

J. Y. Interpretation No.716 (December 27, 2013) *

【On the prohibition on civil servants and persons to whom they are related transacting business with the offices which they are working in or supervising】

ISSUE: The Law Prohibiting Conflicts of Interests for Civil Servants prohibits civil servants and persons to whom they are related transacting business with the offices which they are working in or supervising and punishes those who violate the prohibition with an administrative fine equal to the amount of the transaction or up to three times the amount of the transaction. Are these two rules unconstitutional ?

RELEVANT LAWS:

Articles 15, 22, and 23 of the Constitution (憲法第十五條、第二十二條、第二十三條) ; Article 5, Section 1, Paragraph 2 of Constitutional Interpretation Procedure ACT (司法院大法官審理案件法第五條第一項第二款) ; J.Y. Interpretation Nos. 371, 514, 572, 576, 580, 590, 606, and 641 (司法院釋字第三七一號、第五一四號、第五七二號、第五七六號、第五八〇號、第五九〇號、第六〇六號、第六四一號解釋) ; Articles 2, 3, 9, and 15 of the Law Prohibiting Conflicts

* Translated by Chi Chung.

** Contents within frame, not part of the original text, are added for reference purposes only.

of Interests for Civil Servants (公職人員利益衝突迴避法第二條、第三條、第九條、第十五條(中華民國一〇三年十一月二十六日修正公布)) ; Letter Ruling Fa Zheng Jue Zi No. 0930041998 issued by the Ministry of Justice on November 16, 2004 (法務部九十三年十一月十六日法政決字第〇九三〇〇四一九九八號函釋) .

KEYWORDS:

right to work (工作權), right to property (財產權), freedom to conduct business (營業自由), freedom of contract (契約自由), principle of proportionality (比例原則), civil servants (公職人員), persons to whom civil servants are related (公職人員之關係人), conflict of interests (利益衝突), improper conferral of benefits (利益輸送), the principle of punishment in proportion to responsibility (責罰相當).**

HOLDING: Article 9 of the Law Prohibiting Conflicts of Interests for Civil Servants, which prohibits civil servants and persons to whom they are related (such as family members and the corporations over which they exert control) from transacting business (including sales, leases, and contracts for labor) with the offices they work in or supervise, is consistent with the constitutional principle of proportionality (Article 23) and the constitutional protections of the right to work,

解釋文：公職人員利益衝突迴避法第九條規定：「公職人員或其關係人，不得與公職人員服務之機關或受其監督之機關為買賣、租賃、承攬等交易行為。」尚未牴觸憲法第二十三條之比例原則，與憲法第十五條、第二十二條保障人民工作權、財產權及契約自由之意旨均無違背。惟於公職人員之關係人部分，若因禁止其參與交易之競爭，將造成其他少數參與交易者之壟斷，反而顯不利於公共利益，於此情形，苟上開機關於交易過程中已行公開公平之程

the right to property, and freedom of contract (Articles 15 and 22). However, if this prohibition might cause a monopoly by a small number of market participants, the public interest would be adversely affected. In the case of a monopoly, if the government has sufficiently open and fair procedures to prevent corruption, relevant government officials should promptly review whether it remains necessary to prohibit persons related to civil servants from transacting business with the government offices where the civil servants work.

Article 15 of the same law states that violators of Article 9 should be fined at least the total amount of the transaction or, at most, three times the amount of the transaction. No proper adjustment mechanism has been established for cases of excessive punishment. For this reason, Article 15 is inconsistent with the constitutional principle of proportionality (Article 23) and the constitutional protection of the right to property (Article 15). Therefore, Article 15 of the Law Prohibiting Conflicts of Interests for Civil Servants should become invalid no later than

序，而有充分之防弊規制，是否仍有造成不當利益輸送或利益衝突之虞，而有禁止公職人員之關係人交易之必要，相關機關應儘速通盤檢討改進。

公職人員利益衝突迴避法第十五條規定：「違反第九條規定者，處該交易行為金額一倍至三倍之罰鍰。」於可能造成顯然過苛處罰之情形，未設適當之調整機制，其處罰已逾越必要之程度，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

one year from today.

