



WORKING PAPER

LEGAL COMMITTEE – 36TH SESSION

(Montréal, 30 November to 3 December 2015)

Agenda Item 2: Consideration of the General Work Programme of the Legal Committee

**CONSIDERATION OF GUIDANCE ON CONFLICTS OF INTEREST:
REPORT OF SURVEY ON CONFLICTS OF INTEREST IN CIVIL AVIATION**

(Presented by the Secretariat)

1. INTRODUCTION

1.1 The item “Consideration of Guidance on Conflicts of Interest” was introduced to the General Work Programme of the Legal Committee through a proposal in the working paper A37-WP/80 presented by the United States. The inclusion of this item in the General Work Programme was endorsed by the Legal Committee, the Council and the 38th Session of the Assembly, which elevated its priority to second on the Work Programme.

1.2 A study by the ICAO Secretariat was initiated on 11 June 2014 when States were requested by State Letter LE 4/69-14/40 to complete, by 15 August 2014, a survey on the treatment of conflicts of interest in civil aviation in their respective jurisdictions. A copy of the survey is provided at **Appendix A**. At the request of several states additional time was allowed for completion of the survey which still remains open online. On 5 November 2014, during the 5th meeting of its 203rd Session, the Council was informed that further steps, including the convening of a task force, will be considered depending on the results of the survey (C-WP/14194 refers).

2. BACKGROUND

2.1 It was expressed in A37-WP/80 that reasonably consistent rules across the sector to establish and preserve a clear separation between civil aviation authorities and the activities that they oversee were desirable. In the given context, it was suggested to consider conflicts of interest situations in three distinct areas: 1) financial interests in regulated entities; 2) the movement of individuals from positions in government to industry and vice versa; and 3) the practice of designating or seconding personnel to carry out oversight functions on behalf of the Civil Aviation Authority. The consideration of these elements was deemed appropriate with a view to fostering the objective, disinterested exercise of regulatory responsibilities.

2.2 **Defining Conflicts of Interest**

2.2.1 A conflict of interest is typically defined as a situation in which an official has private interests that may or be perceived to improperly influence or interfere with the performance of his or her official duties and responsibilities. Such improper influence or perceived interference could be attributed to situations involving financial interest, family, emotional life, political or national affinity of the official. Conflict of interest may also be found at the level of an organization. An organizational conflict of interest arises where an organization fails or is impeded to act impartially due to outside activities or relationships it has with other entities.

2.2.2 In the field of civil aviation, such conflicts of interest may arise, principally, in two different scenarios:

- a) First, through interactions between a department of the Government or its regulatory agencies with operating entities that are subject to regulation (such as air operators, aviation training organizations, approved maintenance organizations, design organizations, production organizations, air navigation service providers and aerodrome operators). Examples of conflicts of interest situations that could arise in the course of such interactions include:
 - i) direct or indirect financial interests in regulated entities;
 - ii) movement of individuals between jobs in the regulatory and regulated entities (also referred to as “revolving door” situations);
 - iii) performance of regulatory duties by seconded or designated staff of the regulated entities;
 - iv) partnerships or arrangements between regulatory and regulated entities to advance the commercial interests of the regulated entities at the expense of the public interest (leading to what is also referred to as “regulatory capture”); and
 - v) lobbying of policy or rule-making bodies on behalf of or in favour of regulated entities.
- b) Second, through relationships between different organs or entities of the State involved in civil aviation activities, which could include:
 - i) overlap of functions between regulatory bodies and the government or its other organs such as the military, police, customs and investigative bodies;
 - ii) ownership or control of regulatory and operator entities by the State; and
 - iii) combination of regulatory and service provision functions in the same or related entities.

2.2.3 It is possible that conflicts of interest (real or perceived), arising from such interactions or relationships, may hamper effective, independent and impartial regulation.

3. CURRENT GUIDANCE

3.1 Generally, States may have developed legal and institutional frameworks to deal with conflicts of interest in response to the requirements of domestic law or with reference to international treaties, such as the United Nations Convention Against Corruption of 2003 (UNCAC)¹, or to guidelines or codes of best practice developed by international organizations such as the Organisation for Economic Co-operation and Development (OECD) or by relevant professional bodies. Civil aviation authorities in a given State might be subject to government-wide conflicts of interest frameworks, to frameworks that apply specifically only to them, or to some combination of such frameworks. Frameworks that have been developed generally for the public sector or particular professions may not fully address conflicts of interest as they relate specifically to civil aviation activities.

