Responding to the Conflict of Interest Risks in Central and Eastern Europe: Case of Slovenia

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Prohibition of perceived and actual conflict of interest has been a constituting part of the modern rule of law. Not much interest has been shown in academia to research the underlying reasons for lack of internalisation of prohibition of conflict of interest in state institutions and consequences thereof for the rule of law in Central and Eastern Europe (CEE). Only few studies have been published so

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far examining the importance of prohibitions of conflict of interest for the rule of law. This paper fills the gap by addressing precisely this issue. It aims to analyse the normative frameworks of the prohibition of conflict of interest in CEE by focusing on the experience of Slovenia, which can be extrapolated in the region. Equipped with this knowledge, it questions whether the normative frameworks and practices have been sufficient to eradicate the risks of potential and actual conflict of interest for the rule of law in state institutions.

Keywords: conflict of interests, rule of law, Central and Eastern Europe, Slovenia, normative and empirical analysis

1. Introduction

Three decades ago, Central and Eastern European countries broke away from undemocratic regimes and embarked on the path of democratisation. Those countries have in those three decades propelled constitutional and legislative reforms by introducing formal standards of constitutional democracy and the rule of law (Czarnota, Krygier & Sadurski, 2005).

The rule of law (RoL) *de iure* reforms appear to have been mostly successful, however they have been only partially implemented in practice (Kuhelj & Bugarič, 2016; Blokker, 2015; Letnar Černič, 2018; Avbelj, 2018a; 2018b). As a result, the institutional life in Central and Eastern Europe (CEE) has in the last three decades after democratisation suffered from weak rule of law, weak institutions, including a weak judiciary, resulting in the lack of trust in institutions. CEE countries have been historically subjected to practices which have violated the rule of law. The rule of law has in those countries been historically replaced by the rule *by* law, where the authorities employed constitutional and statutory provisions to justify arbitrary decisions (Bugarič & Kuhelj, 2015; Zyberi & Letnar Černič, 2015). Those decisions were mostly informally adopted through the informal spiderweb of connections within different groups. In that environment, the rule of law turns into rule by law and is used only to cover corruptive and arbitrary practices of the governing elites and their framework. The rule of law signifies the absence of arbitrariness in the performance of duties on the part of the governing elites (Palombella,

2009; Krygier, 2012; Krygier, 2016). The fundamental centerpiece of the rule of law has been prohibition of actual and potential conflict of interest (CoI). The prohibition of CoI implies the absence of actual or potential interference in the decision-making or appearance thereof (Demmke et al., 2008; Singh, 2019; McBride, 2016; Nicolescu Waggonner, 2016; Levmore, 1998). The absence of such a conflict makes sure that decisions are adopted not based on power but on the rule of law.

Not much interest has been shown in academia to research the underlying reasons for lack of internalisation of prohibition of conflict of interest in state institutions and consequences thereof for the rule of law in Central and Eastern Europe. Only few studies have been published so far examining the importance of prohibitions of conflict of interest for the rule of law (Epstein, 1992; Hazard, 2005). This paper fills the gap by addressing this issue and examining it in a comparative context. It will aim to analyse the normative frameworks of the prohibition of conflict of interest in CEE by focusing on the experience of Slovenia. Its aim is also to answer whether the normative frameworks and practices have been sufficient to eradicate the risks of potential and actual conflict of interest for the rule of law in the public administration. It explores different proposals on how to strengthen the prohibitions and awareness of risks of CoI in practice and its disclosure. The paper is divided into four main sections. Accordingly, section 2 provides a theoretical background on the rule of law and prohibitions of conflict of interest. Section 3 deals with normative and institutional safeguards in national statutes and oversight bodies for preventing and limiting conflict of interest through integrity, civil service, and administrative procedures. Section 4 thereafter examines practical challenges as revealed through recent case law. Finally, section 5 provides some proposals for reform based on good practices.

2. Theoretical Background of the Rule of Law and Prohibitions of Conflict of Interest

2.1 Rule of Law as the Context for Conflict of Interest

The rule of law requires the public, especially state authorities, to exercise their power in compliance with their constitutional, international and statutory obligations. Traditionally, it requires them to follow equality before law, the principle of separation of powers between different branches

of government, foreseeability, legal certainty, and legal security. Nonetheless, the rule of law can also be defined through the lense of the power of societal elites. As a result, the rule of law can be defined as the absence of arbitrariness in the application of the law and exercise of public functions. Krygier (2012; 2016) has defined the rule of law as the curtailment of the power of governing elites.

European Commission for Democracy through Law (Venice Commission) interprets the rule of law as "a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures" (Venice Commission, 2016, para. 16). Peerenboom (2005) argues for a distinction between thick and thin rule of law, with the former referring to its formal understanding, and the latter to its substantive understanding. Tamanaha (2007) has submitted that "the rule of law does not in itself require democracy, respect for human rights, or any particular content in the law" (p. 18). The rule of law is therefore more a socio-legal concept that explains that constitutional and statutory obligations are to limit the power of institutional elites and other formal and informal elites in the society. Waldron (2020) notes that "The Rule of Law is supposed to lift law above politics" and distinguishes it from rule by law, which "(…) connotes the instrumental use of law as a tool of political power". Mere compliance with legal norms does not signify that the state authorities comply with the rule of law. Lord Bingham (2010) has explained this difference even more plainly: "A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed" (p. 67). The rule of law can therefore be defined as absence of arbitrariness and consisting of formal and substantive dimensions.

One of the essential components of modern understanding of the rule of law is the prohibition of actual and/or perceived conflict of interest. Conflicts of interest derive from human nature, however when they are not properly controlled and sanctioned they can not only undermine the proper realisation of the rule of law, but also the functioning of constitutional democracy. They can lead to kleptocracy, nepotism and widespread corruption. Different legal systems deal differently with challenges concerning conflict of interest. However, it has not been accepted that

constitutional democracy cannot function properly when holders of public officials and elected officials have bias that would prevent them from performing their functions fairly, independently and impartially. In contrast, it is indispensable for the functioning of the rule of law that public officials exercise their functions without any internal and external pressures.

