Corruption and Conflicts of Interest

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A Comparative Law Approach

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Introduction

Jean-Bernard Auby, Emmanuel Breen and Thomas Perroud

As in all periods of rapid economic development and political upheaval our era of globalization brings corruption and conflicts of interests into the spotlight. The many snapshots in this volume, most of them taken from European windows, show how difficult it is today – and likely still will be tomorrow – to devise global legislative and judicial responses.

Most comparative papers gathered here show that global regulations are doomed to bump up against strong cultural resistances, in particular when dealing with the more subtle patterns of conflicts of interest – a notion that is far from being regulated at all in every country, let alone being defined or addressed in compatible ways, even within the borders of the old continent. As with other domains of transnational ethical endeavors, a 'one-size-fits-all' stance by international organizations or other transnational players would run the risk of fueling a cultural backlash.

And in their response, the multitude of sovereignties would undoubtedly point to the fact that international organizations themselves, not excluding by any means the European Union, have not fully consolidated their system for mitigating their own risks of corruption and conflicts of interest.

PART I CONFLICTS OF INTEREST AND CORRUPTION: A FINE LINE?

Opening the volume with a broad reflection on the definition of corruption and conflicts of interest, Susan Rose-Ackerman ('Corruption and conflicts of interest') starts by noting that in our complex modern societies an individual may play many roles simultaneously. 'Conflicts of interest', she notes, 'arise when a person mixes up his or her roles'. More generally speaking, conflicts of interest may be defined as a 'broad

umbrella that incorporates all sorts of tensions between official and private roles', an umbrella under which downright corruption and fraud are only the most obviously anti-social behaviors.

Moving from definition to policy considerations, Susan Rose-Ackerman identifies two main challenges for policymakers.

A first question for policymakers generally is finding the right mix of *ex ante* prohibitions and *ex post* penalties, and the respective roles of criminal and other responses. Corruption and conflicts of interest bring in their own twists to these determinations, with, in particular, the need to consider certain specific checks based on transparency and easy public access to information about the private interests of public officials.

But a second and even more fundamental challenge for policymakers is to precisely draw the line between permissible alignments of public and private interests and prohibited situations or behaviors. As shown by other chapters in this volume, each of the various national traditions places more or less emphasis on a subjective approach to conflicts of interest, then tending to rely on a system of self-declaration, or on a more objective approach whereby lawmakers identify and prohibit beforehand situations where a conflict is likely to arise. But, as observed by Susan Rose-Ackerman, the more objective stance seems, overall, to gain pace, thus reflecting 'a growing lack of trust in the self-serving statements of the powerful'. As a consequence, lawmakers tend to be faced, more and more, with the difficult task of designing typologies of green, orange and red light situations, for the various categories of public officials and regulatory bodies. As an example of how careful one should be in addressing this issue, the author discusses corporatist bodies that include representatives of all affected interests: the partisan nature of each of the commissioner's decisions is, in this case, embedded in the institution's design and should not be considered as constituting, per se, a conflict of interest.

PART II COMPARATIVE STUDIES ON CORRUPTION AND CONFLICTS OF INTEREST FROM A PROCEDURAL PERSPECTIVE

This part draws from a variety of national experiences ranging from the U.S. and various European jurisdictions to the MENA (Middle East and North Africa) zone, including Turkey, and shows, among other findings, that the very notions of corruption and conflict of interests, as well as the

legal instruments for combatting them, are deeply rooted in national legal and cultural traditions.

Hubert Delzangles sets the scene by evidencing the broad diversity of approaches that various European member States take on how to prevent members of independent regulatory agencies from being 'captured' by private or public interest ('Regulatory authorities and conflicts of interest'). Looking, to begin with, at incompatibilities with elected offices Hubert Delzangles notes, in particular, that where many European continental states define strict incompatibilities with all or part of the elected offices, the British tend rather to rely on a general prohibition of conflicts of interest and an obligation for the agency members to declare conflicts of interest if and when they become aware of them, thus entrusting the individuals with more responsibilities. Other striking differences concern the incompatibilities with public and private employment: a comparison between the composition of French and British agencies shows that, due in particular to French incompatibility rules, the boards of British agencies comprise a higher proportion of professionals with private sector backgrounds. Turning to agencies at European Union level, the author, while expressing certain doubts about potential lack of independence of their members from the member States, in light of appointment procedures, perceives, from a comparative law perspective, 'an influence from English law [at EU level] in preventing conflicts of interest based on a general clause … and a system for obtaining permission'.

Opening a series of more country-focused contributions, Bernardo Giorgio Mattarella addresses conflicts of interest for public officers generally and specifically from a comparative perspective with respect to the Italian system ('The conflicts of interests of public officers: rules, checks and penalties'). The author observes that conflicts of interest may be defined so as to match most other global legal systems, except for the Italian system, which adopts a narrower definition and therefore takes a softer stance. The chapter dwells on regulation applying to public officers only, while observing that, depending on the country, there may be different regulations applying to Members of Parliament or of the Cabinet, or to public officers serving in administrative or territorial divisions. Bernardo Mattarella then proposes a categorization of remedies for conflicts of interest, drawing in particular from the North American case: dismissal of the agent, neutralization of the conflict which implies a duty to disqualify the officer regarding a specific decision, transparency and training on the management of conflicts of interest.

Daniel I. Gordon provides insights for transatlantic comparison by covering corruption and conflicts of interest in the United States federal

acquisition system ('Protecting the integrity of the U.S. federal procurement system: conflict of interest rules and aspects of the system that help reduce corruption'). In a brief introduction to the federal acquisition system, he underlines those of its characteristics that impact the management of corruption and conflicts of interest (ancient and detailed system; well-trained acquisition professionals; decentralized implementation of uniform rules; emphasis on competition, transparency and accountability; allowing the use of subjective criteria). While remarking that corruption in the United States federal procurement system seems to be limited, especially in comparison with other countries, the author discusses the example of the Darleen Druyun case, a top Air Force civilian acquisition official who negotiated jobs for her relatives and herself with the Boeing Company. The chapter also focuses on the complicated conflict of interest rules that apply to federal employees, the key statute being the Ethics in Government Act of 1978. Several topics are covered such as disclosure duties, gifts and restrictions on employees' previous and future activities. Though some have recommended that the rules on conflicts of interest for federal employees be extended to contractors and their employees, for the time being, contractors and their employees are under much lighter regulations. Daniel I. Gordon then introduces the innovative notion of 'organizational conflicts of interest' where 'two different parts of a corporate entity are involved, one that provides goods or services, and another that provides judgment-related services'. He concludes that the relatively low level of perceived corruption in the American federal procurement system is not just a perception, but a fact. The effectiveness of the fight against corruption resides, for the author, in the procurement system itself and in cultural principles.

The three next contributions deal with various aspects of the French situation, which is in the process of being renewed by a draft Law on the Transparency of Public Life, which was submitted to Parliament in April 2013 in the wake of the Cahuzac scandal.[1]

In this context, Grégory Houillon first questions the thin line between lobbying, on the one hand, and corruption and conflicts of interest on the other, under French law ('Corruption and conflicts of interests: future

[1] Draft Law n 1004, filed by the Government with the National Assembly April 24, 2013. The legislative process was not yet completed and the law not yet enacted on July 25, 2013 due, in particular, to political disagreements over the conditions in which the patrimonial situation of the Members of Parliament would be subject to publication or otherwise made available to the public. See: http://www.assemblee-nationale.fr/14/dossiers/transparence_vie_publique_pjl.asp#transparence_vie_publique_pjl.

prospects on lobbying'). The author points to the lack of regulation concerning lobbying. He shows that current rules regulating corruption and conflicts of interest are inadequate with respect to lobbying. In addition to being inadequate, the current rules, which are repressive, are also ineffective regarding lobbying. On the issue of confidence in public institutions with regard to lobbying, the author notes that some of the current rules help ensure appearances, such as the employment restrictions applying to civil servants with so-called 'incompatibilities'. But he also explains that more measures need to be taken, specifically to ensure transparency in lobbying. Finally, Grégory Houillon shows that current non-binding ethics rules fail to properly enforce good practices. Notably, regulation is needed for 'new forms of "judicial lobbying" induced by the new *ex post* constitutional review by the Constitutional Court (PQC)'. Though such proceedings have existed for a long time in other countries, it is only since 2010 that, through litigation, French citizens are able to contest the validity of an existing law with regard to the Constitution. Grégory Houillon concludes by strongly recommending the enactment of a specific law on lobbying in order to avoid any confusion with corrupt practices and conflicts of interest issues.

Looking back at 2010 conflicts of interest cases that – already – involved a French minister in 2010, and which – again already – resulted in a draft law (which was finally not adopted), Pierre Lascoumes questions, more generally, the management of breaches of integrity in France ('Condemning corruption and tolerating conflicts of interest: French "arrangements" regarding breaches of integrity'). The author underlines a paradox: polls show that citizens disapprove of breaches of integrity, but this may not prevent them from voting for a politician previously condemned for a breach of integrity. Pierre Lascoumes draws on the results of a large research project using a panel of citizens confronted with fictional situations involving breach of integrity issues. The study maps out into three zones the judgment by the panel of citizens of corrupt acts: 'the black zone of consensual disapproval' (corruption; misappropriation of public funds; duplicity and lying; the pursuit of private economic interests); the white zone of consensual tolerance (friendly relations with elected officials and the defense of common good); the grey zone of discord (instrumentalization of the political processes, political practices in which private and public interests are confounded, and private corruption). According to the author, the study demonstrates that citizens' judgment regarding breaches of integrity is very variable. He then presents variables that might explain the differentiation of perceptions. Pierre Lascoumes concludes that the judgment of citizens regarding breach of integrity issues differs from one

person to another and varies depending on the specificities of each situation. Broadly, French citizens do not disapprove of most of the situations regarding conflicts of interest, and, when they identify such a situation, they often find justification for it. The author underlines the difficulty of drawing a line between corruption and the 'atypical manner of exercising power', even more so, since in recent years, public and private sectors have been collaborating more often and more closely than in the past.

Taking a comparative stance, Yseult Marique writes about how the differences in administrative cultures between the United Kingdom and France impact the issue of corruption in public contracts: the first relying mainly on ethics, and the second relying mainly on criminal law ('Integrity in English and French public contracts: changing administrative cultures?'). The author highlights the main features of administrative cultures in the United Kingdom and in France and relates them to patterns of corruption in public contracts. The author then underlines the need for both countries to evolve in response to changes in their cultures that occurred over the last two decades. Accordingly, both countries enacted new norms and created specific institutions that are detailed throughout the article. Some of the changes have been triggered by international and European initiatives that both the United Kingdom and France need to comply with, notably provisions enacted by the OECD and the European Union.

Drawing in particular on his World Bank experience, Richard Messick addresses the questions of why and how to draft a law concerning conflicts of interest ('Policy considerations when drafting conflict of interest legislation'). In his view, countries are facing a choice between 'preventive laws', thereby avoiding a potential conflict as officials with a conflict of interest are prohibited from making a decision, and 'disclosure laws', thereby forcing officials to disclose their interests so the existence of a conflict can be determined before a decision is made. The level of public trust in government and the size of the country impact the choice of legislation. In this regard, disclosure laws provide more flexibility. Richard Messick also provides details about categories of conflicts. For financial conflicts, conflicts of interest include naked self-dealing (a direct clash between the personal and/or financial interests and the interests of the community), and nepotism, undue influence, abuse of office, payment for public service and private gain from public office. Richard Messick outlines the need to create an agency to enforce laws applying to conflicts of interest, and preferably different agencies for different branches of the government. The author then identifies four ways to mitigate conflicts of interest: recusal, divestiture, incompatibility

and disclosure. Disclosure duties may also bind bidders for government. While laws may contain rules or standards, the author recommends a law with 'bright line rules', especially those that he lists, subject to interpretation. The author notes that an effective implementation of the conflicts of interest laws requires not only punitive provisions, but also education and training of all people who may be concerned, from government officials to the press and citizens. Richard Messick concludes that conflicts of interest legislation has two roles: increasing citizens' confidence in government and reducing the risk of corrupt practices. One must however keep in mind that those regulations may deprive public services of skilled people and that tighter regulations may result in 'automatic' increases in violations.

By contrast, Carolyn Moser points at the lack of conflicts of interest regulations within the Middle East and North Africa region, while underlining the expression by citizens for a call for social justice through the 'Arab Spring' ('Managing conflicts of interest of the executive in the MENA region: retrospect and outlook with a focus on Tunisia and Egypt'). She first focuses on the regulation of conflicts of interest of members of the government. It is indeed a diverse region, but the various countries share certain common political features and cultural traits. Notably, they have similar conceptions of corruption and conflicts of interest. In terms of the legal framework, most of the countries in the region have signed the United Nations Convention Against Corruption. However, in the author's opinion, they fail to properly implement it. However, Carolyn Moser notes that civil society took certain initiatives regarding the management of conflicts of interest in the MENA region, such as the Social Development Civil Society Fund managed by the World Bank, which has, in the wake of the Arab Spring, awarded financial support to key anti-corruption NGOs and other non-state actors in the MENA region for the year 2012. In the second part of her chapter, the author chooses Egypt and Tunisia as examples to show that the absence or non-implementation of conflicts of interest regulations leads to corrupt practices. Regulations in Tunisia are too old and do not offer full coverage of conflicts of interest issues. By comparison, Egypt's framework seems better. However, the amount of frozen assets belonging to Mubarak and Ben Ali and their entourage is a good indicator of how both in Egypt and in Tunisia the heads of state were corrupted. The consequence of the poor management of conflicts of interest in Egypt and Tunisia was the loss of people's confidence in the State as well as having specific economic effects. Based on these two countries' experiments, the author provides some insight into the future of the management of conflicts of interest in the MENA region. The author

recommends that the legislation manage, rather than prohibit, conflicts of interest, in order to take into account the specificities of the region and provide for a better level of enforcement. The author concludes by pointing to the need to include key players such as, for example, journalists in the management of conflicts of interest.

The next two contributions address certain other aspects of French and UK legislation. Timothée Paris first dwells on the efficiency of French law on conflicts of interest ('Is (French) continental law efficient at fighting conflicts of interests?'). According to the author, contrary to common law and its judge-made law system, continental law is made by Parliament. This difference has an impact, with a comparative advantage for common law, as far as the management of conflicts of interest is concerned. This advantage derives in particular from the importance, in this legal tradition, of procedural rules. However, Timothée Paris points out that continental law may nonetheless efficiently manage conflicts of interest. The non-retroactivity principle guiding French law is likely to provide legal certainty. Additionally, the movement aiming at the conciliation of private and public interests would ease the management of conflicts of interest. The report of the State Commission examining the prevention
of conflicts of interest and the subsequent draft statute imply that a statutory law is needed and is the appropriate tool for treating conflicts of interest. The author concludes that the effective management of conflicts of interest, whether through codes of conduct or regulations, must try to conciliate both private and public interests.

