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PREVENTING CONFLICTS OF INTEREST IN THE PRIVATE SECTOR



Guide pratique

- November 2021 -

FOREWORD



The United Nations Convention against Corruption of 31 October 2003 (the “Merida Convention”) calls on States Parties to take measures to prevent corruption involving the private sector. These measures include “[p]romoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest [...]”.¹

Through its support and audit activities, the French Anti-Corruption Agency (AFA) stresses that the top management² of private companies, public undertakings and public establishments of an industrial and commercial nature (EPICs) (referred to collectively as “organisations” in this guide) should be aware of the importance of managing pre-existing relationships (interests), regardless of whether the organisation in question is subject to the requirements of Article 17(II) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016.³ While such relationships are part and parcel of doing business, they can lead to conflicts of interest and give rise to offences that fall within the AFA’s remit.⁴

This guide therefore looks at conflicts of interest as they relate to corruption risk.⁵ It does not, for instance, deal with preventing and managing conflicts of interest in order to safeguard customers and investors, since such matters are already covered by specific provisions of European and domestic law.

In order to prevent and manage corruption risk, an organisation must identify situations that could expose it to legal, human, economic and financial harm. Risk mapping is therefore the cornerstone of any anti-corruption programme. In keeping with the AFA guidelines, this exercise should focus on risks stemming from executives’ and employees’⁶ pre-existing relationships (interests). Based on the identified risks, the organisation should then develop a procedure for managing conflicts of interest. Reference could be made to this procedure in its anti-corruption code of conduct.⁷

Potential conflicts of interest can have particularly harmful consequences, not least for organisations themselves. Yet there are various measures available for preventing and detecting risky situations and, in doing so, protecting the organisation from harm. And if a conflict of interest is found to exist, the organisation should take remedial measures that are proportio-

nate to the risk. Importantly, such measures must also give due regard to the fundamental rights of the individuals involved – including their right to privacy. This three-part practical guide is intended for organisations and their directors, executives and employees, as well as for compliance professionals. Part I looks at the issue of conflicts of interest as they relate to corruption risk, part II deals with identifying risky situations, and part III explores what measures organisations can take to prevent and manage these risks.

Like the AFA guidelines on which it is based, this guide is not binding and creates no legal obligations.

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¹ UNODC, United Nations Convention against Corruption, 31 October 2003, Article 12.

² [AFA, French Anti-Corruption Agency Guidelines, 12 January 2021, courtesy translation of the French version published in the Official Journal of the French Republic \(Journal officiel de la République française\), paras 93–95, pp. 12–13.](#)

³ [Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016 \(also known as the Sapin II Act\).](#)

⁴ [As defined in AFA, French Anti-Corruption Agency Guidelines, 12 January 2021, courtesy translation of the French version published in the Official Journal of the French Republic \(Journal officiel de la République française\), para. 2, p. 3.](#)

⁵ In the remainder of this guide, the term “corruption” is used as a generic reference to all related illicit acts as defined in the *French Anti-Corruption Agency Guidelines* of 12 January 2021 (paras 2–3). In accordance with para. 88 of the guidelines, this guide also covers some offences that could lead to or follow such offences (such as misuse of corporate assets, breach of trust, concealment and money laundering).

⁶ For the purpose of this guide, the term “employee” covers salaried employees, public officials employed in industrial and commercial public services, apprentices, trainees and temporary staff.

⁷ [AFA, French Anti-Corruption Agency Guidelines, 12 January 2021, courtesy translation of the French version published in the Official Journal of the French Republic \(Journal officiel de la République française\), para. 173, p. 23.](#)

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UNDERSTANDING CONFLICTS OF INTEREST AS THEY RELATE TO CORRUPTION RISK



1. DEFINING CONFLICTS OF INTEREST IN THE PRIVATE SECTOR

There is no definition of conflicts of interest in the private sector in statute or case law. The only legal definitions that do exist pertain to the public sector.

Article 2(1) of the Transparency in Public Life Act 2013-907 of 11 October 2013 defines a conflict of interest as “any situation of interference between a public interest and public or private interests that could influence or appear to influence the independent, impartial and objective performance of a duty”.

Similarly, according to the Organisation for Economic Co-operation and Development (OECD), a conflict of interest “involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.”⁸

In the public sector, which is where the concept has its roots, conflicts of interest are associated with the “duty of integrity” that applies to all public officials, who are expected to place the public interest above their personal interests and to perform their duties independently, impartially and objectively.⁹

Yet there is no legal definition of conflicts between private interests,¹⁰ even though conflicts of interest involving private individuals are equally likely to expose an organisation to corruption risk. For this reason, the definition should not be restricted to interests in the public sphere alone.

A personal interest exists

It would therefore be more useful to define a conflict of interest as follows: “any situation of interference between a person’s duty within an organisation and their personal interest that could influence or appear to influence the independent, impartial and objective performance of such duty on behalf of the organisation”.

⁸ OECD, *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service*, 28 May 2003, p. 4.

⁹ High Authority for Transparency in Public Life (HATVP), *Guide déontologique II*, 1 February 2021, p. 17.

¹⁰ Various bodies and organisations have proposed definitions in their publications and other materials, including the Central Service for the Prevention of Corruption (SCPC) in its *2010 Report* (p. 203), Transparency International France in *Guide pratique des conflits d'intérêts dans l'entreprise* of 5 May 2018 (p. 6), and the French Institute of Directors (IFA) in its answer to question 700.

BOX 1: EXAMPLES OF CONFLICTS OF INTEREST

- A conflict of interest arises when a hiring manager within an organisation has a personal relationship with an applicant for a vacant position (such as a family tie, in which case the hiring manager runs the risk of nepotism).
- A conflict of interest arises when a director, executive or employee of an organisation acts in a manner that results in the organisation purchasing goods or services from an outside entity in which a relative holds a position of responsibility and, as such, is able to influence the performance of the contract.

Every person has a broad and unique set of relationships, which can include friends, relatives, business associates, and fellow political party, trade union, charity or non-profit members. Likewise, the interests stemming from these relationships can be direct (involving the person in question) or indirect (involving a relative).¹¹ Time is another important factor when considering conflicts of interest, since the relationship in question can be current, may have existed in the past, or might exist at some point in the future.

BOX 2: EXAMPLES OF PAST RELATIONSHIPS

- A person cannot serve as a court-appointed administrator if, during the previous five years, they have directly or indirectly received any reward or payment from the individual or legal entity subject to the court-ordered receivership or liquidation proceedings (Article L.812-2 of the French Commercial Code).
- Auditors cannot be appointed as directors or executives of a company or entity they have audited until three years have elapsed since they last audited that company or entity (Article L.822-12 of the French Commercial Code).

There is interference between the person's duty within the organisation and their personal interest

Having personal interests does not, in itself, preclude someone from pursuing the interests of their organisation. It is only when there is interference, or perceived interference, between the two sets of interests that a conflict of interest arises, and that there is a risk of the person placing their personal interests above those of the organisation.

¹¹ The term "relatives" is defined differently across legal systems and cultures. A careful, nuanced interpretation is therefore required.

BOX 3: DEFINITIONS

→ An actual conflict of interest exists when the personal interests of an employee, executive or director interfere with those of the organisation by which they are employed or in which they are an officeholder. Importantly, a conflict of interest exists even where the conflict in question is merely apparent, since the individual in question is neither required nor expected to be able to judge situations in which they are involved with an impartial, objective and independent eye.¹²

→ A potential conflict of interest is said to exist when an employee, executive or director could find themselves, through their action (or through the action of a third party), in the situation described above because of their pre-existing relationships (interests).

Example: A potential conflict of interest exists when an executive or employee in a procurement role has a pre-existing personal relationship with the sales manager of a company that could bid for a contract awarded by their organisation. This potential conflict becomes an actual conflict at the point at which the company in question submits a bid.