2.2 European Framework and General Standards on the Prohibition of Conflict of Interest

Conflict of interest includes situations where individuals holding public functions are closely connected or appear closely connected to members of informal or formal networks thereby compromising their integrity, independence and impartiality. Universal rules on the prohibition of conflict of interest are very scarce. The United Nations Convention against Corruption provides in Art. 7/4 that "Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavor to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest." Additionally, some organisations such as the European Union and the Council of Europe provide for some rules on the conflict of interest. For instance, Rules for the prevention and management of conflict of interest concerning the members of the management board and members of the advisory groups issued by the EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) define conflict of interest as follows: "A conflict of interest generally refers to a situation where the impartiality and objectivity of a decision, opinion or recommendation of eu-LISA is or might be perceived as being compromised by a personal interest held or entrusted to a given individual." (eu-LISA, 2022, p. 4) It adds that "Not only actual independence but also perception of independence is important, since it can affect eu-LISA's reputation by raising doubts about the conclusions reached. The appearance of conflict of interest can constitute a reputational risk to the Agency, even if it turns out to be unsubstantiated" (eu-LISA, 2022, p. 4).

In this context, Guidelines on the prevention and management of conflicts of interest in EU decentralised agencies define conflict of interest as "a situation where the impartiality and objectivity of a decision, opinion or recommendation of an Agency is or might be perceived as being compromised by a personal interest held or entrusted to a given individual" (Eu-

ropean Commission, p. 6). The Guidelines further explain that "Relevant personal interest may be of financial or non-financial nature and it may concern a personal or family relationship or professional affiliations (including additional employment or "outside" appointments or former employment or appointments) and other relevant outside activities" (Ibid). However, one can find those rules and guidelines for the moment only in non-binding documents. As a result, it is hoped that those rules should be translated in a binding source of European law in order for them to gain greater legitimacy and credibility.

Similarly, the Council of Europe in its Recommendation No. R (2000) defines conflict of interest as follows: "Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties", and "The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It also includes any liability, whether financial or civil, relating thereto" (CoE, 2000, Art. 13). It is indispensable that the prohibitions of conflict of interest are followed by strict and efficient supervisory mechanisms. In its Art. 13(3) requires that public officials follow four steps: "be alert to any actual or potential conflict of interest", "take steps to avoid such conflict", "disclose to his or her supervisor any such conflict as soon as he or she becomes aware of it", "comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict", and "whenever required to do so, the public official should declare whether or not he or she has a conflict of interest". Conflicts of interest are best avoided through, firstly, normative guarantees and secondly, internalisation of those normative standards in practice. Institutions are to enforce prohibition of conflict of interest through normative guarantees in three ways: exclusions of individuals, declaration of conflict of interest, and incompatibility with performing certain functions. As for the declaration of a conflict of interest, the Model Code of Conduct for Public Officials provides in Art. 14: "The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests." Regarding incompatibility, normative guarantees prohibit individuals from performing conflicting functions that would cast doubt on the integrity of their office.

2.3 Role of Administrators and Their Interests in Public Governance Frameworks

Public governance is often understood in the broadest sense, as incorporating public policy design and the enforcement thereof in various political and administrative processes. The most prominent views seem to be according to the field literature review related to policy science and public management globally (Bevir, 2011; Raadschelders & Vigoda-Gadot, 2015; Hammerschmid et al., 2016), in CEE in general and Slovenia in particular (OECD, 2005; Bugarič & Kuhelj, 2015; Kovač & Bileišis, 2017; Randma-Liiv & Drechsler, 2017; Koprić et al., 2014; and for Slovenia Mencinger et al.,2017; Ropret, Aristovnik & Kovač, 2018). In this context, a network of political positions and more professionally oriented administrator roles is embedded in the same institutional settings. The roles in question are frequently – even though rather theoretically and in a simplified way – defined dually. That is, there are (i) politicians who are policy makers based on their political agenda, and (ii) administrators driven mostly apolitically and professionally within a given legal framework. The latter prepare draft and alternative policies following political guidelines, and enforce them after they are adopted as strategies and regulations by supra- and national parliament and/or government. Both actors are obliged to follow the rule of law as a basic yet insufficient principle of good or sound public governance; nonetheless, political versus administrative goals and methods differ significantly (Kovač, 2017).

The influence and power of the actors and their interests, hence the rule of law in public administration and related reforms, are additionally highly affected by the tradition of individual countries and regions. The notion of administrative traditions emphasises that persistence in administrative systems also affects administrative structures and reform processes, which leads to divergence in particular time and space. This legacy can be reasoned through historical institutionalism, political and administrative cultures or state traditions and patterns of governance (based on: Painter & Peters, 2010; Bevir, 2011; Kovač & Bileišis, 2017; 2017). Some favour more legally determined approaches with all policies enacted through legislation, while others prefer more flexible yet perhaps less certain public-legal relations when primarily pursuing principles such as efficiency within red tape removal and similar projects, i.e. continental *Rechtsstaat* and Napoleonic versus Anglo-Saxon public interest orientation, and more authoritative versus consultative (like Nordic) approaches. For CEE in particular, post-communist/socialist or Soviet tradition as a hybrid based

on "classical" *Rechtsstaat* or other legacies is emphasised, which is relevant for Slovenia as well. Respective traditions further correspond to the main governance models. The most recognised authors who address public governance models, mostly through public administration reform approaches and priorities, distinguish among the following basic models (as also indicated in the table):

– (neo) Weberian administration as more legally-administratively oriented, accepting the rule of law rather formally where administrators hold in relation to citizens' a superior position as within the *Rechtsstaat* tradition;
– (post) New Public Management (NPM), which advocates public administration as a service similar to private services, understanding citizens as mostly clients in business;
– good governance (GG), incorporating various principles and good administration (GA).