In turn, Cecily Rose starts by observing that United Kingdom regulations mainly treat corruption and conflicts of interest as separate issues ('Corruption and conflicts of interests in the United Kingdom'). However, the author points to the exceptions that allow them to relate to both phenomena, such as the fact that both issues fall within the ambit of the Serious Fraud Office. But despite several years of attempts to reform the rules applying to conflicts of interest, the topic is not formally addressed by the Bribery Act. The Guidance accompanying the Act, which is 'soft law', briefly addresses conflicts of interest, but more as an ethical issue rather than a criminal one. Conflicts of interest are thus mainly treated separately from anti-bribery regulations, and notably in rules regarding the public sector. Cecily Rose then reports on the action of the Committee on Standards in Public Life, which issued reports encouraging self-regulation, accompanied by independent scrutiny and monitoring. In this context, the author observes that, in the United Kingdom, codes of conduct have been the main tool used to treat conflicts of interest in the public sector.

A final stop on the European tour of corruption and conflicts of interests legislation, Çagla Tansung's chapter addresses the issue of the legal framework behind the corruption of civil servants in Turkey ('The legal regulations for the prevention of corruption of the civil servants in Turkey and the Council of ethics for public service'). The author starts by presenting the regulations that aim at preventing the corruption of civil servants. Turkish regulations notably contain rules regarding gifts and disclosure obligations for appointed or elected civil servants. People breaching the disclosure duty, as well as those breaching corruption rules, may thus be given a jail sentence. Also, a person previously condemned for acts related to corruption is no longer eligible for any position in the civil service. The Turkish public procurement law was amended to comply with European Union rules. A Turkish law establishes a right to information and access to public documents to ensure transparency. The author focuses on the Council of Ethics for Public Service, which specifically offers ethical rules for civil servants. The Council's scope of action concerns all civil servants except those with specific duties such as the President of the Republic or a member of the Army. The Council has the duty to prepare regulations and investigate cases of possible violations of corruption regulations. The author concludes that even if Turkish corruption rules sometimes face criticism – much of which could be addressed by the enactment of unique and harmonized legislation – they already contain detailed regulations and effective mechanisms.

PART III INTERNATIONAL ORGANIZATIONS AND THE FIGHT AGAINST CORRUPTION AND CONFLICTS OF INTEREST

Perhaps surprisingly, international aspects are crucial in the law on corruption and conflict of interest: it is fair to say that international organizations and international law have so far played a leading role both in characterizing the issues raised by the two phenomena, and in devising most of the tools which are ordinarily used in institutions and systems in order to reduce them.

It is rather recently that international organizations became conscious that corruption and conflicts of interest were undermining their aptitude to perform their tasks. As Mariangela Benedetti writes, '[f]or a long time, multilateral development banks have turned a blind eye to the corruption problem'. Awareness came in the 1990s, when the World Bank, as

Laurence Folliot-Lalliot explains, started to bring forward the issue, and adopt its first related instruments, such as the 1995 Procurement Guidelines.

Nowadays, the problem of corruption and conflicts of interest is explicitly addressed by a number of international organizations: as Elisa D'Alterio shows, the problem is targeted both by ad hoc institutions – GRECO, Open Government Partnership, Global Integrity, Transparency International and so on – and by well-known general international organizations – the United Nations, OECD, World Bank, other multilateral development banks, European Union, Council of Europe, and so forth. Worth noticing is the fact that, in the first category, there are entities that have a private nature: they belong to these non-state regulators, or standard setters, whose importance in international legal life is constantly growing.[2]

Equally remarkable is the existence, now, of a high level of cooperation between international organizations in their struggle against corruption and conflicts of interest: as Mariangela Benedetti explains, the multilateral development banks have commonly adopted, in 2006, a Uniform Framework for Preventing and Combating Fraud and Corruption, and in 2010 an Agreement for Mutual Enforcement of Debarment Decisions, while, as Laurence Folliot-Lalliot mentions, the OECD and the World Bank have jointly elaborated a Methodology for Assessing Procurement System.

Partly because of this cooperation, one can observe the emergence of a wide common comprehension, within the international ambit, of what corruption and conflicts of interest are, of the reasons why they must be reduced, and of the ways to fight them, by prevention, and by sanction. Prevention supposes setting up independent bodies, having assessment mechanisms, including indicators. Sanctions are less easy to secure: at least, while it is not too tricky to have sanctions available in case of internal corruption or conflict of interest – i.e. in case the organization's staff itself is concerned, it is much more difficult to apply sanctions to third parties, such as member States or partners. International development banks manage to do that by debarring – or threatening to debar – firms which made procurement contracts with them or with states in project frameworks these banks subsidized: Laurence Folliot-Lalliot relates that, at the end of 2012, the World Bank had debarred 280 firms

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[2] Anne Peters, Lucy Keochmin, Till Förster and Gretta Fenner Zinkerwagel (eds), *Non-State Actors as Standard Setters*, Cambridge University Press, 2009.

for periods of either 3, 5, 10 or 12 years, and that 90 firms were debarred permanently.

International organizations sometimes have sanctioning powers applicable to their member States: this is the case when they provide them with financial grants or loans, which they can suspend if it appears that their utilization is surrounded by corruption or conflicts of interest. Even when they do not have such a possibility, what they can do, and often do, is to exercise political pressure on the states so that they improve their standards: this is what the OECD has done for a long time, in particular by encouraging the adoption of conventions it has drafted. As Susan Aaronson and Rodwan Abouharb demonstrate, this is also the WTO's policy, especially in relation to states applying to become members, which will be required to join the international good governance requirements.

PART IV EUROPEAN ADMINISTRATIVE LAW AND THE FIGHT AGAINST CORRUPTION AND CONFLICTS OF INTEREST

The next three chapters all arrive at the same conclusion: the lack of a coherent legal framework to address issues of corruption and conflicts of interests at EU level.

Edoardo Chiti analyses the problems of mismanagement that occurred at the level of EU agencies. He shows very convincingly how concerns about corruption and conflicts of interest are increasing by giving a detailed account of two affairs: the private use of public funds inside the European Police College (CEPOL) and the conflicts of interest inside the European Food Safety Authority (EFSA). Edoardo Chiti then asks whether these case studies do not call for improving the existing legal framework for the prevention of conflicts of interest inside EU agencies? Although the existing legal framework proved adequate to remedy existing issues, several grey areas remain. Edoardo Chiti highlights three issues: the legal remedies and the ways to prevent conflicts of interest by legal and institutional reforms. First, there is a problem of standing to bring court proceedings to remedy breaches related to conflicts of interest concerns. The limitation of the rights of private actors to bring an action before EU courts restrains their involvement in upholding a proper standard of good administration. Second, Chiti argues that the main shortcoming of the existing EU legal framework 'concerns its actual capability to prevent mismanagement by EU administrations'. Following

the EFSA affair the European Parliament pushed the agency to revise its rules to prevent future issues. The capacity of European Agencies to design rules of substance and procedure fostering an administrative culture of good management is key to the success of these policies. Institutional reforms are also analysed. The European Parliament requires European Agencies to develop 'independence policies' to address the problem of their relationship with the market players they regulate. Though impressive, these reforms shed light on the remaining structural weaknesses of European independent agencies, namely their lack of independence towards the market.

Simone White ('Footprints in the sand: regulating conflict of interest at EU level') argues that a comprehensive regulatory framework dedicated to remedy conflicts of interest at EU level is needed. The current framework is scattered across various texts: the EU Staff Regulation, the Financial Regulation, the Code of Good Administrative Behaviour, the Code of Conduct for Commissioners and various guidelines and codes of ethics. White shows that these norms do not appropriately address the issue of conflicts of interest on an EU-wide basis, either because their scope is too narrow (applying only to Commissioners or EU staff), or because the notion of conflicts of interest is not defined, or finally because some key actors such as the European Parliament are not included and thus lack an ethics code.

Patrycja Szarek-Mason ('OLAF: The anti-corruption policy within the European Union') sheds light on the role of OLAF (the European Anti-Fraud Office) in fighting corruption at EU level. OLAF enjoys vast power to investigate the proper distribution and management of EU funds. The Agency's investigations cover fraud, corruption, embezzlement, and any other irregularity, including alleged conflicts of interest. Patrycja Szarek-Mason also notices the lack of a uniform and comprehensive definition of conflicts of interest at EU level and of a comprehensive legal framework. OLAF's investigations also suffer from the reluctance of some member states to collaborate proactively with it. She observes 'The main shortcomings of the current mechanism lie within the transmission of OLAF's investigative reports to national prosecuting authorities. In its efforts to eliminate corrupt practices within EU institutions and in relation to EU funds, OLAF's action is reliant on the goodwill of member states to cooperate in a swift and efficient manner.'

PART I

Conflicts of interest and corruption: A fine line?

1. Corruption and conflicts of interest

Susan Rose-Ackerman

Conflicts of interest come in two overlapping forms. First, the interests of different parts of government may conflict. As democratic institutions developed, newly empowered parliaments sought to limit the king's influence. Monarchs maintained power by providing favors and official positions to legislators. Hence, early efforts were closely tied to an emerging view of the separation of powers, even if some of the benefits were private. Second, the concept refers to conflicts between public roles and private financial interests.[1] Today, the first form is less prominent than the second. Of course, powerful presidents and prime ministers can still seek to sway politicians through their control over government posts and spending priorities. Furthermore, certain institutional reforms are unlikely because they conflict with the interests of politicians. Nevertheless, constitutional terms, legal prohibitions, and the division of labor mean that worries about the separation of powers are not at the forefront.[2] In contrast, the complexity of modern society means that the second form is pervasive. Individuals play multiple public and private roles with accompanying tensions between their conflicting demands.

An individual may play many roles simultaneously. Those who hold government or political positions as legislators, ministers, party functionaries, judges, presidents, prime ministers, or civil servants also have other responsibilities. They are family members, businessmen, tribal elders, religious leaders, or even criminals.[3] A characteristic of modern complex

[1] Cárdenas (2011) summarizes the history of the concept. For an overview that canvasses the legal situation in many countries see Peele and Kaye (2011). On the case of Argentina see De Michele (2004).

[2] The remaining areas of contestation concern whether cabinet ministers in parliamentary systems can also serve in parliament and whether national politicians can simultaneously hold political or bureaucratic posts in lower-level governments.

[3] On the prevalence of the last in the Indian legislature see Aidt Devesh and Golden (2011).

societies is that people shift roles over days, weeks, or years. What is appropriate or even required in one role may be inappropriate or illegal in others. Public roles may require a level of objectivity, evenhandedness, and transparency not imposed on one's private life. Institutions and organizations create their own rules and ethical standards that attempt to socialize people to further the bodies' aims.[4] These are enforced by legal sanctions and internal rules and by moral suasion and political pressures.[5]

Conflicts of interest arise when a person mixes up his or her roles, furthering, say, the interests of her family or her business when acting as a bureaucrat, judge or politician.[6] Behavior based on one's devotion to family, tribe or religion may be illicit if carried out in one's official capacity. Sometimes, of course, private and public interests coincide. A leading business person who becomes mayor of a city may seek to promote economic development, thus benefitting both himself and the municipality. Even in such cases, however, the correspondence is unlikely to be perfect. The businessman might steer contracts to his firm, limiting competition and raising prices. A mayor who accepts outright payoffs in connection with economic development projects may both improve the city's health and enrich himself, but he does this in a way that imposes excess costs on taxpayers. Bribes increase the cost and number of projects to inefficient levels and distort priorities toward elaborate, specialized projects where bribes are easy to hide.

Although the empirical study of corruption has vastly expanded in recent years, analyses of the broader concept of conflict of interest have focused mostly on campaign finance and on studies of individual countries. Many scholars have studied links between legal sources of campaign finance and voting behavior. Because of the lack of explicit quid pro quos, these studies are often inconclusive. The strongest results come from votes on bills that provide very specific benefits to particular firms.[7] That research is complicated by debates over the proper behavior of representatives. Should they vote as their constituents want or in accord with their view of the broader public interest?

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[4] Arellano and Zamudio (2011) stress this aspect of the issue.

[5] Stark (2011).

[6] On the definition of conflict of interest see Peele and Kaye (pp. 338–339). The OECD's definition is: 'a conflict between the duty and the private interest of an official, in which the public official's private-capacity interest could improperly influence the performance of their official duties and responsibilities' (OECD, 2005: 2).

[7] See, for example, the studies cited in Daley and Snowberg (2011).

Another strand of research studies situations where business and politics are deeply intertwined and asks if these political entities have worse economic outcomes and more corruption than others where the overlap is less pronounced. Are the business elite the dominant actors who infiltrate politics and obtain favors at the expense of the rest of the population? Conversely, is it politicians who are dominant and who force firms to do them favors, thus perhaps undermining firm profitability? In the extreme, are the business and political elite the same people who control both the state and the economy, operating in tandem to disadvantage outsiders? Individual country research illustrates the two-faced nature of business/government relations. Consider a few examples. During Suharto's regime in Indonesia, the stock market value of firms partly owned by his family fell in value when he suffered health emergencies.[8] In contrast, banks in Pakistan with more politicians on their boards had a higher proportion of questionable loans than other banks.[9] These data imply that many bank loans to the politically powerful were not of investment grade. Studies of South Korea show how the political power of the chaebol exacerbated the speed and depth of the downturn in the Asian financial crisis.[10] In the United States, research on the oil industry in California in the first half of the twentieth century shows how the industry influenced policy by providing private benefits to politicians.[11] The case of Italy stands out as one with an intertwined business/political elite. Thus, when he was in power, former Prime Minister Silvio Berlusconi both owned the biggest commercial television station and influenced appointments to the public broadcaster.[12]

Cross-country results show an association between the strength of the political connections of domestic business firms and corruption. Rigorous limits on conflicts of interest reduce direct business participation in the state. Conversely, appointing politicians to corporate boards does not increase firm value, echoing the results for Pakistani banks. However, firm value does rise when a business person enters politics, suggesting that those firms benefit at the expense of competitors and suppliers.[13] These data need to be supplemented with information on campaign financing, lobbying expenses and regulation, and revolving doors. (The

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[8] Fisman (2001).
[9] Khwaja and Mian (2005).
[10] Kang (2002).
[11] Sabin (2005).
[12] 'Oh for a New Risorgimento: Special Report – Italy,' *The Economist*, 11 June 2011, at 13–14.
[13] Faccio (2006).

Japanese call it 'ascent to heaven'; the French, 'pantouflage'.)[14] Business leaders do not need to be directly elected to office to have an impact if alternative routes are available.

Although private and public roles can be incompatible, it may be difficult to prove incompatibility in particular cases. That difficulty implies that public institutions should focus on prevention ex ante rather than punishment ex post.[15] Legal punishment and institutional sanctions need to be available as a backup, but they are likely to have limited impact. On the one hand, the protections of the legal system and its cost and delay will permit some of the guilty to escape punishment. On the other hand, the law may sweep up innocent officials who have offended the powerful, or it may target only those associated with opposition groups.

