Elected representatives	0	0
	Personnel	26	10
Universities (2011-2015)	Members of Social Council	0	0
	Teaching and research & admin and service personnel (PAS & PDI)	9	6

As you can see, in each of the authorities surveyed, the number of disciplinary proceedings and sanctions for non-compliance with regulation on incompatibilities is negligible in relation to the number of public servants employed. However, taking into account the different experiences of the Anti-Fraud Office and the Public Audit Office concerning breaches of the regulation on incompatibility, the authorities' response to these violations is inadequate. It should be noted, in particular, that no sanctions have been imposed on any high-ranking civil servant or elected officer in the period covered.

> The number of disciplinary files for incompatibility in the authorities surveyed is negligible compared with the number of public employees each have.

5.11.4. Benchmark practices

The legal systems of the neighbouring countries have responded to breaches of the rules on conflicts of interest by imposing administrative and even specific criminal penalties.

In the UK, criminal sanctions are applied when members of the Scottish Parliament and the Welsh and Northern Ireland Assemblies do not submit declarations. In Italy, members of the Government may be convicted if they do not submit declarations of interest or if they present false information, in accordance with the requirements of the Competition Authority. In Germany there is an offence related to conflicts of interest called *acceptance of an advantage*, which includes all kinds of benefits (monetary, invitations to exclusive events, etc.).[129] In Latvia, infringements of the rules on conflicts of interest may be sanctioned with penalties of up to five years in prison and in Poland, up to three years.

129 http://www.OCDE.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=gov/ sigma(2006)1/rev1

In France, there are different definitions of criminal offence to cover the breaches described. When individuals who are obliged to submit declarations do not do so, the High Authority may require them to be sent within one month from the notice.[130] If the High Authority requirement is not complied with, the individual may be sentenced to a year in prison and a € 15,000 fine. In any case, when there is a breach, the High Authority publishes a special report in the Official Journal.

If those required to declare do not submit all the declarations, or they omit a substantial part of their assets or interests or reflect their assets untruthfully, a penalty of three years in prison and a € 45,000 fine is applicable, and possibly the limitation of their civil rights and application of a penalty of ten years ineligibility.[131]

5.11.5. Recommendations

In accordance with our findings and the benchmark practices described above, the Anti-Fraud Office makes the following recommendations.

The authorities' response to any breach of the rules governing conflicts of interest must be guaranteed, through the provision of resources and the specialised training required for this purpose.

The competent bodies must heighten their vigilance in the exercise of their sanctioning powers in order to avoid infringements becoming statute-barred or proceedings expiring.

The possibility should be assessed of delegating the power to impose sanctions for breaches of the rules governing conflicts of interest to a control authority that specialises in this area, given the inadequate response of the authorities in the exercise of this power.

The sanctioning procedure for senior officials of the Catalan Government needs to be developed without delay.

The publication of the most serious breaches of the regulations governing conflicts of interest should be a regulatory requirement.[132]

Special penal offences must be defined for breaches of the rules governing conflicts of interest, as in other countries.

130 This requirement includes reservations regarding MPs.

131 Article 26 of Law no. 2013-907, of 11 October 2013, on transparency in public life.

132 Meseguer Yebra highlights, among others, the need to make public, in all cases, the penalties imposed for the breach of the regulation on incompatibilities, from the point of view that the current law does not establish this measure generally or completely, and the publicity of non-compliance is conceived more as a formal requirement, as a punitive measure in itself, while he stresses the need for transparency in the public sector, with all the effects that this requirement entails.

6. Final considerations

The findings set out in this report highlight many weaknesses in the current system for managing conflicts of interest, with numerous and repeated breaches of the current regulation. It has been established that institutions and their representatives view the tools for managing conflicts of interest simply as formal obligations to be fulfilled, rather than real tools for guaranteeing the impartiality and objectivity of public servants. Nor is there an overall vision of the set of tools available to the public authorities to deal with conflicts of interest, and little awareness of the purpose of each of these tools.

The Anti-Fraud Office of Catalonia believes there is an *urgent need to carry out a comprehensive review of the system for managing conflicts of interest*, taking as a starting point a risk analysis for each group of public servants in the bodies and organisations which make up the Catalan public sector. There have been a number of international experiences in this regard in neighbouring countries, some of which are of sufficient interest to be highlighted in this report as a benchmark or guide.

The Anti-Fraud Office is submitting this report to Parliament, at the same time as it is addressed to the whole public sector in Catalonia, regardless of the regulatory or executive nature of the measures required to implement it, and the allocation of powers to enforce it. This is because the review of the system for the management of conflicts of interest not only requires the reform of the policy framework, but also the commitment of public institutions to the everyday management of conflicts of interest. The institutions are not only expected to facilitate the proper implementation of all the preventive tools presented in this report, but also give impetus to the fundamental task of raising awareness among and training public servants, who are ultimately responsible for the management of their own conflicts of interest so that they do not jeopardise the integrity of the institutions.