There are also other models, like digital era governance. Some authors additionally distinguish between "classical" Weberian and GG models, and New Weberian State or New Public Governance as more detailed or hybrid concepts (Mathis, 2014, Raadschelders & Vigoda-Gadot, 2015; Randma Liiv & Drechsler. 2017; May & Winchester, 2018; pp. 185–192; Venice Commission, 2011; Craig, 1997; Bousta, 2013; Bevir, 2011; Auburn, Moffett & Sharland, 2013). On the other hand, these doctrinal developments as well as top-down Europeanisation contribute to convergences in the public administration regardless of individual traditions and their persistence (Hammerschmid et al., 2016; Kovač & Bileišis, 2017. For Slovenia, Kovač, 2016; Letnar Černič, 2018). Namely, individual models have shown various benefits but also weaknesses. Dysfunctions relate to politicisation and overloading of the "ought" perspective leading to bureaucracy and formalism *per se* within Weberian concepts, a lack of constitutional state and erosion of democracy within NPM, while GG manages all relevant stakeholders to enable collaborative governance only in a limited way and faces an outflow of democratic accountability due to networking (Mathis, 2014, pp. 139–162).

All these dimension are also the driving factors for understanding the rule of law and for designing management goals and tools of CoI depending on the relation between state and society, status of civil service, organisation, and similar.

Table 1: *Public governance models as a framework for the RoL and managing CoI*

	(new) Weberian Administration	(post) New Public Management	Good (public) Governance
Prevailing timing	19th-20th century	1980s-early 2000s	After 2000
Main principle/s	Rule of law	Efficiency and effectiveness	Balanced application of eight principles
Organisation of administration	Bureaucracy, hierarchy for clear responsibility	Privatisation, deregulation, decentralisation, etc.	State governed by law through delegation, coordination, inclusion
Dominant aspects of the rule of law	Procedural	Substantive	Both
Interests determination in administration	Primarily public interest protection	Private interests realisation as long as not on the account of public benefit	Balancing public and private interests
Politicisation of administrators	Apolitisation, pure professionalism	Neutrality, apolitical management	Differing political appointees, apolitical instrumental officials & interim top officials

Source: Authors.

The procedures in which administrators issue general and individual legal acts in any case amount to a huge extent of administration competences, especially in more Weberian and *Rechtsstaat* countries. However, the two functions are attributed theoretically to a "lower" level of public governance (rowing, instrumentalism) as opposed to a "higher" general decision-making (steering, institutionalism), while in practice, administrators have most often a more influential say (Bousta, 2013; Galetta et al., 2015; Raadschelders & Vigoda, 2015; Koprić et al., 2014; Kovač, 2017).

The distinction is important since political interests being a factor of law-making are legitimate to a certain extent, while no politicisation can be accepted in concrete and individual administrative matters, but personal interests are against the rule of law in both types of exposed processes. Based on legal requirements it is presumed that case law for Slovenia will reveal as a characteristic both in general and in practice, and that impartiality is a salient administrative justice guarantee.

3. National Normative and Institutional Conflict of Interest Safeguards in Integrity, Civil Service and Administrative Procedures

Slovenia is a small central European country, independent since 1991, before which it was a part of former Yugoslavia, existing from 1945 to 1991, with Slovenia as one of six federal republics, combining their powers through a merger of South Slavic nations even in prior structures to oppose German prevalence from the 1920s (more in Kovač & Bileišis, 2017, pp. 302ff). Its political and legal system traditionally combines mostly *Rechtsstaat* Austrian and (post)socialist characteristics, as well as European standards and trends since its full membership in the EU (2004). In this context, Slovenia has a rather structured regulation on CoI, based on two pillars. Firstly, the separation of powers is principally understood already by the Constitution in such a way that all professional representatives are obliged to act transparently and impartially (McCubbins, Noll & Weingast, 2007; May & Winchester, 2019, p. 21). Oversight institutions review these principles, with the judicial branch acting as the ultimate guarantor of lawfulness when exercising control over the executive one, even though there are special agencies established already within state organisation to run internal reviews. In both cases, these courts and special bodies act preventively, e.g. by adopting codes of conduct and general opinions, and repressively by imposing various measures and fines in concrete cases. Secondly, as pointed out above, there is a distinction in the level of admissible political engagement.

Impartiality of officials is regulated for Slovenia principally by secondary rules, in the EU law and national umbrella legislation, respectively. In Slovenia there are several relevant statutes which address CoI in the public administration. However, as a member of the EU, Slovenia is obliged to comply with EU law and the same principles regarding CoI are embedded already in its Constitution (1991). These are the principles of a state governed by the rule of law, equality before the law and equal protection of rights, and legality of general and individual administrative acts reviewed by courts (Art. 2, 14, 22, 23, 120, 153, 160, and 157) (Avbelj, 2018a). Regarding statutes, the most relevant ones tackling CoI are the ones listed in Table 2, with some additional that deal specifically with public procurement, appointing procedures, or sector-specific peculiarities. Nevertheless, all these statutes emphasise duality, while their

hierarchy and range or their scope are clear, and definitions of CoI are regulated consistently[1].

Table 2: *Key laws and oversight institutions addressing CoI in Slovenia*

Scope	Umbrella statutes (adopted)	Oversight institutions
General for politicians and administrators, for any authorisations thereof	Integrity and Prevention of Corruption Act (2010)	Commission for the Prevention of Corruption as the *sui generis* quasi-judicial authority (2004-); administrative, supreme, constitutional courts
Civil service, for all tasks, law-making included	Public Employees Act (2002) and Code of Ethics (2011)	Inspectorate for Public Sector in the Ministry of Public Administration; labour, supreme, constitutional courts
Administrative procedures	General Administrative Procedure Act (1999)	Inspectorate for Public Sector in the Ministry of Public Administration; administrative, supreme, constitutional courts

Source: Authors.