Conflicts of interest cover a wide range of situations. Both parts of the phrase need to be unpacked. Andrew Stark argues that the concept of 'conflict' has evolved from an emphasis on subjective conflicts in the minds of officials to objective indicia that a conflict might exist with some probability. At the same time, the notion of 'interest' evolved from objective financial interests to include subjective interests related to ideological, personal, economic, and political matters.[16] The move to objective measures of conflict is a practical response to the difficulty of probing mental states and reflects a growing lack of trust in the self-serving statements of the powerful. The broader notion of interest reflects a heightened concern for the democratic legitimacy and fairness of public decisions, but it risks conflating individual self-seeking with the necessary expressions of interest and opinion vital to democratic functioning. The impact of the developments that Stark discusses is to sweep a wide range of behavior under the conflict-of-interest rubric.

Conflict of interest is a broad umbrella term that incorporates all sorts of tensions between official and private roles. Illegal corruption and fraud are a subset of this concept where the benefits to the official are financial. The payoffs may induce the official to violate the terms of his official position in return for private gain, or they may be extortion paid

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[14] Examples from France are the director of public affairs at Orange-France Telecom who was previously a top regulator of the industry and a former government official. The senior vice-president of public affairs at Alcatel-Lucent and the director of regulatory affairs at Group Iliad both served in the regulator for six years (examples from personal communication from Akis Psygkas). Similar examples can be found in all countries with regulated private utilities.

[15] Arellano and Zamudio (2011), De Michele (2004).

[16] Stark (2011).

to induce the official to do what he ought to being doing anyway. Fraud is an offense that need not involve a third party. The official simply steals from the public coffers.

The challenge for policymakers is twofold. First, they need to ask if some conflicts of interest are so harmful that they ought to be criminalized even if they do not rise to the level of corruption or fraud. Second, has the state set up the right mixture of ex ante prohibitions and ex post penalties? Perhaps ex ante requirements for financial disclosure, divestiture, recusal, etc. are either too lax or too stringent. Do they discourage otherwise qualified people from taking public positions so that the pool of talent is limited? Are they too easy to circumvent by, for example, transferring assets to one's children or moving assets abroad? Do the rules permit what some call 'legal corruption', in other words, behavior that favors wealthy private interests without the need for outright payoffs.

The primary difficulty is the lack of a well-defined concept of the public interest in a representative democracy. Voting by the electorate and in the legislature implies that citizens and politicians will disagree about the best policy. In practice, any policy will benefit some and impose costs on others. Thus, one cannot easily claim that anything against the public interest is corrupt. There is no comprehensive general will in a democracy that implies a particular set of public policies, and public choices need not be consistent over issues or over time.

Bribery, extortion, and fraud are the easy cases. Enriching yourself at the expense of the taxpayers and of citizens seeking to obtain benefits or avoid costs is clearly against the public interest. There is always a superior non-corrupt option that could make everyone better off except those involved in the corrupt deal. Nevertheless, even for these straightforward cases, there remains room for debate about the relative role of the criminal law versus changes in the way government operates to reduce corrupt incentives. The state can simplify or eliminate programs to reduce discretion, introduce competitive pressures, and create institutions that improve government transparency and accountability.[17] Thus, even when the underlying offense is a crime, the policy response can be preventive.

The distinction between preventive measures and ex post enforcement applies beyond outright corruption, but the appropriate mixture is less clear. Some will argue that what they are doing is completely appropriate and should not be sanctioned or prevented. Consider a few examples. An

[17] See Rose-Ackerman (1999) for a fuller discussion of these options and Rose-Ackerman (2010) on the role of the criminal law.

appointee to a regulatory agency argues that her experience in the regulated industry or in a civil society group makes her uniquely qualified, not conflicted. A well-off politician from a farming background argues that his experience makes him best suited to represent a farming state. A judicial nominee points to his experience as a Wall Street lawyer as giving him needed expertise. A politician accepts funds from wealthy private interests and claims that they will make her independent of party politics.

Criminalizing these behaviors appears counterproductive. Instead, one set of responses involves transparency and easy public access to information, requiring officials to give reasons for their actions subject to neutral standards, and requiring that people either divest themselves and their families of certain financial interests or recuse themselves from choices where they have a conflict. However, in the legislative process transparency is not sufficient if there are collective action problems not solved by knowledge. Even if one holds a delegative theory of democracy – under which legislators ought to represent the interests of their constituents – transparency may not be enough. Rather, as Dennis Thompson argues, 'constituents in *any* state or district may quite properly instruct their representative to seek, through the procedures of the legislature, standards to govern the conduct of *all* representatives.' Citizens may care about the 'moral health and political efficacy of the institution as a whole', not just the private benefits provided by the government.[18] A relaxed attitude toward legislative conflicts of interest ignores the importance of these attitudes. In the bureaucracy, the cabinet, and the courts a different sort of collective action problem limits the efficacy of disclosure. Citizens face collective action problems if they seek to discipline these officials. However, a turn to the criminal law is too blunt and accusatory an instrument in many cases. Those who care about the moral health and efficacy of the state are likely to support generic preventive measures to suppress the most important conflicts.

Although private financial gain always raises conflict-of-interest concerns in public life, most public choices further some interests and impose costs on others. Those affected by such decisions need to be informed when decisions are made and to have an opportunity to argue for or against a policy, as advocates, not impartial observers. In a judicial proceeding, one can try to create neutral adjudicators who lack any interest in the outcome beyond competent fact finding and the skilled application of the law. In practice, such neutrality may be difficult to

[18] Thompson (1987) pp. 108–109.

achieve, but it remains a goal. In the legislature and in the executive, however, such neutrality is not even in principle possible or desirable. Political life requires the participation of affected interests. The problem is both to avoid a takeover by any one interest and to limit the pursuit of private gain by those meant to represent constituency groups.

One response is a corporatist body, deciding by unanimous consent, that includes representatives of all the affected interests. The traditional model comes from the field of labor relations where peak associations of labor unions, business associations, and government ministries meet to set labor policy – minimum wages, average wage increases, working conditions. The agreements may require nominal parliamentary approval, but they are de facto the responsibility of this body: national policy is made by interested parties who have to compromise to reach agreement. The identification of these decisions with the public interest arises from the claim that all the relevant interests are well represented. It breaks down if labor leaders accept bribes from business, if labor unions only represent a subset of all workers, if business associations omit important sectors, and if government officials do not bring in other interests, such as those of consumers. These problems undermine corporatist processes, but only the first in the list is a conflict of interest. The members are explicitly meant to represent the interests of their constituencies.

Similarly, an industry regulatory body might include people with strong ties to the industry as well as representatives of consumer and environmental groups, state and local governments, etc. Neither a person with industry ties nor an employee of an environmental group would be criticized for advocating positions close to those they represent, either de jure or de facto. Neither a rigid industry spokesman nor an uncompromising environmentalist would be a good choice for such a body, but such a person's problem is not a conflict of interest.

In many federal regulatory agencies in the United States a multi-member board can have no more than a majority from one party (usually three out of five). These commissioners are appointed in a partisan process but operate as a decision-making body under majority rule. If a Democratic appointee espouses policies that track those of Congressional Democrats, that behavior would not be a conflict of interest. Party balance in the agency is meant to permit debate across party lines and achieve a result that is more politically acceptable than one produced by an ostensibly independent expert decision-maker. Of course, that does not always happen. Commissioners can be swayed by the hope of subsequent employment in the regulated industry. Conflict-of-interest rules would apply to those blandishments, not to the partisan nature of a commissioner's decisions.

In short, conflicts of interest mainly create a problem when personal economic gain conflicts with one's responsibility as an agent. One may be an agent of broad public values, as when a judge applies the law. However, one may also be an agent of a political party, a geographical constituency, or an interest group, whether economic or social/ideological. If a public body is constituted for the purpose of bringing together diverse interests to make policy or to advise politicians, then it is legitimate for its members to seek to further the interests of their own principals, however narrow they may be. This model of decision-making may be unworkable or undemocratic in some situations, but the body's problems cannot be solved by strict conflict-of-interest rules. Of course, members should be prevented from gaining financially at the expense of their own principals and at the expense of the body's functioning. The broader point is that such conflicts should be carefully distinguished from broader issues of institutional design.

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PART II

Comparative studies on corruption and conflicts of interest from a procedural perspective

2. Regulatory authorities and conflicts of interest

Hubert Delzangles

Regulatory authorities are, more than other sectors of the government and for reasons of independence, particularly prone to conflicts of interest. Conflicts of interest are both the foundation and the main challenge of independent regulatory authorities (IRAs).

In the first place, the independence of regulatory authorities in Europe was intended to be a response to the conflicts of interest that naturally arise from the way in which Member States intervene in the regulated markets.

However, and this will be our main point, regulatory authorities are often accused of being captive to the market actors they are supposed to regulate. On the one hand, the close relationship between the regulatory authorities and the regulated markets can result in an assumption of conflicts of interest. On the other hand, the relationship that these authorities enjoy with public powers can also create certain suspicions towards conflicts of interest.

To avoid this captive position and also for purely ethical reasons, several systems have been put in place to avoid conflicts of interest.

The concept of Independent Regulatory Agencies was developed in the 19th century in the United States. It was the government's response to issues that had arisen in certain markets. These markets were prone to anti-competitive practices and tended to be highly concentrated. In order to fight such abusive behaviours and protect the public interest Congress decided to create Independent Regulatory Authorities. Certain agencies, such as the Federal Trade Commission (FTC), were set up to deal with general subjects, while others were assigned more specific sectors, like for example the Federal Communications Commission (FCC), the Federal Power Commission (FPC) and the Federal Energy Regulatory Commission (FERC). Even though these organisations served as models for their counterparts in Europe, the creation of American IRAs was not prompted by a desire to fight conflicts of interest.

It is in this context that George Stigler[1] and Richard Posner[2] developed their theory of 'regulatory capture'. These two writers suspected a collusion between the regulator and the regulated or in other words converging interests. Professor Stigler, for example, described how regulation is 'acquired by the industry and designed and operated primarily for its benefit.'[3] Professor Posner suggested, along the same lines, 'that it may be cheaper for large-number industries to obtain public regulation than to cartelise privately.'[4] This criticism of the very existence of regulation echoes and coincides with the theory developed by the School of Chicago that these writers helped to found.

By contrast, in Europe, the concept of conflicts of interest was the main reason behind the creation of independent regulatory authorities.[5] In the *R.T.T.* case of 13 December 1991,[6] the European Court of Justice criticised a national system for giving a public undertaking that acted on the market the power to approve telephone equipment which it had not supplied. The Court considered that granting exclusive rights to public undertakings created a situation of conflict of interest contrary to the rules on competition.[7] On the basis of this case law, the '*principle of separation between regulatory and operational functions*', was enshrined by the Council in all secondary legislation on electronic communications, energy and postal sectors in order to avoid any conflicts of interest that could affect competition.[8] This principle implies that Member States that intervene in the market face a choice: either they privatise operators in charge of public services so that regulatory and operational functions are separated; or they task an independent authority with regulating the operators on the market. Independent regulatory authorities are thus legally grounded on the conflicts of interest which naturally arise from intervention by Member States.

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[1] Stigler G.J.: 'The theory of economic regulation', *The Bell Journal of Economics and Management Science*, Vol. 1, n. 2, 1971, p. 3.

[2] Posner R.A.: 'Theories of economic regulation', *The Bell Journal of Economics and Management Science*, Vol. 5, n. 2, 1974, p. 335.

[3] Stigler G.J.: 'The theory of economic regulation', see above (n. 1), p. 3.

[4] Posner R.A.: 'Theories of economic regulation', see above (n. 2), p. 346.

[5] See Delzangles H. *L'indépendance des autorités de régulation sectorielles, communications électroniques, énergie et postes*, doctoral thesis, Bordeaux IV, 2008, p. 120.

[6] ECJ, 13 December 1991, *RTT c/ GB INNO BM SA*, C-18/88.

[7] Point 25 of the case.

[8] See, for example, Council directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines (J.O.C.E., n. L. 165, 19 June 1992, p. 27), point 14.

But in order to act as a shield against potential conflicts of interest through independent regulation, members of these authorities, more so than in any other public authority, must be prevented from acting in a situation of personal conflict of interest. The first section of this chapter looks at the traditional situations involving personal conflicts of interest. The second section examines how the Europeanisation of law as well as the action and recognition of regulatory authorities has had consequences and can have future repercussions on preventing personal and structural conflicts of interest.

I. HOW MEMBER STATES DEAL WITH CONFLICTS OF INTEREST WITHIN REGULATORY AUTHORITIES

Various studies on applicable European legislations reveal four types of incompatibilities. The first three aim to avoid conflicts of interest between various activities carried out by the commissioners (i.e. the staff of the regulatory authorities/IRA members), during their term of office.

These are incompatibilities with: holding elected offices (A); exercising additional functions (B); and with having direct or indirect interests in regulated sector companies (C). It will generally be the duty of the commissioners, in case they find themselves in such a position, to resign from office.

The last type of incompatibility relates to the future steps in the commissioner's career: the incompatibility with his/her future positions (D). The aim is to avoid the 'revolving door' phenomenon, or in other words that a commissioner would treat favourably a company or governmental entity in the hope of obtaining a position for himself at the end of his term of office in this company or entity.

A. Incompatibilities with Elected Offices

First of all, even though it is quite common for commissioners to hold other elected offices, some national statutes have chosen to see this as being completely incompatible, whereas other have not been so stringent on this matter. For example, the energy commisssioners in France (*Commission de régulation de l'énergie*, or CRE) and in Italy are prohibited by law from holding *any* elected office during their term as a

commissioner.[9] In a somewhat less stringent stance, article L. 131 of the French Posts and Electronic Communications Code (*Code des postes et des communications électroniques*) states that serving as a commissionner in the ARCEP (*Autorité de régulation des communications électroniques et des postes*) is incompatible with carrying out any *national* elected office – which leaves the path clear for local or European elected posts. The same rule applies for members of the BNA, the German Federal Network Agency for Electricity, Gas, Post, Telecommunications and Railway (*Gesetzüber die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen*).[10] But might this not lead to certain conflicts of interest, for example now that local authorities frequently negotiate with telecommunication operators? Spain[11] and the United Kingdom opted for two systems that do not specify whether the position of commissioner is incompatible with holding an elected office. Spanish legal scholars have criticised this point as they consider that IRA members should not be allowed to be politically active.[12]

Secondly, with similar results, the British legislature opted for general clauses of incompatibility regarding telecommunications: these clauses specify that commissioners must not have any interests that may affect them in fulfilling properly their roles as members of an IRA.[13] In a more subtle way, the rules of procedure of GEMA, the UK Gas and Electricity Market Authority, do not identify incompatible situations strictly speaking, but they do state that commissioners must declare that there are no conflicts of interest between their positions and the matters dealt with. If the commissioner does have a direct or indirect interest, s/he must declare it and s/he has to abstain from taking part in the discussions.[14]

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[9] Article L. 132-2 French Energy Code.

[10] BNA members cannot, during their employment, be a member of the government or the legislative power of the federation or a Land. Therefore other employment is possible.

[11] In Spain, C.M.T. and C.N.E. rules referred to general rules organised by the *Ley 12/1995, de 11 de Mayo, de Incompatibilidades de los Miembros del Gobierno de la Nación y de los Altos Cargos de la Administración General del Estado* (BOE, n. 113 du 12 mai 1995), which does not mention anything on elective mandates. This did not change with the new legislation: Ley 2/2011, 4 March, *de economia sostenible* (BOE n. 55, 5 March 2011, p. 25033).