The interference could influence or appear to influence the independent, impartial and objective performance of the person's duty on behalf of the organisation

The interference must be significant enough to influence or appear to influence the person tasked with upholding the organisation's interests.

In order to shield themselves against conflict-of-interest risk, organisations must widen their prevention measures beyond actual conflicts of interest to include apparent conflicts of interest, which can also harm their image and erode trust.

¹² In its *Guide déontologique II*, the HATVP states that: "in order to establish whether conflict-of-interest risk exists, it is enough for the interference to cast reasonable doubt on the individual's ability to perform their duties independently, impartially and objectively [...]. [The individual's] subjective judgement of their interests and their ability to perform their duties properly has no bearing on whether a conflict-of-interest situation is deemed to exist".

2. PREVENTING AND MANAGING CONFLICTS OF INTEREST THROUGH AN ANTI-CORRUPTION PROGRAMME

Managing conflicts of interest is not one of the measures laid down in Article 17(II) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016. Organisations are nevertheless advised to prevent conflicts of interest, since they can often lead to corruption offences.

By including conflict-of-interest prevention measures in their anti-corruption programmes, organisations can gain a clearer picture of their exposure to corruption risk and better understand the legal, economic, financial and reputational consequences for their business or activity. Conversely, organisations that fail to adequately manage conflict-of-interest risk can leave themselves open to prosecution if a criminal offence is committed. Likewise, they run the risk of losing the trust of their partners, investors and employees.

Criminal convictions for corruption offences resulting from conflicts of interest involving executives and employees

Although the existence of a conflict of interest in the private sector is not an offence in itself, this situation can sometimes lead to an offence being committed. Similarly, it may qualify as a constituent element of offences that could potentially be committed by organisations, executives and/or employees.

For instance, the offence of **passive private-sector corruption**¹³ is committed when a person tasked with upholding a private interest proposes or agrees to carry out or abstain from carrying out an act relating to their office in return for a personal advantage. In other words, the person in question places their personal interests above the private interests that they are tasked with upholding. This offence carries a penalty of five years' imprisonment and a fine of €500,000, or up to double the proceeds of the offence.

BOX 4: PASSIVE PRIVATE-SECTOR CORRUPTION

Example taken from the ruling of the Court of Appeal of Nîmes, 28 February 2019 (case no. 17/00649)

Mr X was a salaried executive of insurance brokerage company A. His duties included connecting policyholders with loss adjusters to assess their claims.

He also performed a similar role in a personal capacity through holding company H, acting as a business introducer for loss adjustment firm B, led by Mr Y.

¹³ Article 445-2 of the French Criminal Code.

Some 82% of company B's turnover came from clients introduced by Mr X. Company B was holding company H's sole client.

Holding company H billed business introducer commission to loss adjustment company B, and Mr Y made cash payments to Mr X in return for company A appointing company B as the loss adjuster for policyholders' claims.

Mr Y extracted the cash to pay Mr X's commission from company B by issuing fake invoices for services that were never actually performed.

There was a conflict of interest between Mr X's duties as a salaried executive of company A and his interest as the manager and beneficial owner of holding company H.

The court found that these hidden commission payments amounted to corruption. Mr X was convicted of passive private-sector corruption, while Mr Y was convicted of active private-sector corruption and misuse of corporate assets.

The same logic applies to **passive public-sector corruption** and **passive influence peddling**¹⁴ offences committed by a company "discharging a public-service mission", or by one of its executives or employees. In this case, the person in question places their personal interests above the public interest that they are tasked with upholding. These offences carry a penalty of ten years' imprisonment and a fine of €1,000,000.

BOX 5: PASSIVE PUBLIC-SECTOR CORRUPTION

*Example taken from the French Supreme Court of Appeal, Criminal Division, 29 June 2011 (case no. 10-86.771)*¹⁵

A supervisor at an EDF agency arranged unregistered connections to the power grid for a number of people using EDF equipment. He charged an amount ranging from €500 to €1,000 per connection. Through his actions, the supervisor placed his personal interests above the public interest he was tasked with upholding.

He was convicted of passive public-sector corruption. In its ruling, the court stated that any person tasked with "carrying out acts to meet a public-interest need, irrespective of whether [that person] has decision-making authority" should be considered as discharging a public-service mission.

¹⁴ Article 432-11 of the French Criminal Code.

¹⁵ French Supreme Court of Appeal, Criminal Division, 29 June 2011 (case no. 10-86.771).

Criminal convictions for conflicts of interest in the public in dealings with the private sector

The constituent elements of some corruption offences in the public sector (or among private individuals or entities discharging a public-service mission) are tantamount to conflict-of-interest situations. The private sector does not escape the scope of these offences.

For instance, the offence of **unlawful taking of interest**¹⁶ is defined as the taking, receiving or keeping of an interest of such a nature as to compromise impartiality, independence or objectivity in a business or business operation, either directly or indirectly, by a person holding public authority, discharging a public-service mission or holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment. This offence carries a penalty of five years' imprisonment and a fine of €500,000, or up to double the proceeds of the offence.

The courts have adopted a broad interpretation of this type of conduct¹⁷ so as to include within the scope of the offence any person who, deliberately or through negligence, fails to give due regard to a conflict-of-interest situation.

Evidence of this approach in case law includes:

- the extension of the scope of the offence to include private-sector individuals and entities involved in discharging a public-service mission
- the flexible way in which the material and intentional constituent elements of the offence are defined
- the law n° 2021-1729 of December 22, 2021 for confidence in the judiciary recently modified one of the material elements of the offence of unlawful taking of interest. The text no longer refers to an "interest of any kind", but to an "interest of such a nature as to compromise the impartiality, independence or objectivity" of the author, thus aligning the notion of interest with the one retained in art. 2, 1° of the law n°2013-907 of October 11, 2013 which defines the conflict of interest. However, the lack of case law does not allow us to determine the impact of this amendment for the moment.

BOX 6: UNLAWFUL TAKING OF INTEREST

*Example taken from the French Supreme Court of Appeal, Criminal Division, 21 November 2001 (case no. 00-87.532)*¹⁸

A member of the board of an autonomous port (an EPIC discharging a public-service mission) was also a shareholder and de-facto manager of a shipping company, which meant he had a potential conflict of interest.

This potential conflict became an actual conflict when the individual in question participated in a board vote on writing off unpaid fees owed by the shipping company.

¹⁶ Article 432-12 of the French Criminal Code.

¹⁷ French Supreme Court of Appeal, Criminal Division, 9 March 2005, case no. 04-83.615; French Supreme Court of Appeal, Criminal Division, 14 December 2005, case no. 05-83-898; French Supreme Court of Appeal, Criminal Division, 22 October 2008, case no. 08-82.068

¹⁸ French Supreme Court of Appeal, Criminal Division, 21 November 2001 (case no. 00-87.532).

The offence of **unlawful taking of interest by former public officials**¹⁹ applies to permanent and contract civil servants who find themselves in a conflict-of-interest situation after leaving public office to work in the private sector. This offence carries a penalty of three years' imprisonment and a fine of €200,000, or up to double the proceeds of the offence.

Unlawful taking of interest by former public officials is defined as an offence committed by a person who, in their capacity as a civil servant or public official, and specifically by reason of their office, is entrusted with the supervision or control of any private undertaking, or with the conclusion of contracts of any type with a private undertaking or with giving an opinion on the operations of a private undertaking, and who by work, advice or investment takes or receives a participation in such an undertaking before the expiry of a period of three years following the end of their office.

The offence also applies to any person who, through work, advice or investment, takes or receives a participation in a private undertaking owning 30% or more of the capital in one of the undertakings mentioned above, or which has concluded a contract carrying legal or de-facto exclusivity with such an undertaking.