The Commission for the Prevention of Corruption acts as an autonomous and independent institution, led by the chief commissioner and two deputies nominated by the president of the republic based on professional criteria. It issues "general" opinions on corruptive acts and CoI stating the position of the person that has infringed the law and publishes them, hence the respective acts are individual and have to be subjected to judicial review (Supreme Court of the Republic of Slovenia in cases I Up 254/2015, 12. 7. 2016, I Up 73/2016, 14. 9. 2016, I Up 291/2015, 11. 10. 2016). Furthermore, Slovenia adopted the Public Employees Act in 2002. The law was part of the EU harmonisation pact, aiming for professionalism, enhanced capacity and coordination within the civil service system (Kovač & Bileišis, 2017, pp. 320–325)

Pursuant to this law and the State Administration Act, around 160,000 positions in total in the public administration fall into four major groups. These are: (i) political appointees, like ministers and state secretaries, who are outside the scope of this law; (ii) approx. 200 top officials, such as di-

[1] All acts listed in the following table are accessible in both Slovenian and English language, at http://www.pisrs.si/Pis.web/cm?idStrani=prevodi. See also webpages on the relevant oversight institutions: Commission for the prevention of corruption at https://www.kpk-rs.si/en/; Public sector Inspectorate at https://www.gov.si/en/state-authorities/bodies-within-ministries/public-sector-inspectorate/.

rectors general in ministries and heads of administrative authorities, who are a hybrid between professional and political appointees; (iii) other professional officials, in five career classes and 16 ranks; (iv) staff positions, carrying out supportive tasks only. Different rules are in force regarding various groups in terms of their respective principles applied to the performance of tasks, entry requirements, rights and duties, etc.

Regarding development of integrity, the Public Employees Act introduced specific principles to be respected by all servants (10 principles) and officials explicitly (five principles). The common ones are the principles of legality (obliging public employees to perform public tasks based on legislation only), honourable conduct (to act in accordance with the rules of professional ethics), and restrictions with regard to the acceptance of gifts. In addition, Art. 28 regulates the special principle of political neutrality and impartiality for officials, regardless of their level. Art. 100 defines which other activities are allowed (e.g. training) for officials not to interfere with CoI, where political involvement and profit engagement are explicitly exposed as highly limited. Based on this law, a special code of ethics was adopted in 2011, with ten guiding principles.[2] If violated, infringements can lead to various disciplinary measures by heads and as controlled by the special internal inspection and labour courts.

Administrative procedures shall be run equally and professionally by definition, so CoI is a sensitive issue and strictly limited in order to pursue fair trial or due process. EU law addresses impartiality especially in Art. 41 of the EU Charter of Fundamental Rights (2009) (more in Bousta, 2013; Galetta et al., 2015; Kovač, 2016), and the European Parliament's Resolution on a Law of Administrative Procedure of the EU (2013) and Resolution for an Open, Efficient and Independent European Union Administration (2016). The latter has 30 articles, with Art. 13 specifically dedicated to conflict of interest (i.e. a personal interest, including, in particular, any family or financial interest). As one of the cornerstones of a good conflict of interest programme is to have a solid regulation on recusal, which requires a complete and detailed list of the causes of abstention or withdrawal (OECD, 2005, p. 29), Slovenian General Administrative Procedure Act (GAPA) is compliant with EU regulations. This is expressed especially in terms of seeing impartiality as an element of the supreme principle of (procedural) legality (GAPA, Art. 6), although Slovenian law is much more detailed in norms, which does not necessarily

[2] More in: Kovač (2012).

contribute to a higher level of compliance (see Art. 35–40 for officials, 190–193 for expert witnesses, and 237 regarding legal remedies. More in Kerševan & Androjna, 2017; pp. 127 ff.; Auby, 2014). GAPA distinguishes two situations in a case of CoI, that is:

– Indisputable legal fiction when an official is deemed biased if they have another role in the same procedure, if blood relatives to a certain degree or similar family connections, and if they have already been involved in a prior procedure on a lower instance (Art. 35, *iudex inhabilis)*; hence, in these situation the procedure shall not continue until they are excluded from the procedure and another official is authorised;
– Situation with a set of circumstances that cast any doubt on the impartiality of the official (Art. 37, *iudex suspectus*); here the procedure continues with acts, which may not be postponed until the superior decides upon said circumstances while impartiality is reviewed on a case-to-case basis when an actual bias is present (cf. judgment of the Supreme Court of the Republic of Slovenia, I Up 352/2016, 10. 5. 2017).

Both grounds as a part of procedural legality, and particularly the second open option, are of great significance for understanding that CoI is at a cross-section of the legal and ethical domain of public administration (Kovač, 2012; OECD, 2005, p. 29).

4. Conflict of Interest Practical Challenges through Recent Practice and Case-Law in Slovenia

4.1 Analysis of the Anti-Corruption Commission in Supervising Conflict of Interest

The Integrity and Prevention of Corruption Act defines conflict of interest as "(…) circumstances in which the private interest of an official person influences or appears to influence the impartial and objective performance of his public duties" (Integrity and Prevention of Corruption Act of the Republic of Slovenia, Art. 4, line 9). More specifically, the Act thereafter imposes restrictions on business activities due to conflict of interest (Art. 35). It applies to the public sector as a whole, which includes political appointees like ministers and all officials. Art. 37 of the Act provides in paragraph 1 that "An official person shall pay attention

to any actual or possible conflict of interest and shall make every effort to avoid it", whereas paragraph 2 stipulates that "An official person may not use his office or post to advance his personal interests or the personal interests of another person" (Art. 37). If conflict of interest has been found, "the official person shall immediately cease to perform any work with regard to the matter in which the conflict of interest has arisen, unless the delay would pose a risk" (Art. 38(1)). Additionally, the Public Employees Act also provides for the prohibition of conflict of interest in Art. 100. It also establishes obligations of notification of actual or potential conflict of interest (Art. 100(7)). However, it does not provide for any sanction. It only adds that in the case of actual or perceived CoI "(…) the head of the authority shall ensure that the tasks are performed in a lawful, impartial and objective manner and verify whether the tasks have been performed in this manner".