[12] Hernández J.-C., *Regulación y competencia en el sector eléctrico*, Aranzadi, 2005, p. 142.

[13] For Ofcom, the Office of Communications Act 2001 specifies in schedule 1 that: 'no financial or other interest as is likely to affect prejudicially the carrying out by him of his functions as a member of OfCom'.

[14] Rules of Procedure of GEMA 2005, articles 20, 21 and 22.

Finally we should remember that Italian law is different as it forbids commissioners from representing a political party. This provision goes much further than the ones previously discussed, as it almost crosses the line between incompatibilities and freedom of expression. The other Member States have not touched on this topic. In France it seems that nothing prevents an IRA member from campaigning in elections. In fact, as for all members of government, there is a distinction between incompatibility and ineligibility. Incompatibility is a protective rule based on the idea that a commissioner cannot properly carry out two functions. This also tends to avoid the 'capture' of the commissioner because of his elected position. However the rule on incompatibility does not prevent political involvement, only actually holding office, which does not conflict with the freedom of expression.

B. Incompatibilities with Other Employment

There are other incompatibilities, but this time with other employment whether in the public or private sector.

First of all, it should be noted that this type of incompatibility may be implicit and rather vague. For example, GEMA and Ofgem (the UK Office of Gas and Electricity Markets, which is governed by GEMA) members are only subject to general clauses of incompatibility and a declaration of conflicts of interests that address the risk of capture of the regulator. The fact that no provision explicitly prohibits combining the role of IRA member with other employment may be explained by the fact that the British chose a mixed composition for IRAs that allows members to be appointed from companies, the public sector or parliament.[15]

In France, the situation is somewhat different in the energy sector. Article L. 132-2 of the French Energy Code states only that being a member of a commission is incompatible with having any direct or indirect interests in a company in the regulated sector. Does this imply that this applies to paid employment? Logically the answer should be affirmative. Other Member States considered forbidding employment in the public or private sector whilst being an IRA commissioner.

If in some Member States the incompatibility rules are rather strict, they inevitably affect in practice the staffing of these agencies. As a consequence flowing from the rule prohibiting a person from being employed both in the public or private sector and serving as a commissioner, appointees are often senior civil servants on secondment. The

[15] See schedule 1 §4, Office of Communications Act 2002.

private sector has not adapted itself much to the system of secondment and those persons who qualify for such positions are very reluctant to leave their original position. For example, it is quite interesting to compare the composition of the French and British IRAs to see how on the British side of the channel regulators accord greater importance to persons from the private sector. Thus, the rules of incompatibility, whilst they are important in ensuring the independence of the IRA, also prevent diversity in the composition of the commissions.[16]

C. Incompatibilities Connected to Assets

The third type of incompatibility deals with the commissioners' assets. In Europe, commissioners are often prohibited from holding any direct or indirect interests in companies from the regulated sector.[17] These provisions affect independent authorities regulating public services in France and Italy and Ofcom in the United Kingdom.

Spain, however, is subject to different rules that are worth mentioning. According to the legislation on IRAs and the law on the incompatibilities for senior State officials,[18] Spanish commissioners may directly or indirectly have interests in companies in the regulated sector. However, in such a situation, they must officially declare their property and during their term of office and for two years after ceasing their functions, they must entrust the relevant assets to a financial institution registered with the National Commission for the Securities Market. The financial institution must then manage the assets without taking any instructions from the commissioner and in accordance with general guidelines on profitability and risk. During that period, no dividends may be paid.[19] This

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[16] See Lombard M.: 'Institutions de régulation économique et démocratie politique', *A.J.D.A.*, 2005, p. 536.

[17] In any cases, the specification is general (for example for Ofcom: 'no financial or other interest as is likely to affect prejudicially the carrying out by him of his functions as a member of Ofcom', Office of Communications Act 2001 schedule 1 §1; In Italy: 'nelle imprese operant in el settore di competenza della medesima Autorità', Act n. 481, 14 November 1995, article 2 §8), others are more specific. See also article L. 131 of the French Code for Post and Electronic Communications.

[18] *Ley 12/1995, de 11 de Mayo, de Incompatibilidades de los Miembros del Gobierno de la Nación y de los Altos Cargos de la Administración General del Estado* (BOE, n. 113, 12 May 1995), Ley 2/2011, 4 March, *de economia sostenible* (BOE n. 55, 5 March 2011, p. 25033).

[19] *Ibid*., article 7.

interesting provision breaks a compromise between managing the commissioners' assets and ensuring their independence from the financial interests of the regulated sector. However the effectiveness of this system must not be overstated, since even though the property is 'in trust' it still belongs to the commissioner and it is therefore to his benefit that the company in which he holds shares, is making profits.

By contrast, the German and British systems barely satisfy, in this respect, the requirement that IRA members should be independent. The law of 7 July 2005[20] creating the *Bundesnetzagentur*, the energy, telecommunications, post and rail agency, does not mention anything about direct or indirect interests in companies in the regulated sector. However, it does provide that 'the president must inform the Federal Ministry for the Economy and Employment of gifts [or other benefits] that he receives in relation to his position in the agency. The Federal Ministry for the Economy and Employment will then decide what to do with the gifts and beneficial compensation'[21] – an atypical provision with no equivalent in other Member States.

Finally, the founding articles of GEMA only state, generally, that there are possible conflicts of interest and provide that in such a case the commissioner must declare them and abstain from participating in the discussions. This provision does not seem to properly ensure independence from the regulated sector because, at worst, the commissioner may still derive a financial benefit from his assets. For example, in a situation where there would be a limited number of companies operating in the regulated market, a commissioner may indirectly benefit from decisions of the regulator adverse to the interests of competitors of the company in which s/he has financial interests.

D. Incompatibilities with Future Positions

The last type of incompatibility is quite problematic as it relates to commissioners' future positions. It aims to avoid what is called the 'revolving door' phenomenon. It seeks to prevent the possibility that knowledge acquired by the commissioner during his term of office in the IRA would be used to distort competition once the commissioner has left office. It may also contribute to avoiding situations where commissioners might be suspected of having been biased during their term of office as

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[20] Federal Network Agency for Electricity, Gas, Post, Telecommunications and Railway Law, 7 July 2005 ('Gesetzüber die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen') (Bgbl. I P. 2009), §4.

[21] 7 July 2005 Law, see above (n. 20), §4.

regulators in favour of companies that employed them afterwards. Such provisions are very restrictive for former commissioners, in that they drastically limit their employment possibilities after their term of office. They are even more restrictive for commissioners from the private sector, as under this rule, they must shift to another sector, which limits the appeal of the IRA and diversity in the commissions.

Reconversion requirements at the end of office do not exist in French laws on regulatory authorities,[22] nor in Germany or in the United Kingdom. However, in France, Article 432-13 of the Criminal Code provides that there must be a minimum period of three years from the end of public functions before the acceptance of a position in private employment in the sector that the agent was in charge of regulating, monitoring, administrating or managing. In Italy, the measures to try and avoid the 'revolving door' situation are very strict. They are more limited in Spain. In Italy, the time period is longer, four years, and the scope is wider as 'commissioners must not maintain directly or indirectly relationships of cooperation, consultation or employment with companies operating in the regulated sectors.'[23] In Spain, the time period is much shorter, two years,[24] but the scope is the same: regulated sectors.[25] In any

[22] In the silence of the law, the following rules have been decided internally by the French energy authority: 'Chaque agent devra évaluer, (…) les incompatibilités qui pourraient lui être opposées (…) et s'assurer que les fonctions auxquelles il aspire ne portent pas atteinte à la dignité de ses précédentes fonctions ou qu'elles ne risquent pas de compromettre, ni de mettre en cause le fonctionnement normal, l'indépendance, l'impartialité ou la neutralité de la Commission. Lorsque ses recherches ont abouti, l'agent de la CRE adresse au directeur général une déclaration d'intention d'exercer une activité professionnelle hors de l'administration. Si cette activité entre dans le champ d'application du décret du 17 février 1995 (…) le directeur général de la Commission de régulation de l'énergie saisit la Commission de déontologie, selon la procédure prévue par le décret du 17 février 1995. Après avoir pris connaissance de l'avis de la Commission de déontologie, le directeur général statue sur la compatibilité des nouvelles fonctions avec celles exercées à la CRE (…)', in: Frison-Roche M.-A., 'Etude dressant un bilan des autorités administratives indépendantes', in *Rapport sur les autorités administratives indépendantes, Office Parlementaire d'évaluation de la législation*, by Patrice Gélard, 15 June 2006, II, p. 41.

[23] Law n. 481, 14 November 1995, see above (n. 17), point 9.

[24] Ley 2/2011, 4 March, *de economia sostenible*, see above (n. 11), article 15.

[25] It was different before the new legal framework; the Spanish law on the hydrocarbon sector stated that this prohibition covered the energy sector and not just the regulated sectors, *Ley 34/1998 de 7 de octubre, del sector de hidrocarburos* (BOE, n. 241 du 8 octobre 1998), additional disposition 11, §6.

case, financial compensation is provided for in order to make up for the shortfall resulting from this restriction.[26]

To sum up, our key points on the various rules of incompatibilities are that:

– Those regarding the holding of office must not affect the freedom of expression.
– Those relating to employment and preventing the 'revolving door' situation affect the diversity in the composition of the IRAs.
– As regards the issues related to assets, the Spanish system of entrusting the commissioners' assets to a financial institution is a good example, and can also be found in Canada.[27]
– In Germany, there is a system for prohibiting gifts from companies.
– Finally, although this seems generally to have been forgotten elsewhere, in France the authority regulating online games has established rules to take into account the interests of friends and relatives.

Overall, these rules on incompatibility aim to avoid the regulator being held captive in politics or in the regulated sector. These rules are very different[28] and very often have the disadvantage of limiting diversity in the composition of IRAs. It is for each researcher, depending on politics and state traditions, to consider which of these systems best avoids conflicts of interest.

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[26] In the silence of the C.M.T. Law, we have to refer to the general dispositions of incompatibilities for higher functions of the Civil Service, *Ley 12/1995, de 11 de Mayo, de Incompatibilidades de los Miembros del Gobierno de la Nación y de los Altos Cargos de la Administración General del Estado* (BOE, n. 113 12 May 1995). For two years, senior officials cannot engage in private activities linked with cases that they processed during their period of employment.

[27] See the report on conflicts of interest in the public sector, 26 January 2011, '*Pour une nouvelle déontologie de la vie publique*', La documentation française, janvier 2011.

[28] With the same idea, rules are not harmonised among National Regulatory Authorities, see the report on conflicts of interest in the public sector, 26 January 2011, *ibid*., p. 27.

II. THE NEW EUROPEAN ASPECTS OF CONFLICTS OF INTEREST WITHIN REGULATORY AUTHORITIES

The issue of conflicts of interest and IRAs has a European dimension also, considering both the applicable European conventions (in particular the European Convention on Human Rights, ECHR) and the creation of the European Union Regulatory Authorities for the purpose of coordinating national regulatory authorities.

A. Conflicts of Interest, Article 6 E.C.H.R. and the Issue of Impartiality

According to Article 6 E.C.H.R.: 'Everyone is entitled to a fair and public hearing … by an independent and impartial tribunal established by law …'.

After several years of doubts about whether this article applies to IRAs, the issue was resolved in France by the *Dubus* decision of 11 June 2009 which stated that IRAs, when they hand down sanctions or individual measures, are subject to the provisions of Article 6 E.C.H.R.[29] In France, the previously diverging decisions in the case law have thus now been resolved:[30] both the Council of State (Conseil d'Etat, the highest administrative court)[31] and the Cour de cassation[32] (the highest judicial court) consider now that certain independent regulatory authorities are subject to the provisions of Article 6 E.C.H.R.

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[29] ECtHR, 28 Octobre 1993, *Imbrioscia v Suisse*, Series A, n 275, §36: '(…) 'Certainly the primary purpose of Article 6 (art. 6) as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that the Article (art. 6) has no application to pre-trial proceedings. The "reasonable time" mentioned in paragraph 1 (art. 6-1), for instance, begins to run from the moment a "charge" comes into being, within the autonomous, substantive meaning to be given to that term (…); Other requirements of Article 6 (art. 6) – especially of paragraph 3 (art. 6-3) – may also be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them (see, inter alia, the following judgments: *Engel and Others v. the Netherlands*, 8 June 1976, Series A n. 22, pp. 38–39, §91 (…))'.

[30] CE, Ass., 4 March 1991, *Le Cun*, n. 112820, Rec., p. 70; Cass. Ass.plén., 5 February 1999, *COB c/ Oury*, n. 97/16440.

[31] CE, Ass., 3 December 1999, *Didier*, n. 207434, Rec., p. 399.

[32] Cass. Ass.plén., 5 February 1999, *COB c/ Oury*.

The application of Article 6 depends on two types of situations. The first situation relates to an objective lack of impartiality, which is strictly related to the organisation of the entity taking the measure. In this case the question is the following: may the very organisation of an entity put its members in a situation of almost systematic conflicts of interest? The answer is indeed affirmative: there can be systematic conflicts of interest when the same person has several positions within the same regulatory authority.

On this issue, the two French supreme courts did not come to the same conclusion. The Council of State considered that where one person is in charge of prosecuting, investigating and adjudicating on a sanction, this is contrary to Article 6 E.C.H.R. On the other hand, the *Cour de cassation* ruled that the mere fact of having the same person in charge of investigating and adjudicating on the offence/breach constitutes a breach of Article 6 E.C.H.R.[33] This shows once again the inconvenience of the fact that French independent regulatory authorities are not all subject to review by the same supreme court.[34]

The second situation relates to a subjective lack of impartiality. Here the problem is whether a member of an IRA can, because of his personal situation, be in a position of conflicts of interest which would affect the impartiality of the decision. Thus the Council of State considered that on the basis of Article 6 E.C.H.R., one of the members of the disciplinary commission for the Financial Markets Authority had a connection with one of the persons investigated that prevented him from taking part in the discussions on the case.[35]

All of these cases show how Article 6 E.C.H.R. addresses conflicts of interest that arise from the composition as well as the procedure of regulatory authorities. Article 6 E.C.H.R. has had a wider influence, beyond case law, since certain French independent regulatory authorities that were not covered by this case law nonetheless amended their internal procedures to comply with these decisions and prevent any future litigation. The Regulatory Authority of Telecommunications (now the

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[33] The Cour de cassation confirmed that point of view: Cass. Com., 5 October 1999, *SNC Campenon Bernard* n 97-15617, Bulletin 1999 IV n. 158 p. 133.

[34] See CA Paris, 1er ch., sect. H, 7 March 2000, *Société KPMG Fiduciaire de France*, n. 1999/15862; CE, Sect., 20 October 2000, *Société Habib Bank Ltd*; Cass., 1ère civ., 13 November 1996, *Ordre des avocats au barreau de Lille*.

[35] CE, Sect., 27 octobre 2006, *M. Parents et autres*, §11. See also CE, 30 May 2007, Société Europe, Finance et Industrie et Thannberger, n. 288538.