3.2 As of today, ICAO has promulgated certain guidance on conflicts of interest. Examples are:

- a) Paragraph 5.3.3 ICAO Doc 8335, *Manual of Procedures for Operations Inspection, Certification and Continued Surveillance* identifies the need to establish a strategy to mitigate potential conflict of interest issues with respect to the secondment of staff of an air operator to undertake inspection duties;
- b) Paragraphs 2.4.9 and 3.4.4 ICAO Doc 9734, *Safety Oversight Manual*, Part A, “The Establishment and Management of a State’s Safety Oversight System” identify the need to have clear separation of authority and responsibility between State regulatory authorities and operating agencies;
- c) Paragraph 3.4.2.4 ICAO Doc 9734, *Safety Oversight Manual*, Part A, “The Establishment and Management of a State’s Safety Oversight System” identifies the need for the direct supervisory and technical control by an independent civil aviation administration of operator personnel carrying out inspection responsibilities in order to best serve the public interest; and
- d) Paragraph 2.4.2.3 ICAO Doc 9734, *Safety Oversight Manual*, Part C, “The Establishment and Management of a State’s Security Oversight System” identifies the need to have clear separation of authority and responsibility between State regulatory authorities and State-run operating agencies or service providers in order to avoid any potential conflict of interest and recommends that all approval, certification and continued surveillance procedures should be followed as though the operating agency was a non-governmental entity.

3.3 Universal Safety Oversight Audit Programme (USOAP) findings in this area have been that, in a number of States, where operator or service provider functions are carried out by the State, there is no distinct separation of responsibilities between the regulatory bodies and air operators, aerodrome operators, service providers and aviation training centres and that most States that use experts seconded by the State’s civil aviation administration or other organization in the State as investigators, have not established measures to avoid possible conflicts of interest. Under the Universal Security Audit Programme (USAP), it is reported that “22 per cent of States have not ensured that the functions and responsibilities of the various entities within the civil aviation security system are clearly defined to ensure that there are no overlaps of responsibilities”.²

¹ UNCAC has 176 State parties. See for instance, Article 7(4) of UNCAC, “Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.”

² Universal Security Audit Programme-Analysis of Audit Results, Reporting Period: November 2002 to June 2013, ICAO, Fifth Edition – 2013, at page 52.

4. OBJECTIVES AND METHODOLOGY OF THE WORK

4.1 The overall objective of work under this item is to consider the development of ICAO rules or guidance in order to assist Member States on measures to be used to detect, avoid, mitigate and/or manage conflicts of interest and ensure transparency and accountability within their national frameworks.

4.2 The first task was to undertake a survey to identify existing mechanisms and measures in States for dealing with conflicts of interest (COI) as it relates to civil aviation administrations and their personnel carrying out regulatory functions in civil aviation. Responses have been analyzed to determine the extent to which States have established measures on the various elements of conflicts of interest in civil aviation as well as the adequacy of such measures to address them. Further consideration will be given to the question as to whether it would be beneficial to undertake the harmonization of measures and practices to detect, avoid, mitigate and/or manage COI and develop rules and guidance for States as well as their documentary form.

4.3 Options for documenting or promulgating conflicts of interest mechanisms and measures for harmonized or uniform application could include a Standard or Recommended Practice in the Annexes to the *Convention on International Civil Aviation*, 1944 (Chicago Convention) or guidance material in the form of a new or amendment of an existing ICAO Document, Manual or Circular.

4.4 It is acknowledged that work on this subject has to be cognizant of the need to balance the particular circumstances and requirements of States while addressing the regulatory risks to aviation safety and security posed by conflicts of interest. For example, strict divestment requirements or revolving door limits might unreasonably limit States to very few or even no qualified candidates for specialized positions. The consideration of mechanisms or measures to be prescribed or recommended would therefore be mostly concerned with managing risks arising from activities, relationships or interactions giving rise to conflicts of interest (such as those listed in paragraph 2.2) and not necessarily with automatically stopping or prohibiting them.