BOX 7: UNLAWFUL TAKING OF INTEREST BY FORMER PUBLIC OFFICIALS

*Example taken from the French Supreme Court of Appeal, Criminal Division, 22 October 2014 (case no. 13-86.783)*²⁰

Less than three years after leaving office, an ex-civil servant who had worked for a local authority took a job with a company that was a regular contractor for his former employer. As part of his duties, the individual had been responsible for reviewing the legality of the local authority's planning projects and decisions. This placed him in an actual conflict-of-interest situation. The court convicted him of unlawful taking of interest by former public officials. In its ruling, it stated that the offence applied to former civil servants who joined a semi-public company less than three years after leaving public office.

Although a conflict of interest is not a constituent element of the offence of **favouritism**²¹ (also known as **granting of an unjustified advantage**), the existence of such a conflict can lead to this offence and explain the intent behind it. This offence refers to an act whereby a person holding public authority, discharging a public-service mission or holding a public electoral mandate "obtains or attempts to obtain for others an unjustified advantage by an act breaching the statutory or regulatory provisions designed to ensure freedom of access and equal treatment of candidates for public contracts and concession agreements in order to satisfy a particular interest. It carries a penalty of two years' imprisonment and a fine of €200,000 for natural persons.

¹⁹ Article 432-13 of the French Criminal Code.

²⁰ French Supreme Court of Appeal, Criminal Division, 22 October 2014 (case no. 13-86.783).

²¹ Article 432-14 of the French Criminal Code.

BOX 8: FAVOURITISM

Example taken from the French Supreme Court of Appeal, Criminal Division, 4 March 2020 (case no. 19-83.446)²²

Bygmalion, a company founded by a former France Télévisions executive, was given contracts worth a total of €1,486,760 to provide internet watch, strategic advisory and other services to the founder's ex-employer. France Télévisions awarded these contracts without putting them out to tender, despite this being a legal requirement.

The president of France Télévisions, a private undertaking discharging a public-service mission, was convicted of favouritism at trial. The founder of Bygmalion, meanwhile, was found guilty of concealment of favouritism and unlawful taking of interest.

The two executives had conflicting interests, since the first orders were placed a short time after the founder of Bygmalion had left his position at France Télévisions.

Criminal convictions for conflicts of interest in the public sector: consequences for private-sector organisations

The above-mentioned offences of unlawful taking of interest, unlawful taking of interest by former public officials and, in some cases, favouritism stem from conflicts of interest in the public sector (or in private entities discharging a public-service mission). In principle, these offences do not apply to private companies or to their executives or employees. Yet these entities and individuals can face prosecution for **concealment**²³ of these offences or for **laundering**²⁴ their proceeds (both of which carry a penalty of five years' imprisonment and a fine of €375,000), as well as for **compliance**²⁵ in such offences. Importantly, an accomplice faces the same penalties as the person charged with the primary offence.²⁶

BOX 9: CONCEALMENT OF UNLAWFUL TAKING OF INTEREST

Example taken from the French Supreme Court of Appeal, Criminal Division, 5 April 2018 (case no. 17-81.912)²⁷

Mrs B, a local mayor, participated in the sale of municipal land to a company that planned to build a new eco-neighbourhood. The director of the company was the mayor's long-standing friend and golf partner.

²² French Supreme Court of Appeal, Criminal Division, 4 March 2020 (case no. 19-83.446).

²³ Article 321-1 of the French Criminal Code.

²⁴ Article 324-1 of the French Criminal Code.

²⁵ Article 121-7 of the French Criminal Code.

²⁶ Article 121-6 of the French Criminal Code.

²⁷ French Supreme Court of Appeal, Criminal Division, 5 April 2018 (case no. 17-81.912).

Mrs B was involved in every stage of the decision-making process: she chaired the panel convened to appoint the transferee, participated in the decision of the municipal council to approve the sale, personally signed the deed of sale, and participated in the decision of the municipal council to agree to financially guarantee the company. She also participated in the decision of the municipal council to authorise the signing of an addendum to the deed of sale, which removed a resolute condition requiring the company to pay a security deposit of €500,000, refundable upon completion of the demolition and construction work.

Mrs B was tried for unlawful taking of interest and her friend (the director of the company) was tried for concealment of the same offence. The mayor was convicted on two grounds:

→ She had taken an interest in the operation by entering into a contract with a long-standing friend.

According to Article 432-12 of the French Criminal Code, the offence involves the taking, receiving or keeping of "any" interest²⁸, whether material or moral, and whether directly or indirectly. There is no requirement for the interest to meet a "significance" threshold, to involve a financial reward, or to contradict the interests of the public-service mission in question. A mere friendship is sufficient. The French Supreme Court of Appeal upheld this point of law.

→ She had participated in the sale of the municipal land in full knowledge of the existence of her friendship with the transferee. Her friend, the director of the company to which the land was sold, was convicted of concealment of unlawful taking of interest.

BOX 10: COMPLICITY IN INFLUENCE PEDDLING

Example taken from the French Supreme Court of Appeal, Criminal Division, 8 January 1998 (case no. 97-80.885)²⁹

Local authority X invited bids for a public contract to carry out development work in its port. A subsidiary of group Y submitted a bid for the contract. The subsidiary's managing director and sales manager paid money to an intermediary, who passed the money on to the deputy mayor in return for him using his influence on the contract award committee to ensure their bid was successful. The subsidiary of group Y ultimately won the contract.

The managing director and sales manager were convicted of complicity in influence peddling.

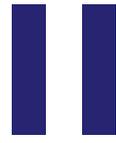
The criminal courts have also handed down convictions for other economic and financial offences that are not corruption offences per se, but that can lead to such offences and whose constituent elements are tantamount to conflict-of-interest situations. Examples include misuse of corporate assets³⁰ and breach of trust.³¹

²⁸ The law n° 2021-1729 of December 22, 2021 modified one of the material elements of the offence of unlawful taking of interest. The text no longer refers to an "interest of any kind", but to an "interest of such a nature as to compromise the impartiality, independence or objectivity".

²⁹ French Supreme Court of Appeal, Criminal Division, 8 January 1998 (case no. 97-90.885).

³⁰ Article L.241-3(4) and (5) of the French Commercial Code for private limited companies, and Article L.242-6(3) and (4) of the French Commercial Code for public limited companies.

³¹ Article 314-1 of the French Criminal Code.



IDENTIFYING CONFLICT-OF-INTEREST SITUATIONS



1.

MAPPING RISKY SITUATIONS

Organisations are advised to identify conflict-of-interest situations that could impact their activities or operations, then to develop a prevention policy tailored to their sector or industry, their structure and governance arrangements, and other distinctive features.

BOX 11: ISO 37001

ISO 37001 – Anti-bribery management systems makes the following recommendation:

The organization should identify and evaluate the risk of internal and external conflicts of interest. [...] This helps an organisation to identify situations where personnel may facilitate or fail to prevent or report bribery, e.g.

when the organization’s sales manager is related to a customer’s procurement manager, or

when an organization’s line manager has a personal financial interest in a competitor’s business.

In its audit work, the AFA does not automatically presume that a corruption prevention and detection system is compliant just because the organisation holds ISO 37001 certification. However, being certified to this standard clearly demonstrates top management’s commitment to adopting an anti-corruption programme. The standard stresses that organisations should identify conflict-of-interest risk as part of a wider “anti-bribery management system”.

Identifying conflict-of-interest risk is a challenging task for any organisation, since every executive and every employee will have pre-existing relationships (interests) and it is impossible to predict if, when and how these interests will come into conflict with those of the organisation. As such, a conflict-of-interest review exercise cannot – and indeed need not – be exhaustive.

Organisations are therefore advised to take a proportionate approach. The exercise should focus on executives and employees who are exposed to conflict-of-interest risk, i.e. those individuals who are tasked and entrusted with making decisions that create obligations for the organisation towards third parties, or who exert significant influence on such decisions, and whose potential conflicts of interest are of such a scale and nature that they could harm the organisation’s interests.

