NEW TECHNOLOGIES AS A SOLUTION FOR CONFLICTS OF INTERESTS CASES

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If policy to prevent conflict of interest is to be effective, it must address two major issues. One has to do with the collection and management of information for case detection, the other with defining adequate rules on conflict of interest and finding suitable ways of enforcing them.

Handling these two issues has been a central objective of Argentina's Anticorruption Office (AO) since its creation in 2000. There are two main divisions within the AO: an Investigations Department that looks into alleged administrative wrongdoings in the public sector, and a Transparency Policies Department whose aim is to prevent the occurrence of irregular situations. The latter is responsible for dealing with both the financial disclosure system and the conflict of interest issue.

This chapter describes the work performed by the AO's Transparency Policies Department in the last two years, the problems encountered, and the solutions implemented. Since the problems concerning information had a direct connection with the financial disclosure system, there is a brief description of the new FDS, the ways in which it differs from the old system, and its impact on Argentina's current policy on conflicts of interests. This is followed by a brief review of the country's experiences with the conflict of interest issue. The chapter ends with some provisional conclusions that take into account the current challenges.

1. The financial disclosures system in Argentina before 2000

Before Law 25.188 was passed, public officials were required to complete a short financial disclosure form, once when entering office and again upon leaving. Both forms were held for safekeeping by the *Escribanía General de la Nación* (Argentina's Office of the General Notary). They were confidential; public access to their contents was restricted. Only a judge formal proceeding could have access to the information enclosed in such forms.

In 1999, Decree 41/99 changed the content of financial disclosure forms and allowed the public to request access to the information contained in them. Although that permission existed legally, public access to the information never became a reality. Among other problems, the new FDS forms were not sufficiently user-friendly for the general public, as shown by the very few requests introduced before the *Oficina Nacional de Etica Pública* (ONEP) (National Office of Public Ethics). Those few requests were never answered or were answered too late to build public trust in the accessibility of the system.

The use of paper forms for the information was another significant problem, both for public officials completing the forms and for those responsible for overseeing them. Filling in the forms was a long and complex process, and directions given to (ostensibly) facilitate that process were vague and misleading. As a result, soon after the system was introduced, there were a great number of rejected forms and the paper traffic produced a jam that clearly indicated the system would be unmanageable and too expensive to operate. No substantial modifications to the content of the disclosure forms were made; the ONEP simply collected the 35 000 forms and kept them in a bank vault. Meanwhile the paperwork required to manage the forms was huge, and the significant number of rejects created extra work with no added value – as well as an administrative cost of about US $70 per financial disclosure.

2. Steps towards a new financial disclosure system

According to Roberto De Michele,[1] head of the Transparency Policies Department of the Anticorruption Office, implementation of the new FDS took into account a new set of considerations.

First, financial disclosure systems in less developed countries have traditionally been created following the model of more developed public administrations.[2] Therefore, in transplanting elements of these models, it is important to consider contextual factors that help to explain the success of the original blueprint. When the models are transplanted into different administrative contexts without these factors, the likelihood of under-performance is high. This occurs, for example, when models demand change-resistant bureaucracies or have operators who lack skills to manage technological complexity or are under-motivated to acquire these skills because of low pay.

Second, the system should cope with the problem of highly decentralised agencies, such as the fiscal service, the foreign service and the armed forces. With the paper-based system, it was very difficult for these agencies to comply with the requirements of the law on time.

Third, the proposed system should try to reach a proper balance between two potentially conflicting values underpinning these policies. On the one hand, transparency and access to information are recognised as strong and effective principles to prevent corruption. As a corollary, these principles support full disclosure policies. On the other hand, there is a privacy expectation with regard to the individual's confidential and personal information, whether or not he or she holds public office.

Fourth, the new system should stress the importance of information that could determine the existence of conflicts of interest. The power of this information to serve as a means of preventing wrongdoing has often been overlooked. Prior to the reform, there existed no significant precedents in the Argentine public sector for detecting and preventing conflicts of interest. Normally, such questions were considered within the scope of criminal law, an area also lacking helpful precedents. Besides the capacity of detection and prevention, the system could provide information valuable in identifying cases of public officials holding more than one occupation.[3]

Fifth, the system should enlist civil society and the media as monitoring forces. Specifically, it should attempt to empower every citizen and journalist to act as an "auditor" of public officials. Complying with this ideal requires, at a minimum, equipping citizens with the ability to consult financial disclosure forms, while respecting the privacy expectation of officials and the requirements of law. This element is crucial, since civil society and the media are sometimes a more effective – and always the least expensive – auditing firm. The task also emphasises the responsibility of citizens in a democracy to act as stewards of the republic.[4]

The public's perception of the forms is undoubtedly a critical issue concerning financial disclosure systems. The necessary balance between protection of privacy for the public officials and the citizens' right to information on the finances and private interests of these officials is a delicate topic. An intense debate is under way between those who believe that privacy values should not be sacrificed on behalf of public trust and those who consider public scrutiny the very core of democracy. The United States, for example, has implemented a financial disclosure system where senior officials' forms are accessible to the general public. On the other hand, in Canada financial disclosure forms are strictly confidential. The balance between these two positions varies from one country to the next. Any reasonable analysis of public access to disclosure forms should take into account the particular country situation and its social and political environment.