Prevention and supervision of CoI are regulated in articles 26–40, addressing general incompatibility of office – mainly regarding political and financial relations, non-admissible acceptance of gifts, restrictions on business activities, and specifically obligation to avoid a conflict of (private) interest. If the latter might arise, an official shall immediately inform their superior in writing or, if they have no superior, the Commission, and cease to perform any work with regard to the matter in which the conflict of interest has arisen, unless it would be dangerous to delay. Afterwards, the competent body decides upon CoI in 15 days. However, the commission may initiate the proceeding also when there is possibility that CoI has arisen in the official conduct within a two-year time limit. If so, the Commission shall inform the competent authority or the employer and set the time limit by which the body or the employer is obliged to inform it of the measures taken in this respect (see very similar instruments as commonalities in six "old" and three "new" CEE democracies, in OECD, 2005, pp. 9–17). The Commission for the Prevention of Corruption supervises compliance with the provision on the actual and perceived interest through the procedure for establishing a conflict of interest. If the Commission determines the existence of conflict of interest, "(…) the Commission shall inform the competent authority or the employer and set the time limit by which the body or the employer is obliged to inform it of the measures taken in this respect" (Integrity and Prevention of Corruption Act, Art. 39(2)). The Commission does not enjoy any binding powers relating to conflict of interest. If it finds violations of the prohibition of actual or perceived conflict of interest, it can only refer the matter to other state authorities such as the police and prosecution authorities

(Art. 39(3)). The Annual Report of the Commission for the Prevention of Corruption for 2019 notes that in 2019 the Commission registered 101 cases concerning alleged violation of the prohibition of actual and potential conflict of interest (Commission for the Prevention of Corruption of the Republic of Slovenia, 2019, p. 46). The Commission examined 90 cases and found violations of the prohibition of conflict of interest in 14 cases. It issued recommendations in two cases. In comparison, the Commission found 14 violations of the prohibition of conflict of interest in 2019 (Commission for the Prevention of Corruption of the Republic of Slovenia, 2020, p. 21), 13 in 2018, 16 in 2017, 12 in 2016, eight in 2015 and 15 in 2014 (Commission for the Prevention of Corruption of the Republic of Slovenia, 2019, p. 47). The Annual Report from 2019 lists among the most common cases of conflict of interest in 2019: nepotism of public officials by favouring their relatives in order to obtain a public post or business contract; and nomination of persons in state-owned companies by the local councils (p. 48). Most of those cases include the actual presence of conflict of interest, whereas the Commission has so far not concentrated on eradicating potential conflicts of interest in the state institutions and public administration. The Commission has also emphasised in its report that a great part of its functioning concentrates on preventive measures mostly by advising and providing seminars to different state and public institutions.

The number of found violations of the prohibition of actual and potential conflict of interest in the past years is very low, particularly given the public perception that such practice is the main cause that has undermined the rule of law in practice in the institutions of the Slovenian state. It seems that those numbers hardly illustrate appropriately the real magnitude of the negative effects of the prevailing conflicts of interest at all levels of state authorities and public administration. Moreover, it appears the Commission for the Prevention of Corruption does not have any binding powers at its disposal to effectively address the issue of conflict of interest. In the best case scenario, they can all issue non-binding recommendations and/or refer the cases to other more competent authorities such as the police and state prosecution departments. Its greatest powers lie in the soft law arena, where its findings can, through public and media pressure, result in the resignation of public officials, ministers and even whole governments. Nonetheless, for its potential public powers to work, the Commission has to protect its credibility and legitimacy through fairness, transparency and integrity of its head and members. Nevertheless, it appears indispensable that the prohibition of actual and potential conflict

of interest is translated also into daily practice of state institutions and public administration and that public employees and public officials also internalise it in their daily work.

4.2. Conflict of Interest in Administrative Procedures and the Corresponding Case Law

CoI is a category in various relations, broadly also in administrative procedures. There are roughly 10 million procedures run annually in Slovenia, for a 2-million population and approx. 120,000 companies. Furthermore, this administrative type of activity requires apolitical and non-personal attachment of officials to the matter and parties in question *per definitionem,* in order to satisfy the basic (formal) legality of decisions (Auburn, Moffett & Sharland, 2014; Galetta et al., 2015). In Slovenia, administrative procedures are in principle run in two instances, with approx. 3% of appeals lodged annually and approx. 3,000 administrative disputes lodged in front of further instances, i.e. specialised Administrative Court (AdminC). Furthermore, the Supreme Court (SuprC) is in charge of judicial appeals and revisions against the judgments of AdminC. The judgments of SuprC can also be challenged in front of the Constitutional Court (ConstC), if the complainant contends infringement of constitutional guarantees in the administrative procedure or dispute.

In order to establish the extent and the most common practical situation in disputes regarding CoI, which can *inter alia* reveal a potential need for reregulation of GAPA, an analysis of case law in front of the Slovenian AdminC, SuprC and ConstC was conducted. There are two publicly accessible databases of court decisions in Slovenia, run by the ConstC for constitutional complaints and SuprC for all administrative disputes, which enable a focused search based on keywords. As emphasised previously, courts ground their judgments on the following notion as very often reasoned, e.g. by the ConstC in case Up-1094/18, 21. 2. 2019: "An integral part of the exercise of the right to a fair trial is also the impartial decision-making of bodies which decide on rights, obligations and legal benefits and are not courts (…). The authority deciding on the rights, obligations or legal benefits must be of a composition such that there are no circumstances which cast doubt on the appearance of impartiality" (para.11). Although this court in particular deals much more regularly with impartiality of judges, it is also important to guarantee unbiased administrative decisions. Namely, the ConstC search engine shows in the ConstC

database that out of 635 cases from 1992 to 2019 regarding constitutional complaints in all administrative fields (taxes, social security, data protection, internal affairs, etc.), there are 33 cases based on the keyword "exclusion/recusal of an official", 62 cases regarding "impartiality", and five regarding "biased". However, almost all address the impartiality of courts and judges. The criteria regarding impartiality of judges are applicable to officials based on Art. 22 of the Constitution (ConstC, case Up-217/15, 7. 7. 2016), even though the rules on impartiality are stricter on judges than on officials in administrative bodies, since the latter are always subjected to judicial review by the former (ConstC, Up-365/05, 6. 7. 2006).