When looking to identify conflict-of-interest situations, organisations should pay special attention to the following:

- **High-risk processes**

High-risk processes are those processes where a conflict of interest could harm the organisation's interests. Examples include procurement, sales, public affairs, finance (capital contributions, loans, grants, etc.), investment, preparation of financial statements and human resource management (recruitment, compensation, etc.).

- **High-risk positions**

After identifying high-risk positions, the organisation should review how the incumbents could place their personal interests above those of the organisation.³²

- **High-risk operations**

Some operations that are part of the natural course of doing business (such as generating leads, seeking new markets, working with the public sector or pursuing external growth opportunities) expose an organisation to a greater degree of corruption risk. Preventing conflict-of-interest situations that could arise during these operations can help to reduce this risk.

BOX 12: CONFLICTS OF INTEREST WHEN MOVING INTO FOREIGN MARKETS

Organisations looking to take their business into new markets, especially abroad, may employ the services of local intermediaries to assist them in this process. In such cases, conflict-of-interest risk typically stems from the relationship between the intermediary and the local authorities. Organisations are advised to capture and evaluate this risk through both corruption risk mapping and third-party due diligence reviews.

Moreover, this type of conduct, where deliberate, could amount to influence peddling under French criminal law. For this reason, organisations should pay close attention to potential conflicts of interest with third parties when employing the services of an intermediary – especially if the third party in question is a public official.

Organisations can prepare a specific map as a way to document the risks they have identified. Alternatively, those organisations that are subject to the requirements of Article 17(II) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016 could include conflict-of-interest risks in their statutory corruption risk mapping. Another option is to include these risks in an operational risk mapping or other, broader mapping exercise. Identifying risky situations gives organisations a clearer, more objective, consensus-based view of potential conflicts of interest and leaves them better equipped to manage these situations as and when they arise. One example of best practice is to keep a register of common conflict-of-interest situations, based on voluntary declarations of conflicts of interest and pre-existing relationships (interests). This register may prove useful when updating the organisation's corruption risk mapping.

³² The Business Growth and Transformation Act 2019-486 of 22 May 2019 enshrines the principle that a company's corporate interest includes social and environmental issues related to its activity ([Article 1833 of the French Civil Code](#)) and requires particular care when defining the corporate interest of companies that are part of larger groups in which the interests of subsidiaries do not always align with those of the parent company.

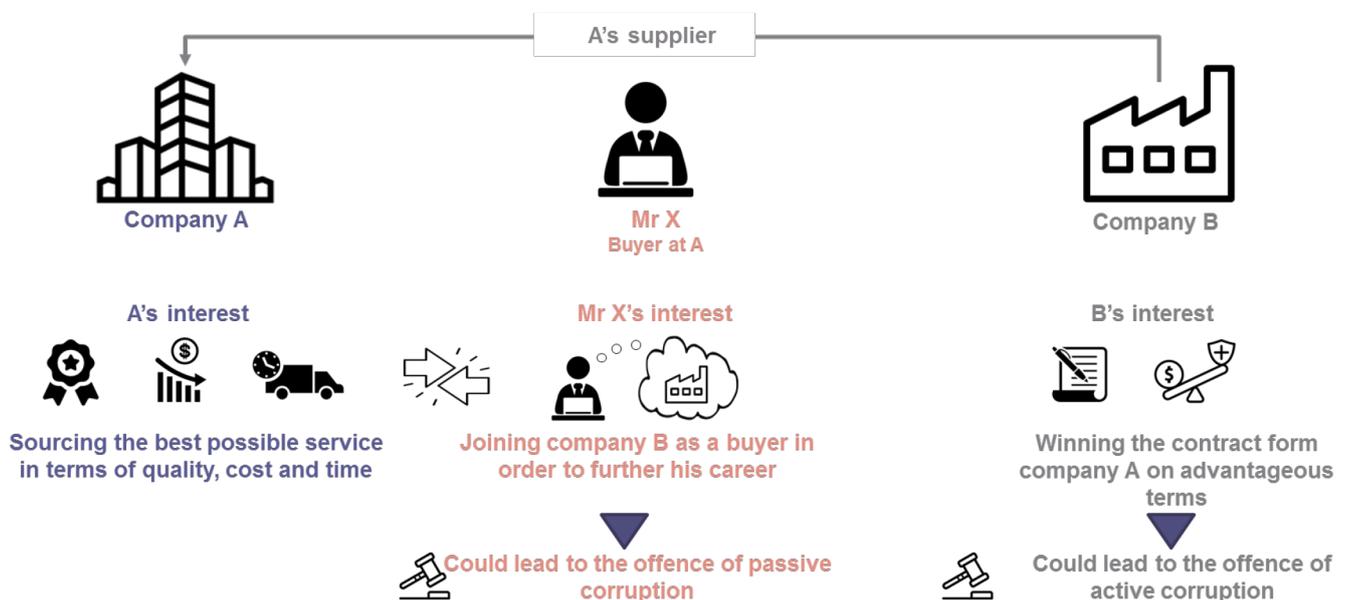
2. EXAMPLES OF RISKY SITUATIONS

Conflicts of interest can affect anyone within an organisation – employees, executives and corporate officers – as well as external parties such as business introducers, auditors and lawyers.

Examples of risky situations involving employees

→ Example 1

A conflict-of-interest situation that could lead to an offence of corruption



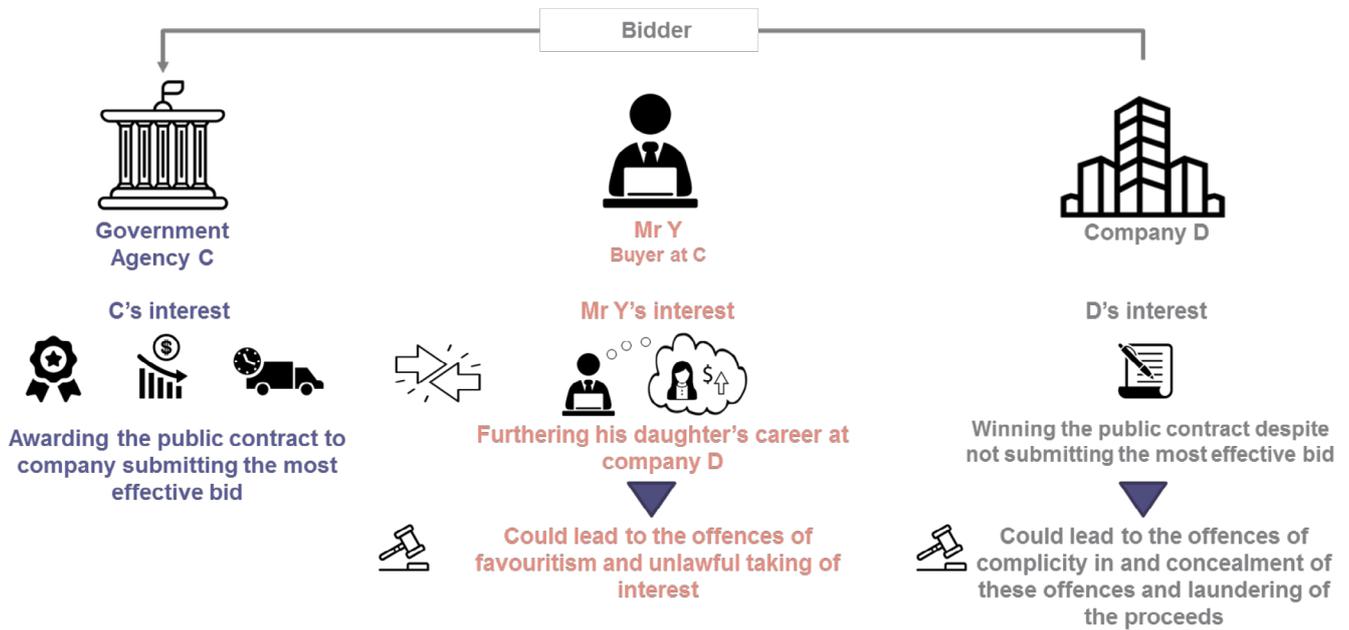
Mr X awards the contract to company B even though its bid was not in the best interest of company A. In return, company B leads Mr X to believe that it will offer him a position with an attractive remuneration package.