In Argentina's case, the Congress has established by law that the general public is to have access to the financial disclosure forms of every public official, but it has also established the confidentiality of certain sensitive information contained in these forms, such as bank account numbers, private addresses and credit card numbers.

Another element to consider is that some countries, including Argentina, have criminalized illicit enrichment and that financial disclosure forms are a key tool in detecting such crimes.[5] On the other hand, is also true that in Argentina's case court decisions are questioning the constitutionality of using the forms to that end.

As international awareness of corruption and its prevention grows, the whole topic of public access to information will become a subject of debate around the world. The framework for the negotiations towards a United Nations convention against corruption is going to be one of the arenas for that debate.[6]

Argentina's new electronic FDS has produced positive results in terms of performance, consistency of the information received, and the absence of rejected financial disclosure forms, as shown by the charts included in the following section.

3. The impact of the new FDS in numbers

The following tables illustrate the preliminary impact of the new system.[7]

Table 1: Levels of Compliance

	Former System	Electronic System
Public officials required	36.000	25.503
Level of compliance	24.198 (67 %)	24.994 (98 %)

Table 2: Number of FDF Requested

	Former System	Electronic System
Through the Internet	Not available	560
By Paper Forms	66	263
Total requests	66	823

Table 3: Estimated cost per FDF

Former System	Electronic System
U$ 70 per form	U$ 8 per form

Table 4: Profile of Users

	Former System	Electronic System
FDF requested by the press	43	612
FDF requested by citizens	23	211

Table 5: Impact on Cases of Conflicts of Interest

	Former System (1999)	Electronic System (2000 - 2001)
Conflicts of Interests files opened	40	331

4. Conflicts of interest in Argentina

A democratic system demands that public officials justify their actions and decisions by providing cogent reasons. The notions of fairness and impartiality are the basis for that cogency. In the conflict of interest issue these notions must indeed be sustained, since the decisions that a public official takes will generate economic benefits to certain individuals or corporations, or will affect fundamental rights.[8]

In the conflicts of interest field the demand for justification is certainly, in line with Robert Behn's view, a demand for accountability, especially in terms of fairness and impartiality of the decisions. It must be pointed out that there is debate between accountability for finances and fairness in one hand versus accountability for performance in the other. This debate can be seen as a little too premature in less developed countries, like Argentina, where we found big troubles in enforcing the regulations, so the look for accountability for performance could sound highly unrealistic. This is an obvious consequence of the profound differences in ethics fields between developed countries and transitional democracies.[9]

Working on conflict of interest means dealing with the opposition between public and private interests. Under a constitutional democracy, the people might reasonably expect the public interest to prevail above claims and demands from particular citizens, interest groups or economic sectors.

Before Law 25.188 was passed, different statues regulated conflict of interest situations. Some of these focused only on civil servants while others referred to political appointees, such as secretaries or ministers. At the same time, decentralised agencies had their own rules concerning conflict of interest. The overlapping of such systems generated uncertainty, and the absence of effective sanctions for violation of these rules deepened the crisis.

The Argentine Penal Code added yet more confusion with the criminalisation of "unacceptable negotiations with public duty", the meaning of which is quite similar to that of conflicts of interest.[10] It is difficult to find references to "unacceptable negotiations" in criminal jurisprudence, and judges differ radically in their interpretation of the term in the few cases that exist.[11]

When Argentina signed the Inter-American Convention against Corruption, things started to change. Law 25.188 incorporates the ICAC into national legislation and its Chapter V (Articles 13 to 17) creates an entirely new system for regulation of conflict of interest. Article 13 is key, because it is meant to define situations where a public servant is involved in a conflict of interest.

However, Article 13, the key clause in the said Chapter, suffers from a number of flaws. First, the legal concepts it contains are only vaguely defined. Second, it does not provide a reasonable definition of conflict of interest. Third, it fails to establish acceptable distinctions between different professional activities (e.g. different treatment in a conflict of interest situation between a freelance consultant and a person who is on the board of a corporation). Chapter V also refers to previous and subsequent conditions for access to and exercise of public office, and these rules also suffer from various defects. In spite of such problems, however, the AO was able to accomplish its enforcement duties on conflict of interest detection and control. The way it did so is summarised in the following sections.