REASONING: Article 15 of the Constitution protects the right to work, the right to property, and the right of individuals to conduct business. As a result of the constitutional protection of the right to work, individuals may freely choose their occupations, including whether to open or close their own businesses, their business hours, their time of business, the location of their business, with whom to do business, and the manner in which to do business. The constitutional protection of the right to property allows individuals to freely conduct business—including the production, transaction, and disposition of products—without government interference (see Interpretation Nos. 514 and 606).

In addition, Articles 15 and 22 both protect freedom of contract, an important mechanism for the development of personal autonomy and self-realization. Freedom of contract enables contracting parties to freely choose how and with whom to conclude contracts, and the content of

解釋理由書：按憲法第十五條保障人民之工作權及財產權，人民營業之自由亦為其所保障之內涵。基於憲法上工作權之保障，人民得自由選擇從事一定之營業為其職業，而有開業、停業與否及從事營業之時間、地點、對象及方式之自由；基於憲法上財產權之保障，人民並有營業活動之自由，例如對其商品之生產、交易或處分均得自由為之（本院釋字第五一四號、第六〇六號解釋參照）。

又契約自由為個人自主發展與實現自我之重要機制，為憲法第十五條財產權及第二十二條所保障之權利，使契約當事人得自由決定其締約方式、內容及對象，以確保與他人交易商品或交換其他生活資源之自由（本院釋字第五七六號、第五八〇號解釋意旨參

the contracts. It ensures that an individual has the freedom to trade goods or services with others (see Interpretation Nos. 576 and 580). Any restrictions imposed by the state on individuals' freedoms and rights should comply with the principle of proportionality as stipulated in Article 23. Moreover, when administrative fines are imposed upon individuals who violate their obligations under the administrative law, if it is possible and necessary to distinguish the different degrees of the seriousness of the violation, these fines should be in proportion to the seriousness of the violation, thereby making the punishment proportional to the responsibility. Legislators may punish violations of obligations under administrative law with administrative fines, but the Constitution requires that appropriate adjustment mechanisms be established to avoid punishments that are excessive in particular cases (see Interpretation No. 641).

Article 9 of the Law Prohibiting Conflicts of Interests for Civil Servants states that civil servants and persons to whom they are related, such as their fam-

照)。國家對人民上開自由權利之限制，均應符合憲法第二十三條之比例原則。另對人民違反行政法上義務之行為處以罰鍰，其違規情節有區分輕重程度之可能與必要者，應根據違反義務情節之輕重程度為之，使責罰相當。立法者針對特別應予非難之違反行政法上義務行為，視違規情節之輕重處以罰鍰，固非憲法所不許，惟為避免個案顯然過苛之處罰，應設適當之調整機制（本院釋字第六四一號解釋意旨參照）。

公職人員利益衝突迴避法（下稱利益衝突迴避法）第九條規定：「公職人員或其關係人，不得與公職人員服務之機關或受其監督之機關為買賣、租

ily members and the corporations over which they exert control (see Articles 2 and 3 of the Law Prohibiting Conflicts of Interests for Civil Servants), may not transact business (including sales, leases, and contracts for labor) with offices (hereafter referred to as Foregoing Offices) that they work in or supervise (hereafter referred to as the First Disputed Rule). Article 15 of the Law Prohibiting Conflicts of Interests for Civil Servants, meanwhile, states that violators of Article 9 should be fined not less than the total amount of the transaction and not more than three times the amount of the transaction (hereafter referred to as the Second Disputed Rule). The First Disputed Rule restricts the right to property and the freedom to make contracts for civil servants, as well as the right of persons to whom civil servants are related to work and possess property and its components (such as freedom of business and of contract). The Second Disputed Rule, fining civil servants and persons to whom they are related for violating the First Disputed Rule, is a restriction on the right to property guaranteed under Article 15 of the Constitution.

賃、承攬等交易行為。」(下稱系爭規定一)第十五條規定：「違反第九條規定者，處該交易行為金額一倍至三倍之罰鍰。」(下稱系爭規定二)系爭規定一禁止公職人員及其關係人(利益衝突迴避法第二條、第三條規定參照)與公職人員服務之機關或受其監督之機關(下稱上開機關)為買賣等交易行為，就公職人員而言，乃屬對其財產權及契約自由所為之限制；就公職人員之關係人而言，乃屬對其工作權、財產權及其內涵之營業自由暨契約自由所為之限制。系爭規定二對公職人員及其關係人違反系爭規定一者處以罰鍰，則屬對憲法第十五條所保障之人民財產權所為限制。