5. STATE RESPONSES TO SURVEY

5.1 As at 30 January 2015, 43 States, or just about 22 percent of ICAO's membership, have responded to the survey. Two territories and one international organization also provided responses (see list at **Appendix B**). The Survey remains open online for other States that would like to respond. Although relatively low, the responses are from States in all the ICAO Regions.

5.2 Current general framework for COI

5.2.1 In general, all but four of the States that responded to the Survey confirmed that they have a legal and/or institutional framework dealing generally with conflicts of interest. In most cases that framework is established in the form of legislation, code of conduct, contractual employment conditions or a combination of all these. In general the frameworks cover the fifteen subjects listed in Q3 of the survey questionnaire at Appendix A. No new subjects were identified by respondents which could mean that the list in Q3 of possible subjects to be covered in a COI framework is fairly complete.

5.2.2 In most cases (86 percent) monitoring of compliance with COI rules is carried out by an independent body such as a government ombudsman or through internal mechanisms established by the civil aviation agency or administration. Most States (63 percent) deemed the level of enforcement of COI to be sufficient while some considered it to be insufficient (21 percent).

5.3 Sources of COI in the public sector

5.3.1 Financial interests in regulated entities as well as social interests of individuals, (leading in some cases to corrupt practices, nepotism and favouritism), movement of individuals between jobs in the regulatory and regulated entities, the involvement of the State in regulated activities or entities and lobbying in favour of regulated entities were identified as being among the most prevalent sources of COI. Other situations such as the exertion of political pressure on regulators to favour regulated entities were cited as an additional source of COI.

5.3.2 A majority of States did not identify any new or emerging forms of COI that could be considered for development of guidance in which case it could be assumed that the list of COI sources identified in paragraph 2.2 of Attachment A to the State Letter (see also paragraph 2.2 above) is fairly exhaustive. One example of additional sources of COI that was identified by a respondent was the “participation of State employees in partisan political activity”.

5.4 State activities as a source of COI in civil aviation

5.4.1 The State is involved in civil aviation activities as an operator or service provider in many States (82 percent), the most prevalent activities in which States are engaged in being the provision of air navigation services, aircraft and aerodromes operations and the management of aviation training organizations. Moreover some civil aviation administrations depend on government subvention or revenue from regulated activities to support regulatory activities. Furthermore the percentage of States that have aircraft on the civil register that are used for military or police operations (49 percent) and those that do not (51 percent) is roughly the same. These relationships and activities are subject to aviation safety and security oversight by the civil aviation administration which could raise the potential for vested organizational COI, whereby civil aviation regulators could be unduly influenced or impeded from acting impartially in dealing with regulated entities due to common ownership and control by the State or because of having commercial interests in those entities.

5.4.2 Many States (67 percent) have established measures to avoid or manage the overlap between different agencies having a role in the regulation of aviation safety and security. Measures such as the establishment of inter-agency coordination committees, programs and guidelines were cited.

5.4.3 Personnel from an air operator or service provider are used to carry out licensing, certification, approval or surveillance duties and responsibilities and to carry out aircraft accident and incident investigations in a significant number of States (49 percent and 40 percent respectively). However a majority of States (51 percent) indicated that they had established mechanisms for the management of conflicts of interest of personnel carrying out these functions. Moreover in most States (79 percent) accident investigation is carried out by an independent organization or entity that is separate from the civil aviation administration.

5.5 Does COI pose risks to civil aviation safety and security?

5.5.1 Those States that encountered COI situations in civil aviation activities indicated that they became known mostly through self-disclosure by the concerned official, USOAP or USAP audit report, report by an independent oversight body, internal review and press reports, in that order. Exposure of COI situations through the occurrence of a safety or security related incident was cited in a small number of cases (5.3 percent). Exposure by whistle-blowers was cited in one case.

5.5.2 Most States (79 percent) did not find or consider the lack of a framework to be a source of concern for aviation safety or security while a substantial majority of States (84 percent) affirmed that COI situations have not been linked to or found to be a contributing factor to the occurrence of a serious aviation safety or security incident.