ARCEP), for example in two decisions dated 18 July 1999[36] and 10 January 2006 respectively,[37] ensured that the roles of following, assessing and participating in discussions on sanctions were kept distinct from each other. Furthermore, the commission discusses cases without the presence of a reporter, their head of legal service, or their deputies so as to reduce any chance of conflicts of interest. The Energy Regulation Commission also implemented an internal rule in 2001, but does not seem to have taken an approach to the separation of the roles of prosecuting, investigating and adjudicating as strict as that of the Regulatory Authority for Electronic Communications and Post (ARCEP). Furthermore, with Article 5 of the law of 7 December 2006[38], the CRE seems to have brought the institution even closer to the court model by creating a Standing Committee for disputes and sanctions.[39] This committee consists of two members of the Council of State and two judges from the Cour de Cassation. For the avoidance of conflicts of interest, members of the committee may not be members of the commission. Similarly, French Act n 2003-706 of 1 August 2003 on Financial Security set up a Disciplinary Commission within the Financial Markets Authority on the same model. It is possible that this new organisation of IRAs is a reaction to the European Court of Human Rights case *Procola*,[40] which stigmatised the Luxembourg Council of State for being both a court and an advisory body.

B. The Issue of Conflicts of Interest Reiterated by the Creation of European 'Regulatory' Authorities

Regulatory agencies have been in existence at European level since the beginning of this century. They are responsible for supporting the work of the European executive, by creating acts which contribute to regulating a particular sector. They have also created a European network of

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[36] Decision n 99-528, 18 June 1999, portant règlement intérieur (J.O.R.F., n. 166, 21 July 1999, p. 10849).

[37] Decision n. 06-0044, 10 January 2006, Internal Rules of the ARCEP, modified by decisions n. 2007-0556, 28 June 2007 and n. 2007-0705, 26 July 2007.

[38] Act n 2006-1537, 7 December 2006, *relative au secteur de l'énergie* (J.O.R.F., n. 284, 8 December 2006, p. 18531).

[39] CORDIS: Comité de règlement des différents et des sanctions.

[40] ECtHR., 28 September 1995, *Procola c/ Luxembourg*, A, n. 326.

agencies for activities that, originally, were dealt with nationally.[41] Among the forty or so existing European regulatory agencies, the Aviation Safety Agency, the Agency for the Cooperation of Energy Regulators (ACER), and the latest financial regulatory agencies have the most significant powers. They normally provide technical expertise to EU institutions, but they often are endowed with a delegated decision-making power; they contribute to the EU's law-making role; they can sometimes enact acts which could be considered as administrative sanctions such as withdrawing licences; they also settle disputes between national regulatory authorities through individual decisions.

Generally, these agencies consist of a Board of regulators made up of senior members of national regulatory authorities. This Board of regulators makes decisions by consulting, to varying degrees, with an administrative board consisting of members appointed by EU Institutions and a Managing Director of the agency appointed by the administrative board. The issue is whether managing independent regulators at a European level could renew or be affected by problems of conflicts of interest.

To determine whether situations of conflicts of interest may arise, one must consider three points.

First of all, members of the administrative board and the director of the agency are European civil servants. Apart from the guarantees of independence confirmed in the Regulation creating the agency, the issue is whether civil service law has sufficiently prevented conflicts of interest. To answer this, we should refer to the *Zavvos v Commission* case of the European Union Court of First Instance (Third Chamber) of 9 July 2002 which created a general obligation of independence and integrity with regard to the institution.[42] Furthermore, Regulation n. 723/2004 amending the Staff Regulations of officials of the EC dedicates an entire section on duties that could prevent conflicts of interest from arising.[43] Thus, the civil servant may not deal with a matter in which he has any

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[41] Communication from the European Commission, 'The operating framework for the European Regulatory Agencies', 11 December 2002, COM (2002) 718 final; p. 4; Draft Interinstitutional Agreement of 25 February 2005 on the operating framework for the European Regulatory Agencies, COM (2005) 59 final.

[42] Judgment of 9 July 2002, *Zavvos v Commission* (T-21/01, ECR-SC 2002 p. I-A-101, II-483).

[43] Council Regulation no. 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (OJ L 124, 27.4.2004, pp. 1–118).

personal interest such as to impair his independence, and in such a case he must immediately inform his appointing authority. For any other situations which could create conflicts of interest, such as plurality of offices, functions or future functions, the relevant appointing authority must be informed. There is clearly here an influence from English law in preventing conflicts of interest based on a general clause that covers all the cases of conflicts of interest and a system for obtaining permission. The European system therefore seems to be rather effective in handling conflicts of interest. However, this view could be nuanced in the light of the case of the European Commissioner for telecommunications, Martin Bangemmann, who joined the company Telefonica in 1999, and of the more recent case of Günther Verheugen, Commissioner for Industry, in 2010, who was criticised for having created a European lobbying company.

Secondly, the members of the board of regulators are national officers. Therefore they are governed by their national rules when they perform their duties. The question is whether these rules are strong enough to prevent conflicts of interest at a European level. The quality of the laws and whether they can cover the maximum number of situations in order to prevent conflicts of interest should be considered in light of our studies on national legislations in the first section of this chapter.

Thirdly and lastly, the question is whether there is a correlation between conflicts of interest and the independence of regulatory authorities. In other words, from an international perspective, are there reasons to suspect that European agencies are structurally in a situation of conflict of interest? Even though the bodies that appoint the members of these authorities are independent, given that this is a legal requirement, one can still harbour doubts. The same can be said for ACER in which the director, who in fact makes the decisions, is appointed by a board that itself is made up of representatives from EU institutions. How can he be impartial, or in other words not be in a position of conflict of interests, when he owes his position to EU institutions? This brings us back to the very foundation of independent regulation in Europe, which is impartiality, and the question is whether the European regulatory 'authorities' should be completely independent from European institutions.

Even though there are no European public companies, nor a European state holding shares in companies, the fact remains that some Member States intervene in the market. Therefore the Council, made up of Member States, is both judge and party if the independence of the European regulatory authorities is not guaranteed. How could a person coming from outside the EU and wishing to enter the European market be convinced of the credibility of a European authority that is influenced

by the Council which is made up of representatives of Member States that take part in these sectors?

Furthermore, European regulatory authorities are created to coordinate national organisations. But these national organisations must be independent of their own governments. How could it be logical that a European authority in charge of coordinating national authorities is dependent on a Council made up of representatives from Member States' executives? How could it be consistent that what is prohibited nationally to avoid conflicts of interest between operators and regulators is allowed at the level of the European legal system?

The members of the European Commission are independent according to the treaties.[44] The independence of these regulatory 'authorities' from the Commission is one of the aspects that the Commission promotes to ensure a new 'European governance'.[45] Furthermore, the recent 'politicisation' of the Commission, due to the new conditions in which its members are appointed as a consequence of the Lisbon treaty, could be a factor which justifies externalisation, by creating independent agencies. However, the Commission is present, without having the right to vote, in a large part of the bodies that appoint the members of the 'authorities'. If the issue of independence of these authorities from the Commission cannot be assessed in the same way as at Member States level, this raises again the problem of how 'European governance' may be perceived from an international perspective.

The problem that needs to be addressed is whether for foreign investors coming from outside the EU, the independence of the regulation, and therefore the prevention of conflicts of interest, affects their trust in European markets. There are therefore still a significant number of unanswered questions, and the issue of conflicts of interest will certainly remain for some time at the heart of the thinking on European regulation.

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[44] Article 213 European Community Treaty.

[45] See: European Commission, White Paper, 'European Governance', 25 July 2001, COM(2001) 428 final.

3. The conflicts of interests of public officers: Rules, checks and penalties

Bernardo Giorgio Mattarella

1. THE ISSUES

This chapter is divided into two parts. Each part is devoted to the same four issues: the definition of conflict of interests; the scope of the relative regulation; the remedies for such situations; and the control and punishment mechanisms.

In the first part of the chapter, these issues are addressed in general terms. In the second part, they are considered in a comparative perspective: a number of observations are proposed on the basis of the analysis of some countries' laws.

1.1 The Definition of Conflict of Interests

The first issue concerns the very notion of conflict of interests, as it is defined by the law concerning government ethics. In order to discuss this issue, it is necessary to provide at least one clarification for each of the terms that the expression consists of: 'conflict' and 'interests'.

1.1.1 'Interests'

As for interests, it should be pointed out that not every contrast or tension between different interests is a legally relevant conflict of interest. Political activity necessarily requires comparing and balancing different interests. In fact, comparing and balancing are also required by every public function – including those of administrative agencies – and also by every private function, such as those of the contract representatives and of the company managers. For instance, when the government has to make choices concerning industrial development and to strike a balance between fostering the economy and protecting the environment, it is not enough just to talk about conflicts of interest. In such cases, politicians have to take care of different, and possibly conflicting, public interests.

There is a conflict of interest only when one of the interests involved belongs to the office, and the other belongs to the individual who is in charge of the office or works in it. Conflicts of interest imply conflicting loyalties on the part of an officer when his personal interest might cause him to postpone or disregard the interest of the institution that he works for. Such a situation is typical of the 'agent' whose interest is opposed to that of the 'principal'.

Conflicts between different public interests may of course arise, but, as stated before, they are not conflicts of interest in the common and in the legal sense. However, in a particular sense, one can say that administrative agencies themselves can sometimes face a real conflict of interests. A good example is provided by the states in which the police departments have an interest in seizing private properties, because they are able to keep the outcome of the auctions of the goods seized in order to fund their work, as happens sometimes in the United States. In other European states, there are some similar examples: such as the fines inflicted by municipal police for breaking the speed limits – limits often intentionally kept low by municipal administrations themselves, which are able to retain the revenue from the fines, or a part of it (this happens sometimes in Italy); or the fines issued by certain independent regulatory authorities, which are able to do the same. In these hypotheses, in fact, there is a conflict between the real public interest, relating to the proper performance of administrative duties (involving people's safety and supervision over private businesses) and the 'instrumental' or 'private' interest of agencies, pertaining to their funding.

In this chapter, however, I do not consider these hypotheses, as I focus on the political and administrative officers' conflict of interests, which is the conflict between a public interest and a private one.

1.1.2 'Conflict'

As for the conflict, the main issue concerns the 'static' or 'dynamic' nature of the conflict of interests. Using a criminal law distinction, one can say that a conflict of interests can be perceived either as a crime of danger or one of criminal damage. Conceived in the first sense, the conflict takes place when an interest collides with another. Conceived in the second sense, it takes place only when the former actually prevails over the latter, which is adversely affected by the agent's decision.

As far as I know, in all the languages in which the term is used, 'conflict of interests' is intended in the first sense, the 'static' one; it is a situation in which two interests are opposing or diverging from each other and cannot both be satisfied. One of them *might* (although not necessarily actually *will*) illegally damage the other. A very good

definition is proposed in an OECD document: 'a conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which *could* improperly influence the performance of their official duties and responsibilities'.

Acting in conflicts of interest, therefore, means acting *in spite of* the conflict between the different interests which, in different ways, pertain to the agent. It does not necessarily mean acting *by reason of* the conflict of interests or wickedly, nor does it mean favouring the private interest and neglecting the public or collective one that the agent is in charge of. This undue preference is the likely or possible detrimental effect of the conflict of interests, but it is not the conflict of interests itself.

Noticeably, however, things change when the undue preference takes place – that is, if the conflict of interests results in an unjust harm to one of the two interests. In this hypothesis, there is, in the words of Plato, no more potency, but art; no more danger, but damage. It is, of course, a harder situation and this is why, at times, the law prohibits this particular situation altogether, and not just the mere existence of a conflict of interests, or treats the two differently.

1.2 The Scope of Regulations

As for the scope of regulation of conflicts of interests, I will focus on the relevant categories of public agents.

I will exclude the private sector and focus on public agents. Among them, the law regulating the conflict of interests may either include only politicians or consider also professional officers, i.e. civil servants. Secondly, the law may treat members of the national government and those of regional and local ones differently. In federal or regional legal systems, based on the division of powers, diversity is often implied – at least for state or regional government – by the apportioning of legislative power between the national and the state or regional parliaments.

Finally, the law may decide to establish different regulations for members of parliament (and of regional and local assemblies) and for cabinet ministers (and members of regional and local boards).

The choices made in regulating the conflict of interests of the various categories of personnel are obviously connected with those inherent to the sources of legal regulation. If, for instance, the rules are set out by regulations or codes of conduct, issued by certain boards or assemblies (such as the American Congress or the British Cabinet), their scope will inevitably be restricted to the members of those boards or assemblies.

1.3 The Remedies

1.3.1 Conflicting goals

In a conflict of interests, an agent, whose duty is to take care of a principal's interest, has an interest of his own which collides with the former. The law does not like such situations, as they expose an inevitably weak interest – that of the principal, who is unable to take care of it personally and has to delegate to another agent – to the threats brought about by a strong one (that of the agent, who acts on behalf of the principal). The agent's interest is obviously the strong one, as it is the agent who makes the decision and has all the relevant information, which the principal often lacks.

How to prevent these threats? One should consider that two different needs, two conflicting goals, are at stake. The first concerns the protection of the weak interest and offers good reasons to hinder or limit the officer's ability to make decisions. The second concerns the regular performance of his administrative duties and offers good reasons to let him decide and even to accept the possibility that his decisions are influenced by a strong personal interest. In other words, the law needs to prevent a dishonest decision, but it also needs to ensure a decision (and to avoid the possibility that brilliant candidates are discouraged from taking public jobs as they are afraid of being obliged to waive their private interests). The first goal pushes for extreme solutions, such as the dismissal of the officer in a conflict of interests; the second goal favours less strict solutions, or simply the acceptance of the conflict of interests as a lesser evil than the dismissal of some public officers.

1.3.2 The three remedies

The main techniques possible for managing conflicts of interests are three: the removal, which implies the choice between the two interests; the neutralization, which implies a duty to disqualify; and the exhibition, which implies a certain transparency.

The first approach requires the agent to choose between the public position and the private interest. It is obviously the most effective remedy. Of course, in order to remove the conflict of interests, the officer, unwilling to give up the public position, has to get rid of the private interest, not simply the private position: for instance, he would have to sell his shares in the company, not just resign as a manager. This technique gives rise to devices such as incompatibility and the duty to sell.

The second approach consists of the duty to disqualify the officer who, having to make a single decision, finds himself in a conflict of interests.

It is obviously a less effective remedy, as it involves the acceptance of the conflict of interests, but it can prevent its degeneration. It is often used by the law, especially for corporations: here, a conflict of interests situation does not usually force the manager to choose between the company job and the personal interest (or between two jobs in different companies); the conflict of interests does not imply his dismissal and his decisions are not void, if the company interest is not adversely affected. This approach, however, has its flaws. First and most obvious, the duty to disqualify may be violated. Second, this system may work for occasional conflict of interests situations, but not when conflicts of interest are likely to arise frequently. Moreover, the higher the public post concerned, the greater the problems brought about by the duty to disqualify: a minister's or regional councillor's disqualification places stress on the political representation mechanism; if it is the Prime Minister or the Regional President who is forced to have to disqualify himself, then the stress on the mechanism is even harder; and if this happens frequently, the functioning of the national or regional government can be disturbed. Consequently, when serious and recurring conflicts of interest take place at the highest political level, there may simply not be a good solution at hand. This is the case when one of the richest men of the country becomes president or prime minister, as it has happened in Italy in recent years.