Both the First and Second Disputed Rules were legislated for legitimate purposes, and the means adopted indeed help achieve their legislative purposes. If civil servants' relatives or other persons to whom they are related transact business with the Foregoing Offices, these persons might compete unfairly or benefit improperly from their relationships with the civil servants. The Law Prohibiting Conflicts of Interests for Civil Servants was enacted for the purposes of promoting clean and capable politics, establishing norms to avoid conflicts of interests, and deterring corruption and the improper conferral of benefits (see Article 1 of the Law Prohibiting Conflicts of Interests for Civil Servants). The First Disputed Rule was enacted to prevent civil servants and persons to whom they are related from securing opportunities or creating conditions that are unfair or otherwise superior to those provided to other members of the public who contract with government offices. The Second Disputed Rule was enacted to ensure that civil servants and persons to whom they are related do not violate the First Disputed Rule, a goal met through

鑑於公職人員之親屬或其他關係人，與上開機關為買賣、租賃、承攬等交易行為，易衍生不公平競爭、不當利益輸送之弊端，立法者為促進廉能政治、端正政治風氣，建立公職人員利益衝突迴避之規範，有效遏阻貪污腐化暨不當利益輸送，乃制定利益衝突迴避法（該法第一條參照）。系爭規定一旨在防範公職人員及其關係人憑恃公職人員在政府機關任職所擁有之職權或影響力，取得較一般人更為優越或不公平之機會或條件，而與政府機關進行交易，造成利益衝突或不當利益輸送甚或圖利之弊端；系爭規定二乃欲藉由處罰緩之手段，以確保公職人員及其關係人不致違反系爭規定一，進而有效遏阻上開情弊之發生，其目的均屬正當，且所採手段均有助於上開立法目的之達成。

the application of administrative fines. Thus, both the First and Second Disputed Rules were legislated for legitimate purposes, and the means adopted have helped to achieve these purposes.

When the Foregoing Offices need to enter into transactions (such as sales, leases, or contracts for labor), if the law does not prohibit civil servants and persons to whom they are related from contracting with the Foregoing Offices, civil servants might be tempted to utilize their official powers, opportunities, or knowledge to confer benefits improperly, creating conflicts of interest. The First Disputed Rule prohibits civil servants and persons to whom they are related from entering into such transactions, while the Second Disputed Rule imposes administrative fines on the violators of the First Disputed Rule to ensure that civil servants and persons to whom they are related do not have opportunities to confer benefits improperly and thereby create conflicts of interest. As there are no other means for achieving the same results without creating more restrictions, the First and Second Disputed

於上開機關行買賣、租賃或承攬等交易行為之際，苟不禁止公職人員及其關係人與上開機關交易，易使公職人員利用其職務上之權力、機會或方法進行不當之利益輸送或造成利益衝突情形。系爭規定一—律禁止公職人員及其關係人為上開交易行為；系爭規定二明定違反系爭規定一者處以罰鍰，以確保系爭規定一規範之事項能獲得落實，從而杜絕公職人員及其關係人有上述不當利益輸送或造成利益衝突之機會。而又無其他侵害較小之手段可產生相同效果，自應認系爭規定一、二係達成前揭立法目的之必要手段。

Rules are the means necessary to achieving the foregoing legislative purposes.

Although the First Disputed Rule restricts the right to work, as well as the right to property and its components (e.g., the freedom of business and of contract), for civil servants and persons to whom they are related, the scope of this prohibition is limited to the Foregoing Offices. In other words, civil servants and persons to whom they are related can transact business with individual persons and legal entities that are not the Foregoing Offices. Therefore, the First Disputed Rule does not excessively restrict the right to work, the right to property, and so on of civil servants and the persons to whom they are related, and the restriction is not out of balance with the public interest. Therefore, the First Disputed Rule does not violate the principle of proportionality as provided by Article 23 of the Constitution, and it is consistent with Articles 15 and 22 of the Constitution, which protect the right to work and the right to property and its components (e.g., freedom of business and of contract).