Regarding administrative disputes, for the period of 2000–2019 the SuprC search engine shows 40 cases for "exclusion/recusal of an official" at the SuprC and 211 at the AdminC; five cases for "impartiality" and one for "biased" at the SuprC, with 98 and 14 cases at the AdminC, respectively, while all these are simultaneously listed above the previous item. In terms of the time span, it seems that the distribution of all 40 cases in front of the SuprC is rather coincidental. As for administrative sectors, these cases range from social, family disputes and schooling affairs to environmental issues, tax inspection and similar, which provides additional ground for a representative analysis of the following content-related conclusions. It is also evident that not higher but directly authorised (lower) officials are seen as potentially biased (77.5%), which also means that not political but rather personal reasons are claimed. As regards the type of administrative body and position of the disputed official, only 7.5% of political agencies or appointees (minister/ry, mayor in a municipality) have been involved. This further explains why in no case before the SuprC explicit exclusion ground is claimed for *iudex inhabilis*, while all others are based on *iudex suspectus* (e.g. financial and personal connection between an official and a party since the former has worked or run for employment for the latter).

Table 3: *Empirical data on the case law on impartiality at the SuprC in 2000–2019*

All cases	**40**	**Share (%)**
Legal remedy lodged in administrative dispute:		
Appeal (regular)	25	62.5
Revision (irregular)	14	35
Suit (regular, based on a sector-specific act)	1	2.5

SuprC ruling:		
Rejected	38	95
Granted	2	5
Administrative field:		
Environment, construction, expropriation, denacionalisation, farms	21	52.5
Social, family and school affairs	8	20
Taxes, competition, insurance, communication	6	15
Others (nominations, weapons, war victims, etc.)	5	10
Officials disputed to be biased; by level:		
Middle or higher level; mainly decision making	9	22.5
Lower or middle level; mainly conducting proceeding	31	77.5
By body:		
Officials at administrative units	13	32.5
Inspectors	11	27.5
Officials at various social institutions	7	17.5
Officials at regulatory agencies, commission, tax office	6	15
Officials at ministries	2	5
Mayors (and no officials from municipalities)	1	2.5
Reasons for potential biases:		
Explicit reasons under Art. 35 (family, etc.)	0	
Other suspects under Art. 37, political interests	0	
Other suspects under Art. 37, personal interest	7	12.5
Other suspects under Art. 37, proceedings conduct	33	87.5

Source: Authors.

As expected, there are more appeals than extraordinary legal remedies lodged before the SuprC. More importantly, the result of judicial review is very rarely that even an appearance of biased decision-making is present, which is the case only in 5% of all cases in the last 20 years. The respective two cases were grounded on a specific situation. First, when issuing a temporary individual administrative act, an application for the exclusion of an official must still be processed since the proceeding is not finished yet (SuprC, I Up 391/2005, 24. 11. 2005). Second, an oral hearing needs to be carried out to verify all relevant circumstances when an application for exclusion is rejected but a party claims that an inspector had in advance publicly expressed the conclusion on how the proceeding would be decided upon before its conduct (SuprC, I U 1152/2005, 25. 10. 2006). In all other cases, parties disputed only the way the proceedings were

conducted (87.5%), which is not an exclusion cause neither by GAPA nor by consistent case law. In sum, we can see already statistically that there are approx. 5 to 10% of cases in front of the ConstC that deal with CoI in administrative matters at the level of judicial review, yet only approx. 0.5% of all cases relevant for this issue deal with impartiality of officials. However, only 5% of disputed cases are judged as even seemingly impartial at the administrative level. Therefore, one can establish that Slovenia exhibits a very high awareness of impartiality as a principle in administrative procedures, in both political and personal biases, as opposed to more general decision-making.

5. Discussion

Considering the dilemmas expressed especially in CEE, CEE countries have been facing problems, such as determining the proper scope of minimal versus strong state with the level of de/regulation or non/marketisation, and developing democratic over technocratic values. This is reflected through the prevailing governance models and traditions that represent an important factor in the development of the rule of law and the prohibition of conflict of interest. The approaches selected in reforms to enhance democracy are influential since more contemporary and holistically oriented concepts are mostly imported to CEE from the West in terms of good, inclusive and effective governance. Here the Europeanisation process is of utmost importance as an external incentive and a framework for the development of common European standards. Experts in theory and practice alike often claim a tension between striving for democracy and the rule of law on one hand and efficient public administration conduct on the other. However, this dilemma is rather artificial when developing good governance since legal regulation of public governance is an essential element of constitutional democracy, although CEE still seems to be in search of a balance thereof (Bugarič & Kuhelj, 2015; Koprić et al. 2014; Ropret, Aristovnik & Kovač, 2019.) In this context, public administrators play a salient role, especially in limiting politicians who usually design public policies when they follow their legitimate yet often particular interests. Administrative levels shall both in theory and through judicial review and other oversight mechanisms reflect a rather rigid concern for non-arbitrariness in order to not only make decisions legally sound but to develop trust in the system as a whole.

The focus of our research was therefore the role of authoritative agencies and administrators, especially top and other officials, who prepare general regulations and conduct administrative procedures. However, this distinction is not often clear. As pointed out by McCubbins, Noll and Weingast (2007), and by Hofmann, Schneider and Ziller (2014), there is a shift in administrative procedures as a tool for the implementation of public policies only on hybrid matters, e.g. when issuing environmental plans and tax guarantee acts (May & Winchester, 2018, p. 123). In both activities, procedural aspects are an important part of the rule of law, as they constitute formal legality as a counterpart of the substantive one regardless of their affiliation or types of processes (See Craig, 1997; May & Winchester, 2018, pp. 8, 37).

From a procedural point of view, there are standards of accessible, clear and predictable legislation, equality before the law, limited discretion and executive, mostly guaranteed by judicial and democratic parliamentary review, whereas substantive aspects are closely related, as a fair procedure is a part of any adopted rule or decision. Some other sources also put forward other elements, such as (anti)corruption, as one of the eight themes of the Rule of Law Index or the OECD. Nevertheless, impartiality is a part of various public affairs, regardless of it being defined as an autonomous item or part of other principles, such as legality, predictability, equality, non-arbitrariness, fair trial.