5.5.3 Direct or indirect interest in regulated entities, partnerships or arrangements between regulatory and regulated entities to advance the commercial interests of the regulated entities at the expense of the public interest (leading to what is also referred to as “regulatory capture”) and the combination of regulatory and service provision functions in the same or related entities were identified, in that order, as the three leading situations that States considered would put aviation safety and security most at risk. Other situations listed in paragraph 2.2.2 above, including movement of individuals between jobs in the regulatory and regulated entities and performance of regulatory duties by seconded or designated staff of the regulated entities, were also identified but to a lesser extent. Political pressure being applied on the national aviation administration was one other situation not included in the list in paragraph 2.2.2 above that was identified as a risk to aviation safety and security.

5.6 **Should States have a specific framework for managing COI in civil aviation?**

5.6.1 Many States (33 percent) have established a framework that deals specifically with the civil aviation in addition to or separate from the general framework applicable to the public sector as a whole. A large number of respondents (68 percent) felt that it was necessary or useful for a State to establish a specific framework dealing with COI in civil aviation, citing as reasons for this position the need to manage COI risks that are unique to civil aviation and to achieve legal harmonization and certainty. Those States that felt differently saw the existence of an adequate framework as obviating the need to establish a specific one for civil aviation. Some States did not consider it prudent to regulate COI on a sectorial basis while one State suggested that a framework could be established at a regional level.

5.7 **Is existing ICAO guidance adequate?**

5.7.1 While a majority of States (77 percent) were of the view that existing ICAO guidance material on COI in civil aviation is adequate or somewhat adequate, most (75 percent) still felt that States could benefit from the harmonization of COI practices and measures for dealing with COI in civil aviation.

5.7.2 Most States (collectively 61 percent) felt that rules or guidance on COI could be developed in the form of Standards, Standards and recommended practices or recommended practices only while other States were of the view that guidance disseminated in an ICAO manual or circular could be sufficient (27.91 percent). One specific suggestion put forward was to develop a model code on managing COI in civil aviation while at the same time making necessary adjustments to other ICAO documents “dealing with the qualifications of personnel and representatives.”

5.8 **Future work**

5.8.1 A small number of States (less than 10 percent) felt that their COI framework had not been effective in addressing COI in civil aviation, citing the lack of a binding framework and the overlapping relationships between state entities involved in civil aviation as the main barriers to success. States that found their COI framework to be effective, credited staff sensitization and the existence of preventive and enforcement measures for the success.

5.8.2 A number of measures were proposed to improve the effectiveness of the COI framework, including: (i) pay parity between personnel of the regulatory bodies and the regulated entities (ii) recruitment of additional personnel dedicated to carry out licensing, certification, approval or surveillance duties and responsibilities; (iii) separation of regulatory bodies from service provision entities; (iv) fostering a COI avoidance culture; and (v) increased regulation of COI.

5.8.3 A substantial majority of States (75 percent) agree that there is benefit in harmonizing practices and measures for dealing specifically with conflicts of interest in civil aviation and that it is necessary for ICAO to develop rules or guidance on this subject for use by States (77 percent) while others (16 percent) chose not to take a position at this time. In fact, just one State expressed the view that there would be no benefit from further work by ICAO in this area.

6. CONCLUSIONS

6.1 It is useful for all States to have a framework for managing COI in civil aviation given the prevalence of COI situations as expressed by States in their responses. It could therefore be of benefit for ICAO to urge States that have not done so to establish a framework on COI that applies to civil aviation activities. This could be done through an Assembly Resolution whose objective would be to promote awareness of potential conflicts of interest in civil aviation and the need to take measures to avoid or mitigate risks from COIs to aviation safety and security. The Assembly Resolution would also respond to the expressed need to improve the effectiveness of existing COI frameworks through fostering a COI avoidance culture and increased regulation.

6.2 Considering that almost all the States that responded to the survey have established a framework dealing with COI and that most States consider their frameworks to be effective and considering further that most States feel that existing ICAO guidance on COI is adequate or somewhat adequate, it is necessary to determine what future work, if any, would be needed. Furthermore there are diverse opinions as to whether States should develop a framework that is specific to civil aviation.