系爭規定一雖限制公職人員及其關係人之工作權、財產權及其內涵之營業自由暨契約自由，惟禁止交易之對象僅及於上開機關，並非全面禁止與上開機關以外之對象進行交易，公職人員及其關係人尚非不能與其他營業對象交易，以降低其因交易對象受限所遭受之損失，系爭規定一對公職人員及其關係人工作權、財產權等之限制尚未過當，與其所保護之公共利益間，並非顯失均衡。綜上，系爭規定一尚未抵觸憲法第二十三條之比例原則，與憲法第十五條、第二十二條保障人民工作權、財產權及其內涵之營業自由暨契約自由之意旨均無違背。

Although the First Disputed Rule is not unconstitutional, relevant government offices should still review its appropriateness. Civil servants are obliged by law to be honest, clean, prudent, and diligent and to avoid arbitrary, corrupt, or lazy behavior that adversely affects their reputations. They are also legally obliged to recuse themselves when necessary and to avoid conferring benefits on themselves and persons to whom they are related through the application of official powers, opportunities, or knowledge. Violations of these obligations are punishable under Articles 5 and 6 of the Law on the Service of Civil Servants; under Articles 6, 7, 14, and 16 through 18 of the Law Prohibiting Conflicts of Interests for Civil Servants; and under Article 32 of the Administrative Procedure Act. In contrast, persons related to civil servants do not have the aforementioned obligations arising from a civil-servant status. Therefore, the state's requirements for civil servants should be higher than those for persons to whom civil servants are related.

系爭規定一完全禁止公職人員及其關係人與上開機關為買賣、租賃、承攬等交易行為，固難謂為違憲。惟公務員本應誠實清廉，謹慎勤勞，不得有驕恣貪惰等損害名譽之行為；公職人員亦依法有迴避及不得假藉職務上之權力、機會或方法圖其本人及其關係人利益之義務，違反者應受處罰（公務員服務法第五條、第六條；利益衝突迴避法第六條、第七條、第十四條、第十六條至第十八條；行政程序法第三十二條規定參照）。而公職人員之關係人因未具有公職人員身分，並無上開迴避或禁止圖利之義務可言。故國家對公職人員之要求自應較公職人員之關係人為高。

If the stipulated prohibition on persons to whom civil servants are related in the First Disputed Rule could cause a monopoly of the market by a small number of market participants, the public interest would be adversely affected. In the case of a monopoly, if the Foregoing Offices have administered sufficiently open and fair procedures so as to prevent corruption, the relevant government offices should promptly review whether it is still necessary to prohibit persons to whom civil servants are related from transacting business with the government offices where civil servants work.

The judiciary has discretion that helps it to ensure that punishments are proportional to the seriousness of a violation. Violators can be fined no less than the amount of the law-breaking transaction and, at most, three times the amount of the law-breaking transaction. However, the amount of the law-breaking transaction is usually far greater, or several times greater, than the amount of the benefits that arise from the transaction itself. For example, the amount of a transaction re-

系爭規定一就公職人員之關係人部分，若因禁止其參與交易之競爭，將造成其他少數參與交易者之壟斷，反而顯不利於公共利益，於此情形，苟上開機關於交易過程中已行公開公平之程序，而有充分之防弊規制，是否仍有造成不當利益輸送或利益衝突之虞，而有禁止公職人員之關係人交易之必要，相關機關應儘速通盤檢討改進。

系爭規定二處違規交易行為金額一倍至三倍之罰鍰，固已預留視違規情節輕重而予處罰之裁量範圍，惟交易行為之金額通常遠高甚或數倍於交易行為所得利益，又例如於重大工程之交易，其交易金額往往甚鉅，縱然處最低度交易金額一倍之罰鍰，違規者恐亦無力負擔。系爭規定二可能造成個案顯然過苛之處罰，立法者就此未設適當之調整機制，其處罰已逾越必要之程度，不符憲法第二十三條之比例原則，與憲法第十五條保障人民財產權之意旨有違，應

lated to a significant construction project is usually so large that even the minimum administrative fine is likely to be beyond the ability of the punished person to pay. In other words, the Second Disputed Rule may result in a punishment that is excessive in some cases. Since legislators have failed to establish proper adjustment mechanisms, punishments may exceed the extent necessary, which is inconsistent with the constitutional principle of proportionality (Article 23) and the constitutional protection of individuals' right to property (Article 15). Therefore, the Second Disputed Rule should become invalid no later than one year from today.