As for normative analysis combined with empirical insight, the initial hypothesis is confirmed, emphasising that the overall legal framework on CoI – covering various levels of civil servants and functioning anti-fragmentally regardless of the organisational structure of the national public administration – is especially crucial in (post)transitional conditions and the *Rechtsstaat* administrative tradition. Furthermore, as regards the empirical overview of anti-corruption commissions and courts rulings, it has been revealed that RoL in general as well as the anti-CoI mechanism are a work in progress in Slovenia. Indeed, improving public administration is a never-ending story, but for the CEE region specifically, it is also significant to act systematically in the field to enhance classical values and principles of democratic authority. In spite of the positive trends established, there are surely many possible and even necessary improvements to work upon. To name but a few, one seems to be the less regulated yet more rigorous concern to reduce the gap between law in books and law in practice. Namely, albeit prescribed impartiality is one of the key pillars in Weberian public administration, which is characteristic for Slovenia, rules that are too detailed and dispersed can function counterproductively. Con-

sequently, better effects are achieved if fewer pieces of legislation cover various layers of employees in the public administration. In addition, one cannot exaggerate the role of oversight institutions in controlling practical cases but mainly in developing a unified understanding of which life situations match prohibited CoI. Moreover, more general decision-making refers rather often to politics, while more concrete decision-making refers rather rarely – and if so – to personal interests (World Justice Project, 2021; May & Winchester, 2018; Auburn, Moffett & Sharland, 2013, pp. 109–274. For EU, Galetta et al., 2015).

If we compare empirical results from this study for Slovenia with the Rule of Law Index rankings, we find the match to prove above recommendations, although differences can also be attributed to other factors. But in the 2021 Rule of Law Index analysis Slovenia is ranked 29th with a score of 67% among the 125 countries measured, which shows a more efficient system with a more harmonised approach and regulatory feedback in the system of division of powers (World Justice Project, 2021, p. 11). Specifically, regarding three out of 44 indicators, i.e. that government officials in the executive (administrative), judicial and legislative branches do not use public office for private gain, the following can be observed: Slovenia has been assessed with 65, 77, and 46% of all possible points. These results show comparable situations of illustrative countries but also interconnections and differences as to whether impartiality of politicians or judges and administrators is in question, since the corruption level as well as less efficient management of CoI is higher when political appointees are involved and lower in professional spheres.

Given the above analysis, several proposals can be submitted for the reform of risk management of CoI in CEE. Previous research has shown that the Slovenian constitutional democracy has been taken over by spiderwebs of informal and political networks, some of them connected to the past regimes (Avbelj 2018a; Avbelj & Letnar Černič, 2020; Letnar Černič 2018; Letnar Černič et al., 2018; Avbelj, 2018b). Our research has established that respective countries have in the last two decades introduced strong normative frameworks and underpinnings of Col. Nonetheless, supervision mechanisms in the Slovenian public administration have remained weak or facing challenges. Most state institutions have suffered from a lack of internalisation of the values of constitutional democracy. In order to progress to mature constitutional democracy, they have strengthened their institutions and improved legal culture by internalising the values of meritocracy, fairness and transparency. As a result, the aim is for the values and principles of constitutional democracy to slowly and grad-

ually eradicate perceived and actual conflict of interest at all levels of state institutions and also in the private sector. Kleptocracy, corruption and nepotism have been eating away at the rule of law in Slovenia and thereby destroying public trust in the functioning of democratic institutions.

Therefore, CEE countries should first work on enhancing the role and functioning of state institutions both in theory and practice. As a rule, only strong institutions of constitutional democracy can adequately tackle the challenges of conflict of interest. Building strong institutions does not happen overnight. On the contrary, it is a long-term process, which requires commitment to the values and principles of constitutional democracy over a few decades. The institutional elites in Slovenia are to take those values and principles as their own and show commitment to their compliance (Avbelj, 2018a; Avbelj & Letnar Černič, 2020). They are to show willingness to curtail practices of "dirty togetherness", which have diminished the operational capacities and effectiveness of the public administration. All in all, prohibition of conflict of interest should be internalised in state institutions and the private sector.

Secondly, albeit the normative protections are quite comparable to the European standards on the prohibition of conflict of interest, a stronger and more effective supervisory mechanism has to be put in place both at the normative level and in policy measures. As a rule, many of the challenges have been connected to deficiencies in translating normative obligations into implementation and practice. For example, the Slovenian Commission for the Prevention of Corruption has faced several internal and external challenges in fulfilling its mandate thereby undermining its power of credibility and legitimacy to fairly, impartially and independently combat conflict of interest. As a result, countries should put in place binding rules that would allow for the creation of public administration bodies that would effectively supervise the implementation of CoI in practice. Another alternative would be to include one or two foreign experts in the composition of those bodies in order to ensure both internal and external control of those bodies (Letnar Černič et al., 2018). Members and employees of the supervisory bodies should be vetted before appointment or employment for potential and actual conflict of interest.

Thirdly, CEE countries appear to have often turned a blind eye to the impact of culture and customs on the actual and/or perceived conflict of interest. Therefore, much has been connected to cultural objections to or even rejection of the rules, which perhaps are not traditionally so common to the Slovenian environment. The reform of CoI in practice would also

require reforms in the conduct of public employees. As a result, countries could engineer cultural training aimed at internalising the values of integrity, honesty and fairness. Moreover, the reform calls for improvement in the registration of lobbying contacts of state officials and public employees with politicians, businessmen and informal networks. More efficient supervision of those contacts that breed potential and/or actual perceived conflict of interest is undoubtedly required. Such a process will be gradual, but it nevertheless requires full commitment to those principles not only by the holders of the highest offices, but by the society as a whole.

Fourthly, the policies and supervision of CoI in the public administration should be opened up and made public and transparent in order for not only state bodies but also the general public to supervise potential and actual conflicts of interest. In countries with weak institutions such as Slovenia, conflicts of interest are prevented and protected against only through full transparency and openness of state institutions and the complementary rule of the public, investigative journalism and ordinary citizens.