This report is only a starting point in the study of conflicts of interest in Catalonia, and in no way exhausts the need for comprehensive research on this subject. It aims to open a debate on the current weaknesses and options for improvement to ensure impartiality and objectivity in public decisions and consequently public confidence in the public sector. The Anti-Fraud Office is committed to monitoring these discussions and actively co-operating to attain the best possible system for the management of conflicts of interest, which any democratic society deserves.

7. Annexes

7.1. Table comparing the European control bodies (EPAC network)

Country	Name of control body	Type of control (internal or external)	Institutional placement	Appointment of the managers of the body	Area of competence (central, federal) and public servants monitored
US[133]	United States Office of Government Ethics	External control body	Reports to the executive power	Appointed by the President of the United States (five-year term), on the recommendation and with the consent of the Senate	Federal
Hungary		Internal control body			Central and local
Netherlands	There is no control body for conflicts of interest. The *Rijksrecherche* (Federal Investigation Office) may initiate an investigation under the supervision of the Prosecutor-General and the National Office for Promoting Ethics and Integrity in the Public Sector, which has a facilitating, training and support role		Prosecutor-General	The head of the Prosecutor-General is appointed by Royal Decree	Federal
Republic of Austria	Internal audit and Federal Bureau of Anti-Corruption (BAK)	Internal and external control body for criminal offences	Ministerial departments and Federal Bureau of Anti-Corruption, part of the Interior Ministry. There are parliamentary committees for incompatibility	The director of the BAK is appointed by the Interior Minister, for a five-year term, following consultation with the Presidents of the Constitutional Court, the Administrative Court and the Supreme Court.	Federal and local
Republic of Bulgaria	Commission for Prevention and Ascertainment of Conflict of Interest	External control body	Reports to the executive power	Three members are appointed by Parliament (including the President), another by the Chairperson of the Commission and another by the Prime Minister	Central

133 While the US is not part of the EPAC network (European Partners Against Corruption), we considered it of interest to include the US Office of Government Ethics in this table.

Country	Name of control body	Type of control (internal or external)	Institutional placement	Appointment of the managers of the body	Area of competence (central, federal) and public servants monitored
Republic of Croatia	Commission for conflict of interests	External control body	Reports to the executive power	Appointed by Parliament based on a list of candidates presented by Committee for Elections, Appointments and Administrative Affairs, after a call for applications to form part of the Commission is published in the Official Journal	Central
Republic of Slovakia	Committee of the National Council of the Slovak Republic on Incompatibility of Functions	Internal control body	Reports to Parliament	The process for appointment of the Chairperson of the Committee of the National Council is established in Law no. 350/1996 on the National Council of the Slovak Republic	The Committee is a centralised body that analyses the responsibilities of public officials and advises on their incompatibility with other functions and activities
Republic of Estonia	Anti-corruption Committee (Riigikogu)	Internal and external control body	Reports to Parliament	The Chairperson is appointed through a vote by MPs for one-year renewable term	Centralised body of control of senior officials, members of the Government and judiciary, agency directors, members of local government, directors of foundations
Federal Republic of Germany	There is no control body for conflicts of interest	Internal control bodies		The President of Bundestag is elected by Parliament for the duration of the term of office	There are various sets of regulation and institutions at a federal level (*Bund*) and state level (*länders*), and also for different types of public servant (MPs, Government politicians, judges, public officials, etc.). Regarding the national Parliament (Bundestag alemany), the President of Bundestag (*speaker*) is responsible for collecting the declarations of interests of the MPs, publishing the content, advising members on their obligations in accordance with the Code and initiating investigations if the members do not fulfil their duties. The Parliaments of the 16 *länders* have adopted similar regulations for their MPs

Country	Name of control body	Type of control (internal or external)	Institutional placement	Appointment of the managers of the body	Area of competence (central, federal) and public servants monitored
Republic of Finland	The Parliamentary Ombudsman del Parliament and the Government Minister of Justice	Internal and external control body	Reports to Parliament and to the executive power	The Parliamentary Ombudsman is appointed by Parliament for a four-year period and the Minister of Justice is appointed by the President of the Government for an indefinite period	Central and over Senior officials, elected representatives and public officials
Republic of France	High Authority for Transparency in Public Life (HATVP)	External control body	Reports to the executive power	The members of the High Authority are appointed for a six-year, non-renewable period. The Chairperson is appointed by decree of the President of the Republic after the Legislative Committee of the National Assembly and Senate has admitted the applicant's candidature for a six-year, non-renewable period	Control of members of Government and MPs; local elected representatives (senior officials); associates of the President of the Republic, Chairpersons and members of assemblies; members of independent administrative authorities; senior officials appointed by the Council of Ministers; leaders of public bodies
Republic of Italy	Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM)	External control body	Accounts to Parliament annually and audited by the Italian Court of Auditors	Headed up by a Chairperson and two Commissioners who form the board. They are appointed by the Speakers of both Houses of the Italian Parliament for a non-renewable period of seven years	Control of public officials and Government politicians
Republic of Serbia	Serbia Anti-Corruption Agency	External control body	Reports to the executive power, and accounts to the National Assembly of Serbia	The Director of the Agency is appointed by the board, which is formed by nine members elected by the National Assembly. The appointment is for a five-year period renewable once	Centralised area of action. Control of declarations of assets and interests of public officials, elected representatives, public companies, institutions and other organisations