Mr X places his personal interests above those of his organisation and, in doing so, falls short in the proper performance of his duties: to source the best service for company A in terms of time, cost and fitness for purpose.

In this case, the courts could rule that this conflict-of-interest situation amounted to private-sector corruption. Passive and active corruption involving persons not holding public office are offences under Articles 445-1 and 445-2 of the French Criminal Code respectively.

→ **Example 2**

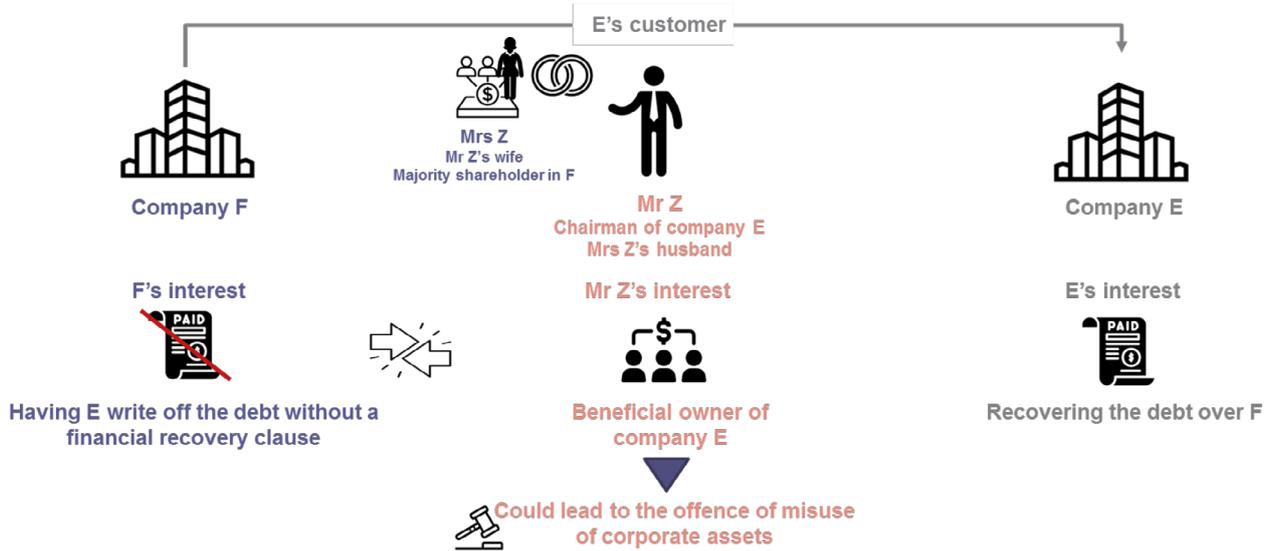
A conflict-of-interest situation that could lead to an offence of favouritism or unlawful taking of interest



In his role as a public-sector buyer at government agency C, Mr Y provides company D, where his daughter works as sales manager and holds signing authority, with confidential information about the award criteria for a public contract. Company D wins the contract on the basis of this information. The courts could rule that this conflict-of-interest situation amounted to **favouritism** and **unlawful taking of interest**, while the company could face prosecution for concealment of these offences and laundering of the proceeds. Even if Mr Y does not discuss the contract with his daughter, the mere fact that they are related constitutes an apparent conflict of interest that could harm the company's reputation.

Example of a risky situation involving a corporate officer

A conflict-of-interest situation that could lead to an offence of misuse of corporate assets

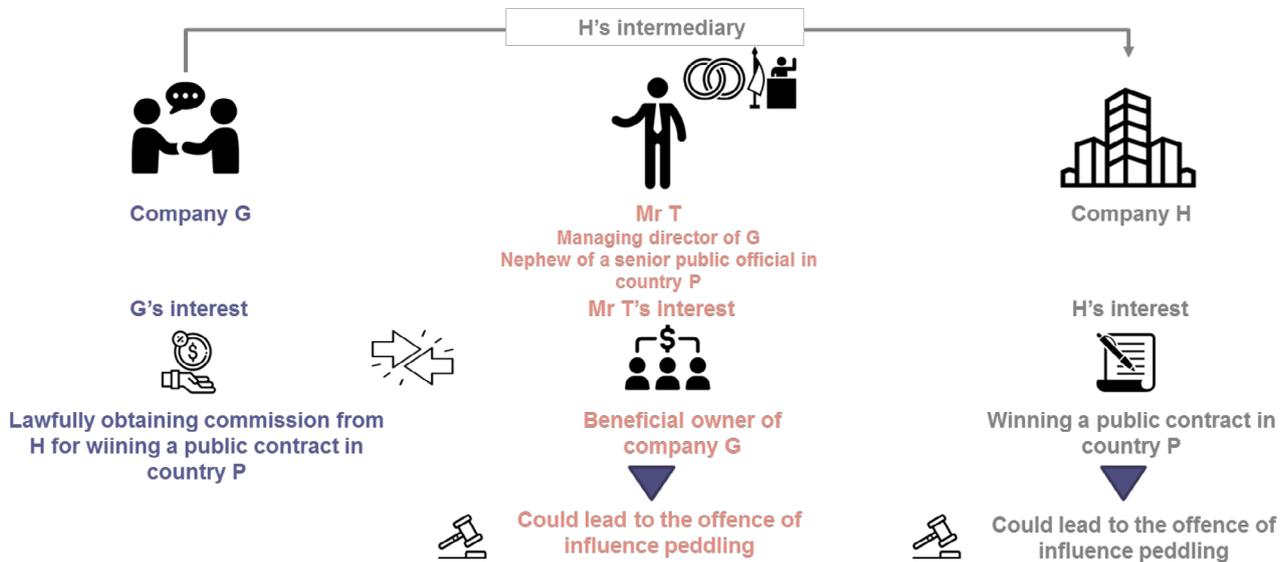


Mr Z is chair of the board of directors of E, a public limited company.

Company F, a customer of company E, wants company E to write off a debt without offering anything in return. Mr Z is married to Mrs Z, who is a majority shareholder in company F. Were Mr Z to intervene on company F's behalf, he would deprive company E of the money to which it is entitled with no countervailing benefit, which would go against company E's corporate interest. And in doing so, Mr Z would be placing his personal interests above those he is tasked with upholding as a corporate officer. The courts could rule that this conflict-of-interest situation amounted to **misuse of corporate assets**.

Example of a risky situation involving an outside party

A conflict-of-interest situation that could lead to an offence of influence peddling



Mr T is a director of company G, which acts as a business introducer for company H in country P. Company H asks Mr T, the nephew of a senior public official in country P, to use his personal contacts to help company H win a public contract in country P. Through its request, company H places the senior public official in country P in a conflict-of-interest situation because it employs the services of company G as a business introducer. The courts could rule that this situation amounted to **influence peddling**.

III

PREVENTING AND MANAGING CONFLICTS OF INTEREST



Organisations should adopt conflict-of-interest prevention and management measures that are appropriate to their risk profile, taking into account their size, legal structure, business area and geographical footprint, as well as the types of third parties they work with. These preventive measures can be combined or adjusted according to the organisation's unique characteristics and the degree of risk.

1. EXAMPLES OF MEASURES DEFINED BY LAW

France has passed various pieces of legislation on preventing and managing conflicts of interest in the private sector. Although these laws are not necessarily designed with preventing corruption risk in mind, they nevertheless serve as examples on how to manage conflicts of interest. They focus on healthcare and other specific sectors and industries, or on individuals practising particular professions such as auditors, barristers, solicitors, company executives, corporate officers and estate agents.