6.3 It is envisaged therefore that additional work on this topic by ICAO could consist of further study of the practices and measures that have been introduced by States to deal specifically with conflicts of interest in civil aviation. The tasks to be undertaken by the Secretariat in this study would be to collect more data and information (including legislation and codes of conduct) from States which have established frameworks on COIs including those specific to civil aviation. States that have not done so could also be encouraged to complete the online survey over the next few months. Further recommendations that could arise from this study will be reported to the Legal Committee.

7. ACTION BY THE COMMITTEE

7.1 The Legal Committee is invited to consider this working paper and endorse the above conclusions.

APPENDIX A

GUIDANCE ON CONFLICTS OF INTEREST SURVEY

STATE: _____

Important

Replies to this survey are intended to be purely indicative and to be used only for the purposes of study. They do not entail a binding commitment by a State in respect of its future position on this subject.

PART A: General Framework for Addressing Conflicts of Interest

1. Has the State established a legal and/or institutional framework for dealing generally with conflicts of interest (COI)? Yes No
2. If the answer to Question 1 is yes, what is the form of the COI framework? Check as applicable.
- (a) Legislation
 - (b) Code of Practice or conduct
 - (c) Contractual i.e. employment conditions
 - (d) All of the above
 - (e) Other: _____
3. What does the COI framework cover? Check as applicable.
- (a) Description of COI situations
 - (b) General disclosure of COI situations
 - (c) Financial interests
 - (d) Restrictions on future employment (post public employment)
 - (e) Rules on acceptance of honours, favours, gifts or remuneration
 - (f) Outside employment
 - (g) Lobbying
 - (h) Relationships, favouritism and preferential treatment
 - (i) Use of information including protection of inside information
 - (j) Official hospitality
 - (k) Relationships with other agencies
 - (l) Whistle blower protections for COI events
 - (m) Sanctions for non-compliance with COI rules
 - (n) Enforcement of COI rules
 - (o) Review and revision of COI framework
 - (p) Others: _____

4. If the answer to Question 1 is yes, does the framework deal specifically with civil aviation or is it a general framework applicable to the public sector as a whole? Check as applicable.

- (a) General framework for public sector
- (b) Specific framework for civil aviation
- (c) Both of the above

5. What do you consider generally to be the three most prevalent forms of COI in your State?

- a) _____
- b) _____
- c) _____

6. Who is responsible for monitoring compliance with COI rules in the State? Check as applicable.

- (a) Internal mechanism of the government agency or administration
- (b) Independent body (such as Auditor General, Ombudsman, or anti-corruption agency)
- (c) Both (a) and (b) above
- (d) Other: _____

7. What is the level of enforcement of COI rules in the State? Check as applicable.

- Sufficient
- Insufficient
- Not applicable

8. Do you recommend any other forms of COI or emerging forms of COI that should be considered for development of guidance? If so, which ones?

PART B: State civil aviation activities

9. Is the State involved in civil aviation activities of an operator or service provider? Yes No

10. If the answer to Question 9 is yes, which activities is the State involved in? Check as applicable.

(a) Aviation training organization

(b) Air operator

(c) Approved maintenance organization

(d) Design organization

(e) Production Organization

(f) Air navigation services provider

(g) Aerodrome operator

(h) Other: _____

11. Does the State use personnel from an air operator or service provider it regulates to carry out licensing, certification, approval or surveillance duties and responsibilities? Yes No

12. If the answer to Question 11 is yes, to what extent are the licensing, certification, approval or surveillance duties and responsibilities carried out by personnel seconded from or by designated personnel of regulated entities? Check as applicable.

Always

Frequently

Occasionally

Rarely

13. Is aircraft accident and incident investigation carried out by an independent organization or agency that is separate from the civil aviation administration? Yes No

14. Briefly describe how the State ensures that accident and incident investigations are carried out independently.

15. Are personnel of the civil aviation administration having licensing, certification, approval or surveillance duties and responsibilities used to carry out aircraft accident and incident investigation functions in the State? Yes No

16. Has the State established mechanisms for the management of conflicts of interest of personnel carrying out (a) licensing, certification, approval or surveillance duties and responsibilities and (b) aircraft accident and incident investigation? Check as applicable.