5. Management targets on conflict of interest situations

Since the creation of the Anticorruption Office, almost 350 files analysing conflict of interest were opened. These files had their origin in one of the following causes:

1) An unclear situation detected in the routine analysis of the financial disclosure forms; a file is opened in order to gather more information and perform a more detailed analysis.

2) A complaint against a public official lodged with the Office by a citizen or the mass media.

3) A public official initiating an inquiry into his or her own situation.

The implementation of Law 25.188 had a strong effect on public opinion, reflected in both citizens' and the media's increasing demands for government action against corruption. A significant number of accusations were presented before the AO, many of them involving officials in very high positions.

Financial disclosures submitted by public officials are the Anticorruption Office's primary source of information in its investigation of conflicts of interest matters. Given that the compliance level is, as seen above, close to 100%, the Office utilises this vital information in practically every case. After a financial disclosure form is analysed, it is often necessary to seek additional information in order to ensure a thorough evaluation. Citizens, non-governmental organisations and the media have played a vital role in case reviews, furnishing substantial information.

A number of factors, however, have hindered action in conflict of interest matters:

a) Vague definitions of conflict of interest, through the inclusion of complex, "undetermined" legal concepts.[12]

b) Lack of a systematic procedure to analyse financial disclosure forms or collect additional information.

c) Lack of enforcement of the existing statues.[13]

d) Absence of effective sanctions.[14]

Core strategies implemented by the AO in order to resolve those problems were:

a) The production of a reasonable definition of conflict of interest via a series of administrative decisions. The said definition is aimed to clearly determine the factual conditions in which a public official would be involved in a conflict of interest situation.

b) The introduction of a standardised procedure based on uniform control of information received, additional data collection, and the different stages of evaluation. All of these are now mandatory steps before a final case decision is issued.

c) The introduction of general remedies such as divestments, transfers of duties, forced resignations from positions in the private sector, blind trusts, etc.

d) Finally, the opening of communication channels with civil society and with the administration itself to receive reports and information on potential conflict of interest situations. This particular strategy has been very helpful in Argentina in detecting cases that were not originally reported.

Examination of the decisions taken by the Office reveals that in most cases the solution provided was a preventive one. The primary goal was to avoid the occurrence of possible conflicts of interest by forcing the public officials to abstain from intervening in those matters that collide with their own interests, or matters pertaining to the enterprises for which they previously worked.

This sort of solution is firmly connected to what Behn calls the "deterrent effect" of aggressive holding-people-accountable strategies.[15] The idea behind this type of solution is to establish an acceptable balance between hiring skilled professionals for public positions and safeguarding impartiality in decision-making processes. The AO strongly believes in preventive solutions but is aware that effective enforcement is needed to support such an idea.

Other decisions were focused on requirements for transparency improvement in decision-making procedures in order to avoid a future lack of impartiality. In these cases the Office suggested the implementation of rulemaking-type procedures in order to increase levels of public access to information and, in so doing, to increase levels of fairness, impartiality and accountability. These suggestions proved very effective in cases where those who would be affected by a certain decision had the chance to intervene before that decision was issued.[16]

Finally, in those cases where conflicts of interest had already arisen, the AO decided that the state of affairs should revert to pre-decision status, charging costs to the public official. In any case the remedies established through prior valid regulations were, as already pointed out, quite ineffective.[17]

Some amendments to Chapter V of Law 25.188 were introduced by Decree 862/2001. These mainly deal with conflict of interest situations relating to positions occupied by the appointee before he or she entered the public administration. Although very recent, this new Decree would appear to be inadequate in solving the problems mentioned above.

6. The impact of the new electronic financial disclosure system on the conflicts of interests policy

What advantages does the new system offer in terms of future work on conflict of interest?

The Anticorruption Office is currently developing new software to improve its capacity to analyse the contents of the financial disclosure forms. It plans to integrate this software into different databases to maximise the use of available information.

The Office expects to enhance its capability to cross-check information from the financial disclosure forms with other sources, such as the local fiscal office or the records of other public agencies – e.g. the *Registro de la Propiedad Inmueble* (which holds information related to the ownership of real estate), the *Registro de la propiedad automotor* (information on cars, ships and boats) and the *Inspección General de Justicia* (information about company incorporation).

Some have expressed concern about the risk of public powers using technology to gain access to citizens' private data, i.e. confidential information that should remain out of the public eye.