The third approach, that of transparency, entails the duty to reveal the conflict of interests. According to this approach, the law accepts that the agent finds himself in a conflict of interests and it also accepts that he makes his decisions in spite of it. But it requires that the principal be informed of it. It is obviously the softest remedy, but it is always useful, irrespective of the use of the other two remedies. Corporation law sometimes adopts this remedy, imposing a duty of disclosure on companies' managers in conflicts of interest so that the shareholders are aware that their manager could be disloyal to them, and thus pay greater attention to his behavior.

There is, in fact, also a fourth approach, which can complement the previous three: that of training and consulting. It is often quite difficult to perceive conflicts of interest, and personal assessment is easily biased by the conception of one's own ethical behavior and by the social and professional context. Therefore, although this is not an issue of legal regulation of conflicts of interest, it is important for public officers to be informed of the relevant law and its implementation, and to be able to receive advice about the correct behavior required. This approach implies training, consulting and the existence of ad hoc officers.

1.3.3 The possible combinations of remedies

The said remedies should not be seen as alternatives to each other: they can coexist in the same regulations, as each of them is suited to a different hypothesis. The first is useful in situations where dangerous conflicts of interest can arise frequently. The second is more suitable in serious but occasional conflicts of interest. The third is always helpful. The fourth can always be of assistance as well. A good regulation of conflicts of interest is one that combines the three approaches.

But how should they be combined? How to decide when the private good, from which the conflict of interests arises, should be sold, when the officer should disqualify himself and when it is enough to bring the conflict into the open? There are two possible approaches: a scrupulous list of the various hypotheses; or a general clause, conferring on a reliable authority the duty to select the right remedy for every concrete case. A continental European lawyer would probably opt for the first approach, an Anglo-Saxon lawyer for the second one.

1.4 Checks and Penalties

To be effective, any remedy requires penalties for the wrongdoers and independent enforcement authorities.

Penalties can have an impact on the agent (as happens with dismissal or suspension from the public post, or with fines, criminal penalties and civil liability), the act at issue (which can be deemed void or annulled), or both. They can work not only on the public side, but also on the private one: for instance, fines may be inflicted on the company in which the public officer has a personal interest, or which was the beneficiary of his illegal decision.

2. COMPARATIVE REMARKS

2.1 The Definition of Conflict of Interests

It should be noticed, at the outset, that not all legal systems have a well-defined means of regulating politicians' conflicts of interest: important and respectable countries, such as France and Germany, seem to be satisfied with having certain provisions which establish cases of incompatibility, some of which are intended to prevent conflicts of interest. In these countries, some conflict of interests may not arise at all, while others are tolerated as long as they do not give rise to a criminal offense.

This remark corroborates the notion of conflict of interests that I have proposed. Incompatibility, in fact, is a device designed to avoid situations of conflict of interests. Therefore, in these countries – as well as in those which do have a regulation for governmental conflicts of interest – the current notion of conflict of interests is plainly the 'static' one, expressed in the OECD definition mentioned: a conflict of interests is a situation, not a behavior.

As far as I know, the only exception to this way of defining the conflicts of interest is provided by the Italian law regulating cabinet members' conflicts of interest. This statute contains a definition of conflict of interests which diverges from the way in which this notion is usually intended, as it entails an event of damage and not a situation of danger. Doing considerable harm to the Italian language, it states that 'there is a situation of conflict of interests […] when the holder of a cabinet post takes part in the performance of an act, even with a proposal, or does not issue a mandatory act, being in a disqualifying situation [or gaining an advantage], causing a harm to the public interest'. A conflict of interests (in the sense of the law), therefore, takes place not when there is a conflict of interests (in the usual sense), but when someone, being in a conflict of interests, gains an undue advantage from it or breaks a disqualification rule. The law does not regulate the conflict of interests, but only the possible behavior of the minister who finds himself in a conflict of interests. It should also be noticed that, if the minister has a conflict of interests and acts as a consequence of this, gaining an undue advantage, this is still not sufficient to have a conflict of interests (in the sense of the law): the presence of a harm to the public interest is necessary as well. To have an 'Italian conflict of interests', thus, three elements are necessary: a conflict of interests in the usual sense; an advantage for the cabinet member; and a harm to the public interest. As these remarks make clear, this law has been intentionally designed not to work. In the Italian legal system, however, there are also different legal regulations, which use a more acceptable notion of conflict of interests.

2.2 The Scope of Regulations

As for the scope of regulation of conflicts of interest, in many legal systems there are different provisions for members of parliament and for cabinet members, although in other systems there are common rules for both. For example, in the United States, at the federal level, the following exist: some general provisions, relevant for all public officers; special provisions for the members of each House of Congress; other special provisions for administrative agencies' personnel; and further provisions

for single agencies. In the United Kingdom, each chamber of the Houses of Parliament has its own code of conduct, while ministers' rules are included in the *Ministerial Code*, which is updated by every new Cabinet.

Moreover, regulations may obviously be different for the various levels of government. In the United States, every state has its own rules, different from those of the federal government. In the United Kingdom, local bodies, such as the Greater London Authority, have their own.

The previously mentioned (and useless) Italian statute regulates only cabinet members' conflicts of interest. However, there are better provisions concerning local and regional politicians. There are no provisions, however, for members of parliament, who are among the few Italian public officers lacking any regulation of conflicts of interest.

2.3 The Remedies

As for the remedies, as I mentioned earlier, the good regulations are those that combine the three approaches which I have outlined. The law should use the first (removal) very carefully, the second (neutralization) more often, and the third (exhibition) extensively.

North American countries provide good examples. In the United States and in Canada extreme solutions, such as the duty to sell company shares and the blind trust, are used exceptionally and in most cases are voluntarily chosen by the agents concerned. Nevertheless, at times they are the only possible way, for a candidate, to be eligible for a certain post without facing an even more draconian set of rules and criminal penalties. These regulations use financial disclosure massively. Following the officer's statement, the competent authority makes an assessment of his conflict of interests: this can initiate a procedure in which the agent can dispute the authority's findings. The necessary measures to manage the conflict of interests are determined in the final decision.

When the different remedies are not well combined, the law does not work very well. This may happen either because it is too strict and requires sacrifices too big for would-be public officers, encouraging them to violate its provisions or by keeping some the best candidates away from the posts; or because it is too permissive and does not prevent even the most dangerous conflicts of interests from occurring.

2.4 Checks and Penalties

Conflicts of interest regulations usually provide for severe penalties for wrongdoers, who are at times subject to criminal law rules. These

penalties are often administered by independent authorities, free from political influence, sometimes by courts.

This can also happen in those legal systems in which a well-defined regulation of politicians' conflicts of interests is lacking and only a few provisions exist for establishing cases of incompatibility. The disputes concerning the enforcement of these provisions are usually settled by courts (sometimes by the constitutional or supreme ones).

Types of remedies and competent authorities are obviously connected issues. Criminal punishments are of course inflicted by criminal courts. Civil courts are competent to deal with civil remedies, such as civil liability and the voiding of contracts. Administrative fines can be imposed by administrative authorities, usually independent from political control (such as the Antitrust Commission in Italy). Even when the remedy is administered within the constitutional or administrative body (like the parliament), there is often an independent office competent to deal with the procedure, such as the Office for Congressional Ethics in the American Congress.

4. Protecting the integrity of the U.S. federal procurement system: Conflict of interest rules and aspects of the system that help reduce corruption

Daniel I. Gordon

This chapter addresses corruption and conflicts of interest in the U.S. federal acquisition system. Outside its scope are the subcentral procurement systems (that is, the procurement systems of the U.S. state and local governments), which, unlike in almost every other country in the world, are different and legally completely separate from the national government's system. The federal procurement system is itself quite large, covering the purchase of goods and services, which for the past several years has totaled more than $530 billion each year. Even at the federal level, this chapter does not reach beyond procurement, so that the more than $500 billion a year spent on grants and financial assistance are outside the scope of the discussion here, as are the appointment and patronage process.

A brief introduction to the federal acquisition system is necessary for context, particularly for non-American readers, since the way the system deals with corruption and conflicts of interest is best understood in that context. Five characteristics may be most important in that regard.

The U.S. acquisition system has a long history and is based on a detailed statutory and regulatory scheme. The roots of the federal procurement system can be traced back to the 19th century (and arguably back to the War of Independence in the 18th century).[1] Today, the bedrock of the federal procurement laws is the Competition in Contracting Act of 1984, supplemented by reform legislation from the 1990s, and implemented through the very detailed Federal Acquisition Regulation

[1] The definitive history of the U.S. federal procurement system is James F. Nagle's *History of Government Contracting* (2nd ed. 1999).

(the FAR).[2] Those statutes and the FAR govern almost all federal procurements, for both civilian and military agencies.

The U.S. uses a cadre of acquisition professionals to run procurements. For many decades, the U.S. has relied on a corps of civil servants who are dedicated to the acquisition functions. For anyone to bind the federal government, particularly regarding the spending of appropriated funds, that person must generally be a specially designated contracting officer, a position whose status and authority are taken very seriously.[3] The requirement for the involvement of a trained acquisition specialist helps protect the acquisition system from pressures, whether from users (such as government computer personnel seeking to purchase from a preferred source without competition) or from political actors (such as officials who might wish to steer contracts toward constituents, friends, or relatives). The acquisition professionals view themselves as the enforcers of the detailed rules set out in the FAR, including the requirements for competition and for adequate documentation of every procurement decision. While their aversion to risk leads them to be criticized by some, it also helps protect the system from the risk of corruption.

The U.S. system uses rules that are broadly uniform for the whole federal government but implementation is largely decentralized. The procurement rules are largely centralized through the statutes and the FAR, and, broadly speaking, the same procurement rules apply for all federal agencies. A few agencies are exempt from the procurement statutes – for example, the Postal Service and the Federal Aviation Administration – and Congress regularly imposes additional rules on the Department of Defense. On the level of regulations, the FAR applies to almost all federal agencies to which the procurement statutes apply, although individual agencies are permitted to supplement the FAR, and the Department of Defense's FAR supplement is quite extensive.

Although the U.S. once experimented with using one agency, the General Services Administration (GSA), as a centralized purchasing

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[2] CICA, as the 1984 statute is often called, was codified in several different parts of the United States Code: in section 2301 and the following sections of Title 10 for defense agencies; in section 251 and the following sections of Title 41 for civilian agencies; and in section 3551 and the following sections of Title 31 for the bid protest provisions.

[3] FAR section 1.601(a) provides that '[c]ontracts may be entered into and signed on behalf of the Government only by contracting officers.'; *See also* J. Cibinic, Jr., Ralph C. Nash Jr., and Christopher R. Yukins, *Formation of Government Contracts* (4th ed. 2011) at 81–96.

agency, it has largely abandoned that approach.[4] While today GSA still puts in place framework contracts (through what is called the Federal Supply Schedule), purchases, even from that Schedule, are virtually all made directly by the user agency.[5] That is as true for the Air Force running a procurement for tanker planes as for an individual national park purchasing grounds maintenance services and for any federal employee buying office supplies, computer equipment, or furniture through the GSA Schedule. Decentralizing the conduct of procurements can increase the risk of corruption, although, as explained below, other measures address that risk.

The U.S. system places heavy emphasis on competition, transparency, and accountability. The U.S. has a long tradition of citizen skepticism about government and its merit, and, perhaps due to that, it has an equally long tradition of insisting on openness in procurement.[6] Since at least the 19th century, the U.S. has generally required 'full and open competition' for federal contracts. Indeed, the bias in favor of competition leads to an aversion to any limitation on competition, such as prequalifying bidders or the system of limiting the number of bidders through mechanisms such as restricted bidding under the European Union Procurement Directive. In legal terms, the default requirement for every procurement process above $150 000 is unrestricted competition. A decision to limit competition to only five firms would face the same legal obstacles as a decision to award a contract to one firm with no competition at all – from the point of view of U.S. law, both would be 'other than full and open competition,' and would require legal justification.[7] Transparency, too, has been a core requirement of the U.S. system for much more than a century: public opening of bids, for example, has been required at least since the 19th century.[8] Except for small purchases, all upcoming procurements and all contract awards must be publicly posted on the single point of entry website, fedbizopps.gov, just as they were previously published in hard copy in the *Commerce Business*

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[4] On the creation of GSA, see Nagle, above note 1, at 450–52.

[5] The rules for use of the GSA Schedules are set out in FAR subpart 8.4.

[6] For examples of 18th-century public requests for proposals, see Nagle, above note 1, at 49.

[7] Subpart 6.3 of the FAR contains both the statutory citations and the rules for conducting a procurement without full and open competition

[8] Indeed, for mail transportation contracts, public advertising was required since 1792. Nagle, above note 1, at 72.

Daily.[9] In terms of accountability, the U.S. offers, through a bid protest system with roots going back to the 1920s, legal recourse to bidders who believe that the government conducted a process of procurement unlawfully.[10] Additional accountability is provided through Congressional oversight hearings and reports of inspectors general, the national audit office (the Government Accountability Office, or GAO), and the press. When criminal actions are at issue, the justice system takes over, and corruption is prosecuted by both general and specialized offices.

The U.S. routinely allows 'best value' contracting decisions, in which contracting officers are allowed to make subjective selection among competing bids, rather than selecting based only on price or other objective, quantifiable factors. As in other countries, U.S. government agencies are permitted to use price as the sole criterion in selecting among acceptable bids, and they sometimes do so. What is noteworthy, though, is the subjectivity that the U.S. system permits when agencies consider additional non-price evaluation criteria. First, there is an element of subjectivity in the assessment of non-price factors that would not be permitted in many other procurement systems. Thus, bidders' past performance is a widely used (and often required) evaluation criterion, and the past performance rating (such as 'outstanding') that a bidder receives can be assigned by a contracting official on a judgmental basis, without objective criteria.[11] Second, and perhaps more striking in terms of differentiating the U.S. from other systems, contracting officials may make a subjective tradeoff decision among competing bids. The acceptability of subjective tradeoffs has been recognized at least as far back as the 1970s, when GAO declared that contracting officers had discretion in making tradeoffs among competing bids, as long as their decision was consistent with the publicly announced evaluation criteria and met the

[9] The detailed rules for publicizing contract actions are set out in Part 5 of the FAR.

[10] The current rules governing bid protests at GAO are set out in sections 3551–56 of Title 31 of the United States Code and Part 21 of Title 4 of the Code of Federal Regulations. For a discussion of the earliest protests at GAO, see D. Gordon, 'In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office', 13 Public Procurement Law Review 5 (2004).