A non-exhaustive list of the preventive measures defined by law is given below:

BOX 13: PREVENTING CONFLICTS OF INTEREST IN THE PHARMACEUTICAL INDUSTRY

Article 2 of Act 2011-2012 of 29 December 2011 on improving drug and health product safety requires pharmaceutical laboratories to "make public the existence of agreements" they enter into with any person or organisation in the healthcare industry.

The same act prohibits experts from being in a conflict-of-interest situation with their family members.³³

BOX 14: PREVENTING CONFLICTS OF INTEREST IN CERTAIN COMPANIES GOVERNED BY THE FRENCH COMMERCIAL CODE

Under the French Commercial Code, public limited companies and private limited companies are subject to certain rules designed to prevent conflicts of interest. These include a specific oversight procedure for agreements between the company and one of its executives, directors or shareholders, and for agreements between the company and another company sharing one or more executives, directors or shareholders (known as "regulated agreements"). Under these rules, certain types of agreement are strictly prohibited. If this oversight procedure is not followed, the agreement may be struck down or the individual in question may face prosecution.³⁴

³³ Article L.1452-2 of the French Public health Code.

³⁴ Article L.225-38(2) of the French Commercial Code sets out the rules on regulated agreements, while Article L.225-43 prohibits certain types of agreement.

BOX 15: PREVENTING CONFLICTS OF INTEREST WHEN HIRING PUBLIC OFFICIALS IN THE PRIVATE SECTOR

The Civil Servants Rights and Obligations Act 83-634 of 13 July 1983 (known as the General Civil Service Regulations) sets out rules on post-public employment. Under these rules, which were amended by the Civil Service Transformation Act 2019-828 of 6 August 2019, any public official governed by the regulations who leaves their post temporarily or permanently and wishes to take up a paid position (as an employee or otherwise) with a private company or entity, or to work in a self-employed role, must first seek authorisation. The official's request is reviewed to determine whether it is compatible with their duties in the previous three years.

In most cases, this review is carried out by the official's superior, who examines the ethical implications of the proposed move from the public sector to the private sector. The superior also assesses feasibility of the official's proposed change of employment. The superior raises any specific concerns with the ethics officer. If doubts persist, the matter is referred to the HATVP.

If the official in question holds a senior position or performs specific duties, they must refer their request directly to the HATVP. This requirement applies to civil servants across all three branches of the French civil service: central government, local government and public hospitals.

Before approving such requests, the official's superior and/or the HATVP³⁵ must be satisfied that the proposed move to the private sector will not:

- prejudice the normal operation, independence or neutrality of the official's former public-sector employee
- run counter to the general ethical principles that apply to the civil service (dignity, impartiality, integrity and probity)
- place the official at risk of committing the offence of unlawful taking of interest, or unlawful taking of interest by former public officials.

³⁵ For a fuller description of the review and authorisation procedure, see: [HATVP, Guide déontologique II, 1 February 2021](#).

2. DEVELOPING AND DOCUMENTING A POLICY, AND EMBEDDING IT IN THE ORGANISATION'S PROCESSES

Once an organisation has completed its mapping exercise (as explained in the previous section), the next step is to implement a system for preventing and managing conflicts of interest. This system should be based on a documented policy that is aligned with other, related risk-reduction policies (such as the policy on gifts and hospitality) and is embedded in the organisation's processes.

Developing and documenting a conflict-of-interest prevention and management policy

The top management team should make clear its commitment to preventing and, where necessary, managing conflicts of interest, and should draw up an effective policy for this purpose.

The organisation could set out the key principles of this policy in its anti-corruption code of conduct, then provide fuller details in a dedicated procedure (or in another appropriate document if the organisation is not subject to the requirements of Article 17(II) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016).

In order for conflict-of-interest rules to be binding on employees, they must be included in the anti-corruption code of conduct, which itself forms part of the organisation's employee regulations³⁶ (including for organisations not subject to the requirements of Article 17(II) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016). Since the obligation to inform the employer of the existence of a conflict of interest is part of the provisions establishing "permanent general rules on discipline", it must be incorporated into the internal rules and therefore be subject to consultation with the social & economic committee and forwarded to the labour inspectorate. The labour inspectorate will check that the measure is justified and proportionate.³⁷

Top management should ensure that employees are made aware of the policy (such as during the on-boarding process or as part of awareness and training campaigns).

Developing and implementing a policy on gifts and hospitality³⁸

Giving or accepting gifts, hospitality or other advantages may constitute a conflict of interest.

Organisations can guard against this risk by developing a policy that sets clear rules and includes enhanced transparency and record-keeping measures (such as requiring all employees to seek approval before giving or receiving gifts and hospitality, or keeping a dedicated register).

³⁶ French Supreme Court of Appeal, Labour Division, 5 May 2021, case no. 19-25.699: Employees can only be bound by the code of conduct, and disciplined on this basis, if it is included in the employee regulations. DGT circular 2008-22 of 19 November 2008 on codes of ethics, whistleblowing systems and employee regulations states that conflict-of-interest policies and procedures can be included in employee regulations even where this is not a legal requirement.

³⁷ CA Paris, 25 juin 2020, n°20/0442

³⁸ AFA, Gifts and Hospitality Policy in Private and Public Sector Corporations and Non-Profits.

Embedding conflict-of-interest measures in the organisation's processes

→ Conflict-of-interest prevention measures could be included in high-risk processes such as procurement, sales, external growth, preparation of financial statements, public and regulatory affairs, and human resource management (recruitment, variable compensation, etc.).

One option is to set up a procedure whereby employees declare potential conflicts of interest or consult a designated officer whenever they join³⁹ an organisation, take on new responsibilities or move to a different role – a practice already adopted in the public sector.

These declarations could be recorded in a register of conflicts of interest, although the organisation must ensure it follows the rules on privacy⁴⁰ (which limit the information individuals can be forced to disclose upfront) and on data protection (the General Data Protection Regulation⁴¹ and the French Data Protection Act 78-17 of 6 January 1978).

→ The organisation could include a conflict-of-interest clause in its employment contracts.

This type of clause, which restricts employees' ability to engage in activities that conflict with their duties to their employer, is only enforceable if it is specific enough about the types of relationships that are prohibited.

→ The organisation could also rotate staff between high-risk positions, as well as ensuring physical and organisational separation in decision-making processes (segregation of duties, stricter signing requirements, etc.).

BOX 16: SPECIFIC MEASURES FOR DIRECTORS AND EXECUTIVES: RECOMMENDATIONS OF THE FRENCH INSTITUTE OF DIRECTORS⁴²

In November 2010, the Ethics Committee of the French Institute of Directors (IFA) published a briefing paper setting out nine recommendations on preventing and managing conflicts of interest, and on reporting such conflicts to the board of directors.

The IFA defines a conflict of interest as “any situation in which a corporate executive officer, exercising their rights and powers, must choose between acting in the corporate interest and acting in a personal interest that contradicts the corporate interest”.

The IFA encourages companies to adopt good governance rules that go above and beyond legal and regulatory requirements.

³⁹ With regard to the examination of conflicts of interest at the recruitment stage, Article L. 1132-1 of the Labour Code stipulates that no one may be excluded from a recruitment process on the grounds of “political opinions, trade union or mutualist activities, or the exercise of an elective mandate”. Furthermore, a refusal to recruit must be based on the existence of an objective problem with the operation of the company, analysed in the light of the risk map and the specific obligations of the position applied for.

⁴⁰ It should be noted that in order to comply with Article L. 1121-1 of the Labour Code and not infringe “the rights of individuals and individual and collective freedoms”, this procedure must be “justified by the nature of the tasks to be performed and proportionate to the aim sought”.

⁴¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁴² IFA, *Charte de l'administrateur*, 2015; IFA, “Comment identifier les conflits d'intérêts entre l'administrateur et sa société?"; IFA, *Note de synthèse de la commission de déontologie de l'IFA : Administrateurs & conflits d'intérêts*, November 2010.