Country	Name of control body	Type of control (internal or external)	Institutional placement	Appointment of the managers of the body	Area of competence (central, federal) and public servants monitored
Czech Republic	There is no centralised control body for conflicts of interest	Internal control body	The members of local authorities are controlled by local authorities; MPs and senators, by an «immunities» committee for both Chambers; Government politicians are supervised by their respective ministries	There is no sole control body	Decentralised area of action. The subjective scope includes senators, MPs, Government politicians and other senior officials, mayors and members of the local authorities
Romania	National Integrity Agency	External control body	Independent administrative body with separate legal personality, reports to the executive power	The agency is headed by a Chairperson, assisted by a Vice-Chairperson, both appointed by the Senate following a competitive selection carried out by the National Integrity Agency. Both have a non-renewable term of four years	Centralised area of action. Control of senior officials; Presidents of the Chambers of Parliament (MPs and senators); Romanian Members of the European Parliament and members of European Union committees in representation of Romania; members of the High Council of Magistrates, judges, public prosecutors, substitute judges and judicial assistants; support staff in the courts and to the Public Prosecutor; Constitutional Court judges; directors of agencies; diplomatic personnel; boards of companies owned by national public capital; candidates for President of Romania, to enter Parliament, the Government or to become Prime Minister

7.2. Field study on conflicts of interest

7.2.1. Introduction

As part of the work in developing this report, the Anti-Fraud Office carried out a field study to establish a diagnosis of the real extent of the problem in Catalonia. The results were included in this report on the Management of conflicts of interest in the public sector of Catalonia, which the Anti-Fraud Office will present to the Catalan Parliament, in accordance with the ruling of the Commission of Inquiry into Fraud and Tax Evasion and Practices of Political Corruption, approved on 21 July 2015.

7.2.2. Methodology

This study included the 947 municipalities of Catalonia, the seven public universities plus the Open University of Catalonia (UOC) and the Catalan Government Administration (Administration and Public Service Secretariat).

We designed a questionnaire for each of these three areas, and they were processed online through the website of the Anti-Fraud Office of Catalonia (www.antifrau.cat) between 6 October 2015 and 9 of December 2015.

For sending information on the study with a link to the online form, at the local level, we had the co-operation of the Catalan Association of Municipalities, Federation of Municipalities of Catalonia and the professional body of Secretaries, Comptrollers and Treasurers.

The response to the survey was voluntary, and the Anti-Fraud Office undertook to ensure anonymity and to present the results in an aggregated and statistical form.

The periods of reference for each group were:

— Municipalities: 2011-2015 term of office

— Universities: 2011-2015

— Catalan Government Administration: 2012-2015 term of office

— In terms of the information requested, in all three cases, the related or attached institutions were included.

— The level of response obtained was of 34.74% at the local level, 87.5% for universities, and 100% in the area of the Catalan Government (the Administration and Public Service Secretariat compiled the information). The breakdown of results is detailed below.

Table 21. Response to the survey on conflicts of interest in the public sector of Catalonia by type of authority

		Answered the questionnaire		Did not answer the questionnaire		Total
Local authorities	By municipality	329	34.74%	618	65.26%	947
	By population represented	3,896,371	51.82%	3,622,532	48.18%	7,518,903[134]
Catalan Government Administration		1	100%[135]	0	0	1
Universities		7	87.5%	1	12.5%	8

134 Source: Municat, data relating to local authorities (updated on 31/12/2015). Excluding the municipality of Medinyà

135 The Administration and Public Service Secretariat compiled all the information relating to the Catalan Government.

Table 22. Town and city councils' response to the survey: number of municipalities and population represented

Census range	No			Yes			Total municipalities	Census	Census percentage
	No. municipalities	Census	Census percentage	No. municipalities	Census	Census percentage			
Over 50.000	4	1,951,351	25.95%	19	2,093,886	27.85%	23	4,045,237	53.80%
10.001-50.000	43	791,468	10.53%	54	1,268,534	16.87%	97	2,060,002	27.40%
5.001-10.000	50	366,152	4.87%	37	252,317	3.36%	87	618,469	8.23%
2.001-5.000	88	266,545	3.54%	56	180,004	2.39%	144	446,549	5.94%
501- 2.000	186	185,134	2.46%	80	81,860	1.09%	266	266,994	3.55%
Up to 500	247	61,882	0.82%	83	19,770	0.26%	330	81,652	1.09%
Overall total	618	3,622,532	48.18%	329	3,896,371	51.82%	947	7,518,903	100.00%

The results of the survey were compiled in a database from which all the figures contained in the tables in the report have been taken. This database is available to the scientific community under the obligation to maintain the anonymity of the institutions answering the survey and to correctly cite the context in which the Anti-Fraud Office conducted the fieldwork.