6. Conclusion

CEE countries have been plagued by deficiencies in implementing the rule of law. The risk of conflict of interest has accordingly been one of the areas of concern. Much of the challenges relate to the remnants of the past authoritarian systems, but also to the lack of internalisation of the values of the rule of law for the functioning of modern constitutional democracies. Furthermore, public administration models that are characteristic for Western democracies and enhance the rule of law as an inevitable part of good governance are in reality only partially implemented in CEE. To establish what the main gaps are at both normative and empirical levels of CoI as one of the salient RoL components, a comprehensive analysis was carried out in two major fields, i.e. in administrative conduct generally, and as regards single-case decision-making which has the most pervasive impact on citizens, in particular. Specifically, this paper examines the normative frameworks of the prohibition of actual and perceived conflict of interest and challenges of compliance in practice of CEE state institutions by focusing on the experience of Slovenia as an EU Member State. We have investigated normative and institutional safeguards in the national statutes and oversight bodies on preventing and limiting conflicts of interest through integrity, civil service, and administrative procedures.

We have also examined how normative protections have been employed in practice in the work of the judiciary and anti-corruption commissions. The paper fills the gap by addressing the importance of conflict of interest prohibitions for the rule of law. We have investigated whether the normative frameworks and practices have worked towards eradicating the risks of potential and actual conflict of interest for the rule of law in the public administration. Over decades, Slovenia has put in place normative safeguards to enforce CoI in order to protect the rule of law. It has introduced modern standards of the rule of law in its constitutional system. However, based on normative and empirical comparisons, the post-socialist heritage and excessive legalism still hinder the Slovenian system from fully developing lawfulness. Hence, further comparisons and data-based research are required to raise awareness of these topics for good public governance in the region.

The rule of law in the region requires that conflict of interest is not present in the decision-making in all three branches of government and in the wider public administration. Our research illustrates those high-flying rhetorical standards have yet to be fully implemented and internalised in the daily workings of Slovenian institutions. Several practical challenges have been revealed through the examination of the recent case law. State institutions remain weak and subject to internal and external pressures by informal networks from different backgrounds. Finally, we have outlined some proposals for reform based on good practices from the comparative law perspective primarily focused on a reform in the mentality of persons working in state institutions and the public administration. Equipped with this knowledge, we found that normative frameworks and practices have not been sufficient to eradicate the risks of potential and actual conflict of interest for the rule of law in the public administration. State institutions are not to turn a blind eye to the risks of conflict of interest for the rule of law if they wish to turn into full-fledged constitutional democracies.

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RESPONDING TO THE CONFLICT OF INTEREST RISKS IN CENTRAL AND EASTERN EUROPE: CASE OF SLOVENIA

Summary

Prohibition of conflict of interest prevents abuses of the rule of law in modern constitutional democracies. As a result, is ensures that persons working in state institutions do not use their posts and functions for private gain. The experience from Central and Eastern Europe (CEE) illustrates that state authorities have in the past faced challenges in how to internalise the prohibition of conflict of interest. Literature from CEE on the prohibition of conflict of interest has been scarse. Consequently, this paper aims to address this gap by examining the experience of the Slovenian state in coping with the risks arising from conflict of interest. It discusses and analyses on one hand theoretical and normative underpinnings of the prohibition of conflict of interest in the Slovenian, European and international frameworks. On the other hand, it examines the recent practice of administrative and judicial bodies concerning the prohibition of conflict of interest. It finds that normative frameworks in the Slovenian constitutional framework have been reformed in recent years. Nonetheless, there is still a risk of potential and actual conflict of interest for the implementation of the rule of law in state institutions. The normative prohibition appears not to have been fully internalised in the practice of state institutions. As a result, the authors submit that state institutions should not turn a blind eye to the risk of conflict of interest in order to show willingness to strengthen the rule of law in the Slovenian constitutional democracy. The Slovenian normative and empirical experience shows lessons

that can be taken up in the constitutional democracies of Central and Eastern Europe experiencing similar challenges.

Keywords: *conflict of interests, rule of law, Central and Eastern Europe, Slovenia, normative and empirical analysis*

ODGOVOR NA RIZIKE OD SUKOBA INTERESA U ZEMLJAMA SREDNJE I ISTOČNE EUROPE: SLUČAJ SLOVENIJE

Sažetak

U suvremenim ustavnim demokracijama zabrana sukoba interesa sprječava zlouporabu vladavine prava. Ona osigurava da se osobe zaposlene u javnim institucijama ne koriste svojim položajima i funkcijama za stjecanje privatne koristi. Iskustva iz zemalja srednje i istočne Europe pokazuju da su se državne vlasti već suočavale s izazovima internalizacije zabrane sukoba interesa. Ipak, literatura o zabrani sukoba interesa iz tih je država rijetka. Nastavno na to, ovaj rad adresira taj nedostatak ispitujući iskustvo Slovenije u suočavanju s rizicima koji su imanentni sukobi interesa. S jedne strane, rad raspravlja i analizira teorijske i normativne osnove zabrane sukoba interesa u slovenskom te europskim i međunarodnim pravnim okvirima. S druge strane, rad ispituje recentnu praksu upravnih i sudskih tijela koja se tiče zabrane sukoba interesa. Rad nalazi da je normativni okvir za sukob interesa u slovenskome ustavnom uređenju nedavno reformiran, no još postoji rizik od potencijalnog i stvarnog sukoba interesa u državnim institucijama. Čini se da zakonska zabrana još nije potpuno internalizirana u praksu državnih institucija. Kao rezultat istraživanja autori zaključuju da javne institucije ne smiju ignorirati rizik od sukoba interesa te trebaju pokazati volju za jačanjem vladavine prava u slovenskoj ustavnoj demokraciji. Slovensko normativno i praktično iskustvo pruža lekcije koje se mogu iskoristiti u ustavnim demokracijama zemalja srednje i istočne Europe koje se suočavaju sa sličnim izazovima.

Ključne riječi: *sukob interesa, vladavina prava, srednja i istočna Europa, Slovenija, pravna i empirijska analiza*