Examples of best practice mentioned by the institute include:

- having directors identify and declare conflict-of-interest situations they encounter throughout their term of office
- ensuring that directors remain alert to conflict-of-interest situations that their colleagues fail to disclose
- reviewing the situation of all directors on an annual basis

If an actual conflict of interest arises, the IFA's Directors' Charter (Charte de l'administrateur) recommends that the individual should inform the board of directors and abstain from participating in deliberations and decisions on the matter in question.

As this duty to inform stems from the duty to act in good faith, it should be included in the company's employee regulations or in the board charter.

The IFA also recommends that directors be required to sign a "sworn declaration of interests" when the selection process begins or when they commence their term of office, and annually thereafter. This sworn declaration should "not be a generic confirmation that no conflicts exist", but instead should "capture the various situations that could give rise to a conflict of interest".

The IFA also advises companies to appoint a designated officer to collect these declarations and manage conflict-of-interest situations – and in particular to determine whether, by acting in their personal interests, a director is gaining an advantage and causing harm to the company.

This task could be entrusted to a "lead director". According to the Autorité des Marchés Financiers (AMF), the appointment of a lead director is "an interesting area for discussion which aims to prevent potential conflicts of interest, in particular should the positions of chairman and CEO be combined. In this respect, it is important that companies that have decided to set up a lead director grant him or her powers and resources appropriate to his or her duties, in particular the power to convene a board meeting, and that these powers and resources be formalized and transparent."

Finally, the IFA encourages transparency by recommending the recording in the minutes of the Board of Directors of any decision relating to the management of conflicts of interest, such as the abstention of one or more of one or more directors or the fact that the board has decided that there is no that there is no conflict of interest.

3.

DETECTING CONFLICT-OF-INTEREST SITUATIONS

Having a documented conflict-of-interest prevention and management policy is an important first step. But if organisations want to be able to detect risky situations, they must foster a culture of conversation about conflicts of interest – and empower employees to respond appropriately through awareness-raising, training, tools and resources.

Fostering a culture of conversation about conflicts of interest

Organisations can only prevent conflicts of interest if they foster a culture in which employees are willing and able to talk about them.

The top management team should instil trust by making clear its commitment to preventing conflicts of interest and by modelling exemplary conduct,⁴³ such as by declaring its own conflicts of interest and taking appropriate remedial measures.

By creating a climate of trust, the top management team encourages employees to report actual or apparent conflicts of interest when they arise.

Preventing conflicts of interest is an integral part of good governance.

Providing awareness-raising and training for all employees, executives and directors

Employees, even acting in good faith, may fail to identify potentially damaging conflicts of interest. It is therefore essential that employees feel comfortable talking about this topic – something that can be achieved through awareness-raising and training on how to prevent conflicts of interest, how to manage them when they occur, and what risks are involved if these situations are not handled properly.

Awareness-raising and training should:

→ focus on employees who are most exposed to conflict-of-interest risk. In organisations subject to the requirements of Article 17(II) of the Transparency, Anti-Corruption and Economic Modernisation Act 2016-1691 of 9 December 2016, this group should include, as a minimum, those employees who are most exposed to risks of corruption and influence peddling as identified in the organisation's corruption risk mapping.

⁴³ See: [MiddleNext, Code de gouvernement d'entreprise, September 2021](#), which states that "both the senior executive" and the "directors" must "model exemplary conduct in order to instil trust" in the company.

- equip employees with the knowledge to report actual or potential conflicts of interest they encounter in the performance of their duties to their superior or to another designated officer.
- include practical illustrations and describe what measures are taken to mitigate the identified risks.

Providing awareness-raising and training for all employees, executives and directors

- The organisation may appoint a designated officer (the compliance officer⁴⁴ or another duly authorised person) to whom employees, executives and directors can turn if they have any doubts or concerns. The role could be modelled on the ethics officer in the public sector.

BOX 17: THE ETHICS OFFICER IN THE PUBLIC SECTOR

Under the General Civil Service Regulations, public officials are “entitled to consult an ethics officer for advice and guidance on fulfilling their ethical obligations and adhering to ethical principles” (Article L 124-2 of the General Civil Service Code). The duties of the ethics officer may be performed by one or more individuals or by a committee.

Article 8 of Decree 2017-519 of 10 April 2017 states that “where a report is received of circumstances likely to constitute a conflict of interest [...] the ethics officer provides the parties involved, as required, with relevant advice and guidance in order to bring such conflict to an end”.

When a potential conflict of interest is referred to the ethics officer:

- They should review the situation as presented to determine whether it constitutes an actual conflict of interest and whether it could lead to the offence of unlawful taking of interest.
- If the ethics officer determines that this is the case, they should:
 - provide the parties involved with relevant advice and guidance in order to bring the situation to an end, and
 - where the matter was referred by a public official in person, advise the official on how to avoid committing the offence (e.g. by recusing themselves from the situation or giving up the interest in question).

- There may be grounds for requiring employees and executives occupying high-risk positions to declare potential conflicts of interest upfront, especially if they are vested with the power to represent the organisation and to

⁴⁴ AFA, *French Anti-Corruption Agency Guidelines*, 12 January 2021, courtesy translation of the French version published in the *Official Journal of the French Republic (Journal officiel de la République française)*, para. 176, p. 23; AFA, *Practical Guide: The Corporate Anti-Corruption Compliance Function*.

make undertakings on its behalf.⁴⁵ Prior declaration is particularly important for employees who deal directly with public decision-makers, since impropriety in such dealings could leave the organisation exposed to prosecution for concealment of or complicity in unlawful taking of interest, unlawful taking of interest by former public officials or favouritism, or for laundering of the proceeds of these offences. For instance, organisations are advised to implement such a system for employees who carry out lobbying activities.

Organisations should be mindful of the operational implications of implementing a prior declaration system (which will only be effective if declarations are properly reviewed and managed), and must ensure that such a system adheres to privacy⁴⁶, data protection and other applicable rules.

→ The organisation may opt for an ad hoc system in which employees, executives and directors voluntarily⁴⁷ declare conflicts of interest using a special form, or use a self-assessment tool to detect potential conflicts. This approach would allow employees, executives and directors to declare conflict-of-interest situations without revealing details of the personal interests in question. The form or tool could be publicised internally on an annual basis, or be used as part of an annual voluntary declaration campaign.

→ Employees and executives could also report conflict-of-interest situations via the internal whistleblowing system, which is designed to gather disclosures about all forms of conduct that breach the organisation's code of conduct.

Building conflict-of-interest detection measures into third-party due diligence procedures

→ The organisation could write a clause into its contracts requiring third parties to declare potential conflicts of interest and to disclose any beneficial owners who are politically exposed persons.

→ The organisation could educate the third parties with which it does business about the importance of declaring and managing potential conflicts of interest through relevant training, which should include practical guidance on reporting such conflicts.

→ As part of its due diligence procedures, the organisation could check whether there are any personal relationships (interests) between third parties (and their beneficial owners) and its own employees, executives, directors and beneficial owners. Where a third party acts as a business intermediary (such as a business introducer, importer or distributor) or is vested with the power to represent the organisation to a public body, these checks could be extended to include potential pre-existing relationships (interests) between the third party and the end customer (and its beneficial owners) or the public body in question.

⁴⁵ Under [Article 121-2 of the French Criminal Code](#), companies can be held criminally liable for offences committed by these employees.

⁴⁶ Regarding family ties, it may be noted that the Constitutional Council in its decisions No. 2013-675 DC and No. 2013-676 DC of 9 October 2013 considered that, with regard to elected representatives, the specification of the professional activity of the spouse could be considered justified and proportionate in a declaration of interests, but not that of the activity of children and parents or other family members.

⁴⁷ The fact that the declaration is voluntary does not alter the controller's obligations regarding the protection of personal data.

4. TAKING APPROPRIATE REMEDIAL MEASURES

Before the organisation can take appropriate remedial measures, it must first **analyse the potential or actual conflict-of-interest situations it has detected**.