Yes

No

Not applicable

17. How does the civil aviation administration of the State obtain funds to support its regulatory functions? Check as applicable.

(a) Prescribed fees and charges paid by the operating entity it regulates

(b) Percentage of revenue earned by the operating entity it regulates

(c) Government subvention

d) Revenue from services that it provides and regulates (examples include aerodrome operations, airport security, aviation training and air navigation services)

(e) Other: _____

18. Does the State have aircraft on its civil aircraft register that are used for military or police or customs operations? Yes No

19. Has the State established measures to avoid or manage the overlap between different agencies having a role in the regulation of aviation safety and security? Yes No

If so, briefly describe such measures.

PART C: Operational COI in civil aviation

20. What are the most common ways (over the past 5 years) through which the existence of COI situations related to civil aviation activities have been exposed in your State?

Check as applicable.

- (a) Occurrence of safety or security related incident
- (b) Self-disclosure (by official)
- (c) Report by independent oversight body such as Auditor General or Ombudsman
- (d) Press reports
- (e) Periodic internal review
- (f) USOAP or USAP audit report
- (g) Others: _____
- (h) Not applicable

21. In the past, has the lack of a COI framework, if this is the case, given rise to aviation safety or security concerns?

- Yes
- No
- Not applicable

22. In the past, has a COI situation contributed or been linked to the occurrence of a serious aviation safety or security incident? Yes No

23. Please identify up to three COI situations, including those in paragraphs 2.2.1 and 2.2.2 of the Attachment A to the State letter LE 4.69-14/40, that you consider would put aviation safety and security most at risk?

- a) _____
- b) _____
- c) _____

24. How effective do you consider the framework has been in addressing COI in civil aviation? Check as applicable.
- Effective
- Fairly effective
- Not effective
- Not applicable

25. Could you highlight the reasons for your response to Question 24? If Effective, what have been the reasons for success; if Not effective, what have been the main barriers to success; if Fairly effective what could be done to improve effectiveness?
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26. How do you assess the adequacy of ICAO guidance on COI in civil aviation? Check as applicable.
- (a) Adequate
- (b) Somewhat adequate
- (c) Not adequate

27. Do you agree that it is necessary or useful for a State to establish a specific framework dealing with COI in civil aviation? Check as applicable.
- Yes
- No
- No Position

What are the reasons for your answer?

28. Do you agree that States could benefit from the harmonisation of COI practices and measures for dealing with COI in civil aviation? Check as applicable.
- Yes
- No
- No position

Appendix A

29. Do you consider it necessary for ICAO to develop rules or guidance on dealing with COI in civil aviation for use by States? Check as applicable.
- Yes
- No
- No position
30. If the answer to Question 29 is yes, in what form do you think such rules or guidance should be developed? Check as applicable.
- (a) Standards
- (b) Recommended Practices only
- (c) Both Standards and Recommended Practices
- (d) ICAO Manual or circular
- (e) Both (c) and (d) above
- (f) Other: _____

Part D: Other Comments

Please provide any additional comments you may have on the management of conflicts of interest in civil aviation

Contact person:

Please indicate below the person in your administration whom ICAO could contact, should there be a need to seek further clarifications with regard to the answers contained herein.

Name (Optional): _____

Title: _____ Office: _____

Fax number or email address: _____

THANK YOU

ATTACHMENT B

LIST OF STATES WHICH RESPONDED TO THE SURVEY

Angola	Israel	Portugal
Australia	Italy	Republic of Moldova
Austria	Jamaica	Russian Federation
Barbados	Japan	Singapore
Belgium	Jordan	South Africa
Brazil	Kenya	Spain
Canada	Lithuania	Sweden
Chile	Malaysia	Switzerland
Cuba	Namibia	Thailand
Cyprus	Netherlands	United Arab Emirates
France	New Zealand	United Republic of Tanzania
Germany	Niger	United States
Greece	Pakistan	Venezuela
Hungary	Philippines	
Ireland	Poland	

TERRITORIES

China (Macao, SAR)

China (Hong Kong, SAR)

INTERNATIONAL ORGANIZATIONS

European Aviation Safety Agency