[11] In a recent protest decision, GAO stated, as the standard legal framework for its review of a challenge to an agency's evaluation of a firm's past performance, 'An agency's evaluation of past performance, including its consideration of the relevance, scope, and significance of an offeror's performance history, is a matter of discretion which we will not disturb unless the assessments are unreasonable or inconsistent with the solicitation criteria.' *Phoenix Management, Inc.*, B-405980.7 *et al.*, May 1, 2012.

test of rationality.[12] That means, for example, that, where a solicitation advised that the government will weight price and past performance equally, two contracting officials could reach different – but both permissible – tradeoff decisions between competing bids. Thus, one contracting officer could decide that bidder A, with an 'outstanding' past performance record but offering a price of $10 million, should receive the contract, rather than bidder B's $9 million offer, because bidder B had only 'good' past performance. Another contracting officer, faced with the identical facts, could decide that it was not worth the government's money to spend that extra $1 million to obtain the benefit of working with a firm with a track record of outstanding performance. That degree of subjectivity can open the system to problems, including problems potentially related to corruption, since it decreases transparency (in the sense that it is not so clear why the government chose the winner).

Finally, the U.S. system has shifted to relying on contractors primarily for services. While in the first 200 years of the Republic, 'procurement' largely meant 'procurement of goods,' since the mid-1990s, the government has spent more on services than on goods.[13] The widespread reliance on contractors for services has had many implications for the U.S. government; of most relevance here is the growing concern about organizational conflicts of interest as well as personal conflicts of interest on the part of contractors' employees performing work for the government.

EXTENT OF CORRUPTION IN THE U.S. FEDERAL PROCUREMENT SYSTEM

While definitive data are not available, what is available suggests that corruption in the federal procurement system is relatively rare, when compared with reported corruption in other systems. Not considered here, although apparently also relatively limited, is corruption covered by U.S. law but involving foreign government officials, in particular, acts within

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[12] The seminal GAO decision establishing this principle was *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

[13] Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress (Jan. 2007), at 2–3; Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations (GAO-08-160, Dec. 20, 2007), at 1.

the scope of the Foreign Corrupt Practices Act.[14] Corruption appears to be more common in some state and local governments within the U.S., and many other countries appear to have far more pervasive problems with corruption than does the U.S.[15] That said, there are, of course, incidents of corruption in the U.S. system, as in every system.

Those incidents include cases of 'hard core' corruption, such as bribes and payoffs, with money or other assets being exchanged between would-be contractors and government officials.[16] But they also include 'softer' corruption, such as use of the legislative process to include provisions in law requiring an agency to take steps, the more-or-less predictable impact of which will be to help one company.[17] This is typically through an appropriations provision (an 'earmark') directing an agency to buy particular goods or services that happen to be sold (perhaps solely) by a company located in the member of Congress's state or district.[18] Such earmarks may be fully lawful and may not involve

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[14] 15 U.S.C. §§ 78dd-1 et seq. For an example of action taken under the Act, *see* Dep't of Justice, *Former Vice President at California Valve Company Pleads Guilty to Foreign Bribery Offense* (June 15, 2012) *available at* http://www.justice.gov/opa/pr/2012/June/12-crm-763.html.

[15] In Transparency International's Corruption Perceptions Index for 2011, the U.S. ranked number 24, with a score of 7.1. TI's index does not separate perceptions of corruptions at the national level from perceptions related to subcentral (meaning, for the U.S, state and local) governments, nor does it separately address perceptions of corruption in procurement, as opposed to other aspects of government. For an example of a contracting corruption scandal in local government in the U.S, see Paul Egan, 'Scandal at Cobo Deepens', Detroit News, June 9, 2009, at A3 http://www.detroitnews.com/article/20090609/METRO/906090347.

[16] See, for example, Clarence Williams, 'Father, Son Plead Guilty in Fraud Scheme', Wash. Post, May 18, 2012, at B05 http://www.washingtonpost.com/local/crime/father-and-son-plead-guilty-in-multimillion-dollar-federal-bribery-scheme/2012/05/17/gIQAhFH5XU_story.html; 'Retired U.S. Army Major to Be Sentenced for Accepting Bribes from Contractors Delivering Water to Troops', CBS L.A., June 13, 2012 http://losangeles.cbslocal.com/2012/06/13/retired-u-s-army-major-to-be-sentenced-for-accepting-bribes-from-contractors-delivering-water-to-troops/; Dep't of Justice, Indictment Charges Civilian Navy Employees and Contractors with Fraud and Bribery (July 7, 2009) *available at* http://www.justice.gov/usao/cas/press/cas90707-Alexanderpr.pdf.

[17] For a GAO discussion of earmarks (appearing to treat them as entirely lawful), see, for example, BUDGET ISSUES: Earmarking in the Federal Government, AIMD-95-216FS, Aug. 1, 1995.

[18] During the Obama Administration, the Office of Management and Budget, an office within the Executive Office of the President, posted the following definition of earmarks: 'Earmarks are funds provided by the Congress for

improper payments – although if the company made a generous contribution to the political campaign of the member of Congress sponsoring the earmark, the situation may appear corrupt to some observers.[19] The more tenuous the link between the contribution and the earmark, and between the earmark and the contributor actually receiving a contract, the less this may appear corrupt.

It should be noted that one primary accountability mechanism for procurement in the U.S., the bid protest system, generally does not uncover cases of corruption. While GAO and the Court of Federal Claims, which together decide many hundreds of protests each year, do regularly hold that contracting agencies have violated procurement statutes or regulations, they virtually never point to corruption. Instead, a finding against a contracting agency is generally based on the agency having failed to follow the rules, such as by using specifications that unduly restrict competition or by weighting cost or other evaluation criteria differently in practice from the weighting scheme called for in the solicitation. The only hint of concern about improper motives – and it is virtually never explicit – comes when GAO or the Court calls for the agency official (or officials) involved in the mishandled, protested procurement to be replaced by others in the next round, conducted to address GAO's or the Court's concern.[20]

The one case that American procurement experts might cite as an example of corruption being considered in a GAO bid protest decision is exceptional in every sense: the Darleen Druyun case. In that case, Druyun, the highest-level civil servant handling procurements for the U.S. Air Force, had been accused of improperly turning to a high-level official from the Boeing Company – a firm competing for Air Force contracts – to obtain a job for her daughter, her daughter's boyfriend, and

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projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.' http://earmarks.omb.gov/earmarks-public/.

[19] For an example of the press raising concern about the propriety of an earmark due to personal interests of the sponsoring member of Congress, see http://www.elpasotimes.com/news/ci_20506564/aliviane-received-250k-earmark-about-series.

[20] For an example of GAO recommending that a source evaluation board be replaced, with no explanation for why that recommendation was made, see *North Wind, Inc.; Earth Resources Technology, Inc.*, B-404880.4 *et al.*, Nov. 4, 2011.

ultimately herself.[21] That was clearly a case of corruption, and Druyun had confessed as part of a plea bargain in court, before the protest came to GAO. Whether Druyun actually steered any contracts to Boeing was, however, much harder to prove, partly because of the subjective nature of tradeoffs in the U.S. procurement system, where Druyun, as the official deciding which company's bid was to be selected for award, had considerable discretion to exercise her judgment.[22] Ultimately, Lockheed Martin filed a protest at GAO alleging that, in one particular competition, Druyun's selection of Boeing should be overturned. While GAO never explicitly found that Druyun had acted improperly in selecting Boeing over Lockheed Martin, it did conclude that she was actively involved in the selection of the contractor and that the taint of a corrupt official actively involved in a procurement was intolerable in terms of the harm it caused to the appearance of integrity of the federal procurement system, and GAO therefore ruled in favor of Lockheed Martin.[23]

Nonetheless, the overall picture is one of limited corruption in the U.S. federal procurement system. The credit for that does not go primarily to the rules regarding conflicts of interest, but rather to the characteristics set out above. The U.S. has a long tradition of the rule of law – statutes and regulations – governing procurements; the existence of a professional acquisition corps means there are officials with training enforcing the rules, and any improper action requires cooperation from both those officials and others involved, thus complicating the task of anyone trying to run a corrupt procurement; the preference for competition and the requirement for transparency make it legally and practically difficult to direct awards to favored firms; and the extensive and open accountability mechanisms making hiding corrupt actions difficult.

Conflict of Interest Rules that Apply to Federal Employees

Federal employees are covered by a complicated set of rules intended to address conflicts of interest and various other areas of concern. While the

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[21] See the congressional testimony on the matter, presented by the author in his role as a GAO official, Air Force Procurement: Protests Challenging Role of Biased Official Sustained, GAO-05-436T, Apr. 14, 2005.

[22] Perhaps alluding to the difficulty of determining the influence of subjective factors, Druyun stated, in what was essentially her confession, that she 'believes that an objective selection authority may not have selected Boeing.' *Lockheed Martin Aeronautics Co. et al.*, B-295401 et al., Feb. 24, 2005, at 4.

[23] *Lockheed Martin Aeronautics Co. et al.*, B-295401 et al., Feb. 24, 2005, at 13–14.

rules cover a range of subjects as diverse as the use of government property and restrictions on publishing written material, the rules are focused largely on ensuring that federal officials do not use their public positions for private gain and that governmental actions are not affected by the personal interests of federal employees. The discussion here by necessity is incomplete, but touches on areas of importance in terms of addressing conflicts of interest. Violation of the many legal rules can trigger both criminal and civil penalties; the key statute in this area is the Ethics in Government Act of 1978, as amended.[24]

Under that Act and the implementing regulations, which are issued by the Office of Government Ethics (OGE), certain employees whose responsibilities include the exercise of discretion in areas considered sensitive (such as procurement) are required to file financial disclosure forms.[25] While the specific rules are very complicated, overall it can be said that, above specific dollar thresholds, assets and liabilities, as well as transactions, must be disclosed. For higher-level officials, the disclosure is public; for others, it is confidential.[26] Disclosure typically reveals the approximate size of a transaction (such as that it was between $10 000 and $25 000), rather than an exact amount.

The financial disclosure forms are meant to ensure that employees do not work on government work in which their personal financial interests could create a conflict of interest. While employees are supposed to recuse themselves in those situations, the disclosure forms are also intended to assist supervisors in ensuring that employees do not work on matters where the employees have a conflict, and (presumably) to reassure the public, at least for employees who file public financial disclosure forms. In the author's experience, at any rate, filling out and submitting financial disclosure forms are viewed as time-consuming activities with very little benefit to anyone. It is hard to see, for example, what purpose is served by forcing a government official to spend time gathering information and then filling out a form to disclose that she or he bought or sold a particular mutual fund on a particular date. While the criticism about the lack of benefit of financial disclosure may be disputed, it cannot be denied that the requirement for financial disclosure causes stress within agencies and has led to the creation of a veritable cottage industry of reviewers.

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[24] Public Law 95-521, codified in various parts of the United States Code.

[25] 5 U.S.C. app. 4 §§ 101–111; 5 C.F.R. part 2634.

[26] The OGE's website explains many of the rules, and has links to the statutes and regulations: http://www.oge.gov/Financial-Disclosure/Financial-Disclosure/.

There are also restrictions on gifts that federal employees may receive. Those restrictions go far beyond the prohibition on bribes.[27] They generally may not give a gift to their superior nor accept a gift from a lower-paid federal employee. There are also strict limits on gifts that a federal employee may accept from anyone outside the federal government. The rules are extremely detailed, and there are many exceptions, and then exceptions to the exceptions. To give one example: there is an exception to the prohibition on gifts from employees to their superiors for occasional gifts, such as the superior's birthday, but that exception does not apply to cash or to a gift with a market value above $10. The complexity of the restrictions on gifts has led to sensitivity (as well as many jokes) about whether a federal employee is permitted to accept a donut and a cup of coffee offered by a contractor, or whether it matters whether refreshments offered are consumed while people are standing or sitting.

Federal employees are also restricted in what they can do with entities outside the government, out of concern that a relationship with an outside entity could affect the employees' performance of their government duties, and that any benefit associated with the relationship could be perceived as improperly obtained.[28] Even where engaging in outside activities is permitted (such as volunteering for nonprofit organizations), disclosure and approval by an agency for ethics are often required.

Federal employees are also limited in the political activities that they may engage in under the law known as the Hatch Act.[29] That law prohibits executive branch employees from, among other things, asking for political contributions and from engaging in political activity while on duty.

In addition, there are strict, complicated rules restricting what certain federal employees, particularly high-level officials, may do just before, and then after, leaving government service.[30] For individuals about to leave the government, the rules restrict what they can do while negotiating with a potential employer. Once high-level officials and political appointees leave the government, post-employment restrictions often limit their permissible contact with an employee of their former federal agency (and, in some cases, even certain officials at other agencies), on

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[27] http://www.oge.gov/Topics/Gifts-and-Payments/Gifts-Between-Employees/.

[28] http://www.oge.gov/Topics/Outside-Employment-and-Activities/Outside-Employment – Activities/.

[29] 5 U.S.C. §§ 7321–7326.

[30] http://www.oge.gov/Topics/Post-Government-Employment/Post-Government-Employment/.

behalf of another person or entity, concerning any official matter. These rules governing the 'revolving door' between the government and industry are particularly important in the area of procurement, since high-level government officials, after they retire, often go to work in the industry from which they had been acquiring goods and services. Those serving in the U.S. military can retire at a relatively young age, at which point moving to industry can be very appealing, and there is a widespread phenomenon of retired military officers working for large defense contractors. Learning and working through the post-employment restrictions has become a common step in the final year or two of many service members' military careers, as well as in the careers of many civil servants.

To the extent that this complicated matrix of rules is viewed as an anti-corruption mechanism, it is generally viewed as effective. That is, there are only a limited number of reported instances where these rules are knowingly violated. Exceptions exist, of course. An especially prominent case is the one mentioned earlier, involving Darleen Druyun, the Air Force's top civilian acquisition official, but, as noted above, that case was an exceptional one.

Conflict of Interest Rules that Apply to Contractors and their Employees

Because of the government's increased use of contractors to perform services, some of which require the exercise of judgment, there has been growing concern that at least some of the conflict of interest rules that apply to federal employees should be extended to contractors' employees.[31] The fact is that, in many federal government offices, civil servants and contractors' employees work in close proximity, and the nature of what they do may be quite similar – yet the federal employees are subject to the complex rules summarized briefly above, while the contractors' employees are subject to far less regulation. Opponents of extending the federal-employee rules to contractors' employees sometimes caution that the federal-employee rules impose burdens with questionable benefit – as noted above, for example, many doubt whether having federal employees disclose their mutual fund transactions once a year provides anyone any benefit.

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[31] DEFENSE CONTRACTING: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees, GAO-08-169, Mar. 7, 2008.

Recently, the Administrative Conference of the United States, an independent agency whose mandate is to make recommendations to improve the federal administrative process, focused on this subject. Ultimately, the Administrative Conference recommended that the FAR be modified to include model language that agencies could use in contracts found to pose a high risk that a contractor's employees might either have personal conflicts of interest or misuse non-public information to which they gain access through performance of the federal contract.[32] Similarly, Congress directed that the FAR include rules governing personal conflicts of interest by employees of contractors providing agencies services in the area of acquisition.[33] There are those who call for extending the federal-employee rules on personal conflicts of interest to more, and potentially to all, contractor employees.[34]

Another area of growing importance in federal contracting since the 1990s has been organizational conflicts of interest (OCIs). OCIs may arise when a company provides services to the government, particularly services that entail the exercise of judgment. Consequently, it is not surprising that concern about OCIs has grown alongside the growth of the federal government's reliance on contractors for services, including differences that involve the exercise of judgment.[35]

Restrictions on OCIs, and the definition of OCIs, appear in the FAR, but generally not in statutes. Historically, the FAR, and the case law from bid protests at GAO and the Court of Federal Claims, have treated three somewhat different types of situations as OCIs:

1. Situations where a company has gained access to non-public information through work with the government, and that information may give the company (or an affiliate) an unfair competitive advantage in the competition for a future contract (these are referred to as 'unequal access to information' OCIs);

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[32] http://www.acus.gov/acus-recommendations/compliance-standards-for-government-contractor-employees-personal-conflicts-of-interest-and-use-of-certain-non-public-information/.