Analysing situations in this way enables the organisation to understand the scale of a given conflict of interest and to design measures accordingly. The organisation's compliance officer could assist in this exercise for complex situations. Responsibility for analysing and managing conflicts of interest does not necessarily have to fall upon the employee's superior. One example of best practice is for the superior to work with the human resources and compliance teams in dealing with the matter collectively.

Examples of possible remedial measures are given below:

→ Introduce **stricter signing and oversight requirements** for the employee's activities, or even **adjust the employee's tasks, permissions, authorities and powers**, e.g.:

- directors should abstain from voting or participating in board decisions on matters in which they have a conflict of interest
- employees should not enter into transactions with any organisation of which they or a relative are a beneficial owner without first obtaining their superior's written permission.

→ In the highest-risk cases, require the **individual in question to bring the conflict-of-interest situation to an end** (in line with the duty to act in good faith or in accordance with a specific clause in their employment contract). Doing so will avoid a situation where the person commits an offence by acting or making a decision that could be construed as being in their personal interests. For instance, the individual could be required to:

- recuse themselves from a procedure
- withdraw from a contract award committee or supplier selection panel
- sell their shares in a company⁴⁸ or appoint a third party to manage these shares on their behalf.

⁴⁸ Only if this course of action is possible (i.e. the shares are liquid and are not subject to an approval clause or pre-emptive rights).

→ **Reassign the account or operation to another employee** if the individual in question cannot or refuses to bring the conflict of interest to an end. In this case, the employee to whom the matter is reassigned must not be a subordinate of the individual with a conflict of interest. This option demands a certain degree of flexibility in team structures and the introduction of temporary measures, such as adjusting permissions in order to limit access to information.

→ Involve more people in the decision-making process to make sure decisions are arrived at objectively, and ensure that all decisions are properly documented.

In any event, the organisation is advised to keep proper records of the situation analysis and any remedial measures taken to manage the conflict of interest. These documented records will serve as supporting evidence for the organisation's decisions at a later date. It might also prove useful to include the situation analysis in the register of conflicts of interest.

It is difficult for an organisation to determine in advance how it will respond to different types of conflict of interest. It would nevertheless prove helpful to develop a set of specific criteria to guide the decision-making process and ensure an objective response. These criteria could be included in the conflict-of-interest management procedure shared with employees, as a way to put minds at ease and foster a culture of transparency.

5. PUNISHING BREACHES STEMMING FROM CONFLICTS OF INTEREST

Other than in those cases provided for by law (see part I of this guide), it is not an offence, in the private sector, to gain an unfair advantage from these conflict-of-interest situations. Those who gain such an advantage cannot therefore be convicted by the criminal courts. Conflicts of interest can, however, result in civil penalties and disciplinary action. For instance, acts and decisions taken despite the existence of a conflict of interest can be declared null and void, while executives who find themselves in a conflict-of-interest situation can face penalties including dismissal and civil prosecution. Moreover, where **conflicts of interest are not properly managed and addressed, employees can face disciplinary action** for breaching their duty to act in good faith.⁴⁹

The French Labour Code states that an “employment contract must be performed in good faith”.⁵⁰ The courts have interpreted this provision as a requirement for employees to act in the interests of their organisation. For instance, staff are bound by a non-compete obligation even if there is no specific clause to this effect in their employment contract. Likewise, where there is interference between personal interests and those of the organisation, employees – including senior executives – must place the organisation’s interests first.⁵¹ However, the employee's obligations to put an end to the conflict of interest situation are only those resulting from his employment contract.⁵²

Employees can only face **disciplinary action** for **misconduct**. The mere existence of a conflict of interest does not constitute misconduct⁵³. The individual in question must have breached their duty to act in good faith, such as by deliberately concealing a conflict of interest from their employer.⁵⁴ The organisation will find it easier to demonstrate that an employee has acted wrongfully if it has a conflict-of-interest prevention system in place (e.g. if it has developed an anti-corruption code of conduct, carries out awareness-raising activities and includes a conflict-of-interest clause in its employment contracts).

Thus, failure to comply with internal regulations including a code of conduct on the prevention of such conflicts may constitute a legitimate cause for sanction.⁵⁵

⁴⁹ For instance, the Commercial Court of Paris (10 November 2020, case no. 2019036759) ordered a senior executive to pay substantial damages after ruling that a potential and actual conflict of interest existed and that the individual in question had breached their duty to act in good faith. Executives can also be dismissed by shareholders or partners for acting in a manner contrary to the corporate interest as a result of a conflict of interest (see [Article L.225-55 of the French Commercial Code](#) for public limited companies, [Article L.223-25 of the French Commercial Code](#) for private limited companies, [Article L.227-8 of the French Commercial Code](#) for simplified joint-stock corporations and [Article 1851 of the French Civil Code](#) for non-trading companies).

⁵⁰ [Article L.1222-1 of the French Labour Code](#).

⁵¹ The courts have ruled that employees cannot act in their personal interest where doing so would be contrary to the corporate interest ([French Supreme Court of Appeal, Labour Division, 12 January 2012, case no. 10-20.600](#)). Likewise, corporate officers cannot place their personal interest above the corporate interest ([French Supreme Court of Appeal, Commercial Division, 15 November 2011, case no. 10-15.049](#)).

⁵² [Cass., soc., 9 juin 1998, 95-45.019](#).

⁵³ [Cass., soc., 21 septembre 2006, 05-41.155](#).

⁵⁴ [French Supreme Court of Appeal, Labour Division, 10 February 2021, case no. 19-14.315](#): Where an employee breaches their duty to act in good faith as a result of a conflict-of-interest situation, such a breach may constitute gross misconduct, for which the employee may be held civilly liable.

⁵⁵ [Cass., soc., 31 mars 2021, 19-23.144](#).

The courts also consider the proportionality of conflict-of-interest prevention measures when ruling in a given case. The organisation's internal rules should be specific and precise.

BOX 18: DISMISSAL FOR GROSS MISCONDUCT ON THE GROUNDS THAT AN EMPLOYEE BREACHED HIS DUTY TO ACT IN GOOD FAITH BY CONCEALING A CONFLICT OF INTEREST

Example taken from the ruling of the Court of Appeal of Paris, 22 May 2014 (case no. 12/05073)

An employee who was dismissed for having a conflict of interest appealed against the measure, arguing that the mere risk of a conflict of interest did not constitute sufficient grounds for dismissal.

In rejecting the appeal, the court ruled that "Mr X demonstrably breached his duty to act in good faith and, through his activity at Y, breached the code of ethics by undertaking a professional activity that could give rise to a conflict of interest and by failing to make every effort to avoid a conflict of interest, and acted in bad faith by concealing such outside activity; such breaches were likely to cause harm to his employer, rendering it impossible for him to remain at the company, including during his notice period".

Importantly, privacy law prevents employers from taking action against employees who refuse to declare their personal interests. Such action is only possible if the employee in question breaches their duty to act in good faith or makes a decision that goes against the corporate interest (where such breach or decision stems from a conflict of interest).

BOX 19: BALANCING CONFLICT-OF-INTEREST PREVENTION AND PRIVACY

Article 12 of the United Nations Universal Declaration of Human Rights (1948) establishes the right to privacy. This same principle is enshrined in domestic law in Article 9 of the French Civil Code, which states that "[e]veryone has the right to respect for his private life".

While there is no legal definition of "privacy", the right is routinely upheld by the French Constitutional Council on the basis of Article 2 of the Declaration of the Rights of Man and of the Citizen (1789), which recognises "liberty" as a "a natural and imprescriptible right of man". Under privacy law, individuals therefore have the right to enjoy their home peacefully without intrusion, the right to their own image, the right not to have intimate information disclosed, and the right to professional and medical confidentiality.

Organisations must therefore strike a balance between requiring employees to be transparent and to discharge their duties in good faith, and upholding their right to privacy.

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