The AO shares those worries and affirms that the Office itself is not doing anything of that sort. The AO's main goal is simply to improve the links between records that are all already public.

7. Conclusions

A policy on conflict of interest has, in countries like Argentina, one main goal: to put the public good first. What we now know as a conflict of interest situation was, not long ago, an ordinary situation both in the minds of public officials and in the public eye. Obtaining private benefits was considered "an extra benefit from holding public office".

Effective policy in this area must take into account the complexity of the legal, operational and enforcement components. Rules must precisely define conflicts of interest; the gathering of information should be efficient; and the enforcement agencies must have officials equipped with the skills to properly analyse this type of situation.

An adequate financial disclosure system is a key element in any successful conflict management policy, but its importance must not be overrated – it is but one piece of complex and structured policy. In this sense the AO is supporting the implementation of preventive strategies – such as public hearings, rule-making processes, notice and comments – in different core areas of public administration.

Many transitional democracies require highly qualified experts to enforce the consolidation process. There is an increasing demand from the public to improve government performance, and this should be taken into account in the design of any conflict of interest policy.

Achieving a proper balance between public interest and private rights is a central objective that must never be underestimated.

The work of corruption control agencies must aim to attain reasonable standards. The pursuit of perfection can only lead to dissatisfaction when high expectations collide with reality.

The figures in Section 3 show that the AO has improved its quantitative performance in terms of public officials' compliance with financial disclosure duties and in generation and analysis of conflicts of interests cases. The new challenge is to enhance its qualitative performance in case detection and resolution.

The central challenge is to find a proper balance between hiring officials who can deliver high-quality services that citizens value, and a properly functioning government that operates honestly and above particular interests.

NOTES

1. This section outlines most of the findings by Roberto De Michele in *Harnessing Information Technology to Increase Transparency and Control: The Financial Disclosure System in Argentina*. **[More bibliographic information, such as publisher and date/place of publication?]**

2. The Argentine system follows the pattern of the US legislation. See the Debate in *Parlamentario de la Ley* 25.188. *Imprenta del Congreso*, Argentina.

3. Argentine regulations are not a particularly good example in this domain. A general prohibition is matched by several possibilities of being granted permission in special situations, rendering the system less than reliable. The Anticorruption Office is working on a plan to deregulate this area, setting simple general standards both for conflicts of interest and for the requirements relating to information on the assets of public officials.

4. At the time of writing, the Anticorruption Office has been successful in winning court cases **[reader wonders how many]** against public officials who requested restricting public access to the financial disclosure forms.

5. See the Inter-American Convention against Corruption, Article IX, and Argentina's Penal Code, Article 268.

6. For more on this, compare country documents for the "Informal Preparatory Meeting of the Ad Hoc Committee on the Negotiation of a UN Convention against Corruption" at http://www.odccp.org/crime_cicp_convention_corruption_prepmtg.html.

7. Data updated 31 October 2001.

8. See Cass Sunstein, "A Republic of Reasons", in *The Partial Constitution*, Chapter 1. **[Again, for Notes 8 and 9, more bibliographic information is needed.]**

9. For more on this point see Robert Behn, *Rethinking Democratic Accountability*, Chapters 1 and 2.

10. Argentina's Penal Code Art. 265. - *Será reprimido con reclusión o prisión de uno a seis años e inhabilitación especial perpetua, el funcionario público que, directamente, por persona interpuesta o por acto simulado, se interesare en miras de un beneficio propio o de un tercero, en cualquier contrato u operación en que intervenga en razón de su cargo.* **[translation?]**

11. For an in-depth look into this matter, see Florencia Heggelin, "La figura de negociaciones incompatibles en la jurisprudencia de la capital federal". **[more info?]**

12. For fuller background on this issue, especially on "undetermined legal concepts", see García de Entrerría, *La Lucha contra las impunidades del Poder*. **[more info?]**

13 No formal records indicate the existence of conflict of interest files opened before the AO was created.

14. According to Article 17 of Law 25.188, the only sanction provided was the nullity of the decisions taken by public officials who took those decisions while in a conflict of interest situation.

15. Robert Behn, op. cit., pages 15/16.

16. See Cornelius Kerwin, *Rulemaking – How Government Agencies Write Law and Make Policy*, Chapters 1 and 2. **[more info?]**

17. For an in-depth analysis of decisions taken by the AO on conflicts of interest, visit www.jus.gov.ar - *Oficina Anticorrupción – Resoluciones de la Oficina Anticorrupción sobre conflictos de intereses e incompatibilidades en la Administración Pública Nacional. En particular Resolución 38 (Henoch Aguiar) y Resolución 63 (Javier Tizado*).