The applicants applied for the constitutional interpretation of two additional issues. First, they alleged that Article 2 of the Law Prohibiting Conflicts of Interests for Civil Servants (hereafter referred to as the Third Disputed Rule) was too wide in scope and therefore violated the constitutional principle of proportionality. Second, they alleged that Letter Ruling Fa Zheng Jue Zi No. 0930041998, issued by the Ministry of Justice on November 16,

自本解釋公布之日起，至遲於屆滿一年時失其效力。

至聲請人認利益衝突迴避法第二條規定（下稱系爭規定三）規範對象過廣，違反憲法比例原則；法務部中華民國九十三年十一月十六日法政決字第0九三00四一九九八號函釋（下稱系爭函釋），牴觸憲法平等原則、比例原則、法律明確性原則、信賴保護原則及法律不溯及既往原則之疑義，聲請解釋部分，核其等指摘，僅係爭執法院認事用法之當否，泛稱系爭規定三及系爭函釋違憲，尚難謂於客觀上已具體指摘系

2004, violated the following constitutional principles: of equality and proportionality, the minimum requirement for clarity, the protection of reliance on existing law (Vertrauensschutz in German), and the prohibition against ex post facto rules. Their allegations—that the Third Disputed Rule and the Letter Ruling violated constitutional principles—are, in effect, disputing the propriety of fact finding and legal analysis by the court, instead of noting how the Third Disputed Rule and the Letter Ruling objectively violated the Constitution. Therefore, the applications do not satisfy the requirements set out by Article 5, Section 1, Paragraph 2 of the Law Governing Adjudication by the Grand Justices of Judicial Yuan and, therefore, should be dismissed pursuant to Article 5, Section 3 of the same law.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Chang-Fa Lo filed concurring opinion.

Justice Yeong-Chin Su filed dissent-

爭規定三及系爭函釋有何牴觸憲法之處。是此部分之聲請，核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此指明。

本黃大法官茂榮提出之協同意見書；葉大法官百修提出之協同意見書；羅大法官昌發提出之協同意見書；蘇大法官永欽提出之一部不同意見書；湯大法官德宗提出之部分不同意見書。

ing opinion in part.

Justice Dennis Te-Chung Tang filed dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: 1. The Ministry of Justice fined six enterprises for transacting business with government offices where persons related to civil servants were working or supervising. The amount of these transactions ranged between approximately NT\$8,000,000 and approximately NT\$500,000,000. In accordance with Article 9 of the Law on the Avoidance of Conflicts of Interests for Civil Servants, which sets out a minimum fine of the amount of the prohibited transaction and a maximum fine three times the amount of the prohibited transactions, the Ministry of Justice imposed on these six enterprises a fine that equaled the amount of the prohibited transactions. The applicants disputed the administrative fines but lost their litigations. They argued that the First and Second Disputed Rules violated the Constitution and applied for constitutional interpretation.

編者註：

事實摘要：(一)聲請人 1.A 公司、2.B 營造廠、3.C 公司、4.D 公司、5.E 公司、6.F 公司，或因代表人之配偶或手足或公司監察人之配偶或代表人自身任職縣市議員，或因代表人配偶之兄任職台電核安處處長，而參與各該公職人員任職機關或受其監督機關之投標案或簽訂營建承攬契約，交易金額小自 8 百餘萬元，大至 5 億餘元不等，先後遭法務部認定違反公職人員利益衝突迴避法第 9 條禁與公職人員服務或受其監督機關交易之規定，依同法第 15 條違者處交易金額一至三倍罰鍰之規定，處以各該交易金額一倍罰鍰。聲請人均不服，提起行政爭訟敗訴確定，爰認確定終局判決所適用之上揭二規定有違憲疑義，分別聲請解釋。

2. The Third Adjudication Panel of the Supreme Administrative Court, in its adjudication of a case concerning the Law Prohibiting Conflicts of Interests for Civil Servants, held that, on the basis of its reasonable belief, Article 15 of the Law Prohibiting Conflicts of Interests for Civil Servants violates the constitutional principle of proportionality and the protection of the right to property. The Third Adjudication Panel, therefore, applied for constitutional interpretation.

Since the seven cases concerned the same subject matter, the Grand Justices of the Judicial Yuan decided to adjudicate these seven cases in one procedure.

(二) 最高行政法院第三庭為審理上訴人 G 環保公司公職人員利益衝突迴避事件，依其合理確信認應適用之上揭第 15 條有抵觸憲法比例原則及財產權保障之疑義，聲請解釋。

大法官就上開七案先後受理，因所主張違憲之標的相同，乃合併審理。