[33] Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, implemented through the FAR rule issued on November 2, 2011. See 76 Fed. Reg. 68,017 (Nov. 2, 2011).

[34] See, for example, the report by Professor Kathleen Clark, written under contract for the Administrative Conference of the United States: http://www.acus.gov/wp-content/uploads/downloads/2011/03/Clark-Report-v.2.pdf.

[35] Daniel Gordon, 'Organizational Conflicts of Interest: A Growing Integrity Process', 35 Pub. Cont. L.J. 1 (2005).

2. Situations where a company has had a contract with the government to write the specifications to be used in a future procurement, which may give the company (or an affiliate) an unfair competitive advantage in the competition for a future contract using those specifications (these are referred to as 'biased ground rules' OCIs); and
3. Situations where a company has a contract to provide assessment or evaluation services of some kind to the government, and in the course of performance of that contract, the company will be called upon to assess or evaluate its own or an affiliate's product or performance (these are referred to as 'impaired objectivity' OCIs).[36]

These conflicts of interest are referred to as 'organizational' because, in many instances – particularly for biased ground rules and impaired objectivity OCIs – two different parts of a corporate entity are involved, one that provides goods or services, and another that provides judgment-related services. For an example of an impaired-objectivity OCI, consider a situation in which Company ABC is one of five contractors that have contracts to provide to the U.S. Navy janitorial services to clean buildings, and the Navy decides to award a new contract to assess the performance of the five janitorial-services contractors. If Company ABC's affiliate, ABCD, were to win that assessment contract, it would find itself evaluating the performance of janitorial services by ABC, and a reasonable person might have concern about whether it could be fully objective in that assessment. In OCIs, there typically is no individual with a personal conflict of interest; the conflict is purely organizational. Thus, for example, no employee of ABCD may stand to win or lose money (or anything else of value), based on whether ABC's performance is assessed to be good or bad.

The rise of OCIs is thus attributable, not only to the federal government's increased reliance on service contractors, but also to the creation of large corporate families, in which one affiliate provides goods or services (often of a non-controversial and non-sensitive nature, along the lines of the janitorial services in the above example) and another one advisory services. A desire to avoid OCIs has led some corporations to spin off components that may give rise to OCIs – leading to a phenomenon sometimes referred to in federal contracting argot as 'choose your major.' Thus, Northrop Grumman divested itself of TASC, a unit that

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[36] For a discussion of the three types of OCIs, *see Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397.15 *et al.*, July 27, 1995, 95-2 CPD 129.

provided the government with advisory and engineering services potentially related to systems that Northrop built and maintained for the government.[37]

As noted above, the law in the area of OCIs is largely not statutory. Instead, the rules are set out in subpart 9.5 of the FAR, and they have been elaborated through case law developed at GAO and the Court of Federal Claims in response to bid protests. The FAR directs contracting officers to identify and address OCIs as early as possible, and allows contracting officers broad discretion in deciding whether a conflict exists at all, and if so, how to deal with it – for example, whether a conflicted firm needs to be excluded from a competition, or whether a conflicted firm's plan to mitigate the conflict is acceptable. The degree of deference that is, or should be, shown to contracting officers in these determinations has been a subject of much controversy. Also, the question of whether particular facts establish hard evidence of a conflict, or merely the possibility or appearance of a conflict, has been litigated in numerous protests. The trend appears to be in favor of requiring 'hard facts.'[38] In addition, though, the FAR rules on OCIs are being rewritten, and the outcome of that revision is not clear at the time of this writing.

In closing this discussion, it should be underscored that corruption is rarely discussed in connection with OCIs and, even with respect to personal conflicts of interest, the complicated web of rules is unlikely to be the explanation for the relatively low level of perceived corruption in the U.S. federal procurement system. Rather, the author believes that the real protections against corruption in the U.S. system are the existence of a professional acquisition corps, the extensive transparency throughout the procurement system, the frequent oversight and use of accountability mechanisms, and, more broadly, the well-established culture of the rule of law and the unacceptability of corruption in procurement.

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[37] See http://washingtontechnology.com/articles/2009/11/08/northrop-sells-tasc.aspx.

[38] See *Turner Const. Co., Inc. v. U.S.*, 645 F.3d 1377 (Fed. Cir., 2011).

5. Corruption and conflicts of interest: Future prospects on lobbying

Grégory Houillon

The development of democracy arising from the people's need to participate more effectively in public debate,[1] and to have a better control of governing authority's actions, has led legal practitioners and scholars to be interested in lobbying. The growing importance of this practice raises the question of its legal boundaries. The exercise of lobbying comprises various practices accomplished by diverse organisms and can be defined as follows: an influential action, motivated by particular, category-specific and divisive interests which are brought to the attention of a particular public officer or a producing branch of imperative legal rules without any counterpart. The aim of this practice is to obtain from the author of the act a legal effect, compatible with the interest defended by the lobbyist. Otherwise put/stated, the lobbyist solicits an administrative or a legal protection for certain particular interests.[2] It neither binds nor commits. A lobbyist can only suggest, or propose, without any compensation. Indeed, any such counterpart would imply either imperative instruction,[3] if the coercion was used on a representative, or corruption or conflict of interest. Concerning public interest,[4] lobbying appears to be partial or biased, whereas it is addressing an authority whose duty is to be impartial. In spite of this apparent contradiction, lobbying has, without a doubt, an essential educational role to play

[1] Conseil d'Etat, *Consulter autrement. Participer effectivement* (62 EDCE 2011).

[2] For further developments: G Houillon, *Le lobbying en droit public* (Bruylant, Administrative law, Brussels, 2012) 4–54.

[3] French Constitution, art 27.

[4] French Declaration of human rights and the citizen (1789), art 6.

towards public authorities.[5] Therefore, if it is not limited by an '*Exemplary State*',[6] it will extend very closely and unintelligibly into conflicts of interests in their most accomplished form: corruption.

Corruption and conflicts of interests cover in French law many legal qualifications, essentially criminal:[7] active and passive corruption,[8] influence peddling[9] and illegal acquiring of interest.[10] Some constitutive elements of these offences are close to lobbying, which explains the common confusion between such practices. Corruption and conflicts of interests, therefore, negatively affect public policy makers because of the effects of their decisions. However, constitutive elements of corruption – active and passive – can, thus, appear through some forms of lobbying.

The fundamental distinction in French law between lobbying and corruption or influence peddling resides in the fact that the latter are regulated by *law*, whereas lobbying still remains in the domain of *facts*. Indeed, apart from recent regulation, adopted in 2009, and concerning both chambers of the French parliament (Senate and National Assembly,[11]) no specific rules apply to lobbying. In spite of its limited scope, this regulation remains an undeniable progress given the ideological barriers that such legislation had to overcome compared to those existing in other foreign systems.[12]

Nothing would be more erroneous than to assimilate lobbying with corruption and conflicts of interests. The former is clearly independent from the two latter offences.[13] The object of the three practices may be

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[5] G Houillon, 'Pédagogie et efficacité du droit' in M Hecquard-Theron and P Raimbault (eds), *La pédagogie au service du droit* (LGDJ 2011) 327, 355.

[6] F Rouvillois, 'Réflexions autour de la notion d'Etat exemplaire', in YC Zarka (ed), *Repenser la Démocratie* (Emergences, Armand Colin, 2010) 397.

[7] See, therefore, the bill (Sénat, n 798) *sur la transparence de la vie publique* which strengthens the actual provisions on conflicts of interests.

[8] Criminal code, art 432-11 & 433-1.

[9] Ibid, art 432-11, 433-1, 433-2.

[10] Ibid, art 432-12.

[11] Office rules of the House, art 26 III B; office rules of the Senate, Chap XXII bis.

[12] In US law: Administrative Procedure Act (1946), Public Law 79-404, 5 USC 551f.; Foreign Agents Registration Act (1938), 22 USC 611f; Lobbying Disclosure Act (1995); Anti-Bribery Act (1962), Public Law 87-849, 76 Stat 1119 (1962) amended 1994, Public Law 103-322 (1994); 18 USC 201f. President Obama recently signed the Executive Branch Reform Act 12 February 2007 which reforms the Ethics in Government Act (1978).

[13] G Vedel, *Cours de droit constitutionnel et d'institutions politiques* (Les cours de droit, 1958) 312.

the same, but their motivation is different: the defence of a particular, category-specific interest before public authorities is not prohibited by any provision of law, provided it is neither forced nor '*inappropriate*'.[14] Informing the public interest is one thing; impairing it is another.

So, it is this borderline constraining aspect of lobbying which makes it slide towards corruption, conflicts of interests, and drives it, more widely, to impair the foundations of State sovereignty. How may one distinguish the moment when lobbying becomes corruption? Under the current state of French law, there is no clear way of distinguishing lobbying from corruption. Therefore, one must identify, amongst many divers forms of conduct, the threshold over which lobbying becomes legally corrupt. This difficulty remains unresolved: if lobbying is allowed as nothing is prohibiting it, how can governments ensure its good practice without it becoming corrupting? Given the growing importance of these ambiguous and influential practices, why not regulate their exercise so as to prevent any doubt on potential conflicts of interest? The regulation of lobbying uniquely by criminal law is not satisfactory given the close link between its exercise and public authorities, highlighting obvious shortcomings in French law (Part I). Confronted with the development of lobbying – not only by citizens' and interest groups' need to participate in the elaboration of public policy, but also by the governing authority's need to obtain information from 'civil society' – such shortcomings cannot be sustained without impairing the rule of law and democracy, which a unanimous and highly regarded literature has described as the 'crisis' of representative democracy.[15] Maintaining the confusion, this crisis inevitably damages one of democracy's foundations: the confidence[16] that citizens have in the running of public institutions by their representatives (Part II).

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[14] Lobbyists' code of conduct before the Senate, art 2.

[15] H Kelsen, *La démocratie, sa nature, sa valeur* (first published 2nd edn, Sirey, 1933, Dalloz 2004) 34; G Scelle, 'A propos de la crise actuelle de la représentation politique' RDP 1911, 525; J Barthélemy, 'La crise de la démocratie représentative' RDP 1928, 584, 587; O Rudelle, 'Crise de la représentation ou utopie de la conformité?' 3 RFSP 1998, 535.

[16] For the use of the expression, see: Report of the State counsellor T Berlier, about the criminal instruction code of 1810, reprint in Répertoire Dalloz 26 1852 'Forfaiture et délits commis par les fonctionnaires publics' 5, notes; AC Coté, Building confidence: 'fiduciaries of the power'. AM Escoffier, Senate Report 519, 2 June 2010, 7; Senate report of the working group on conflicts of interests (518, 12 May 2011).

I. LOBBYING AND DEFICIENCY IN FRENCH REGULATION

The use of criminal offences which were not initially conceived to frame lobbying reveals a deficiency in French regulations. This deficit renders its characteristics very indistinct and assimilates too hastily – without a clear legal definition – lobbying, and corruption or conflicts of interests. The following developments aim to show that the current rules, essentially repressive, are inadequate from a practical standpoint, to regulate these new and borderline practices which characterise lobbying (A). Moreover, the burden of proof associated with criminal prosecution and sentencing makes them inefficient (B).

A. Inadequate Rules

The confusion between lobbying and corruption is not new. However, if lobbying and corruption can overlap, they must not be confused.[17] Until lobbying is not regulated by a specific law, it will not be clearly defined. Without such legal definition, it will be nearly impossible to clearly distinguish lobbying from corruption. Until lobbying is defined by a unified legal definition, one cannot exactly know what one is talking about when the subject is under discussion. In this situation, all corrupt practices, even the most dangerous among them, can be attributed to lobbying. Without a legal definition, it becomes extremely difficult not to perceive lobbying as corrupt in and of itself. There is therefore a constant risk of assimilation resulting from this regulatory deficiency. Absent satisfactory regulation for lobbying, the result will be that corruption, bribery and influence-peddling offences will remain the only legal possibilities to deal with lobbying. Even if this eventuality is limited concerning charges on corruption,[18] it can however have major effects on charges of influence peddling.[19] Indeed, the constitutive elements of the latter, which is a criminal offence, and the practice of lobbying tend to get dangerously mixed up. This confusion is sufficiently harmful to

[17] See in US law: JF Kennedy, 'Congressional Lobbies: A Chronic Problem Re-Examined', 45 GLJ 535, 536.

[18] D Jean-Pierre, 'La lutte contre la corruption des fonctionnaires et agents publics' D 2000 Chron 307; W Jean Didier, 'Du délit de corruption et des défauts qui l'affectent' JCP G 2002, I 166. Crim 28 October 1897, Bull 332. For a favourable vote in the interest of a company in a local authority: Crim 3 November 1933, Bull 200, Gaz. Pal. 1933, 2 972.

[19] Criminal code, art 432-11 & 433-1.

create legal uncertainty. Clearly, lobbying aims to obtain a '*favourable decision*' from a public policy maker. Furthermore, the lobbyist, as he solicits, requests and seeks to convince, exerts a '*real influence*' as defined by articles 432-11 and 433-1 of the French Criminal code. The only difference between lobbying and influence peddling is minor, and tied to the abusive use of the influence.

The professional lobbyist or the lawyer, soliciting a member of an administrative authority or legislative branch on behalf of an individual or group which finances him, is therefore potentially targeted by the provisions of article 433-2. The formula '*directly or indirectly*', which incriminates the solicitation by any outside interposition reaches every aspect of the lobbying professional's activity. Authoritative legal scholars demonstrated very early on that favourable decisions sought by guilty manoeuvring largely surpass mere individual decision. The Central Service for Prevention of Corruption (CSPC), created by the 29 January 1993 Act,[20] reveals this in two of its reports. A 1993–1994 report established a sort of analogy between the two notions and concluded that lobbying contains a verifiable risk of influence peddling.[21] In order to limit this pitfall, the CSPC called upon the lawmaker to regulate this practice which should not be confused with a legal violation.[22] This position was confirmed in its June 2007 report, in which the third chapter proposed to avoid legal uncertainty and the unwitting commission of offences by creating a code of conduct and by enhancing the transparency of lobbying techniques.[23] In the current state of the law, lobbying practitioners suffer from the risk of significant criminal pursuits under active and passive influence-peddling offences. These incriminations, considered as palliatives to a direct legal regulation of lobbying, reduce the confines of the lobbyist's activity, by creating legal insecurity which is contrary to the rule of law. Furthermore, besides their inherent inadaptability, applying these offences to lobbying is also inefficient.

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[20] Act of Parliament 93-122, 29 January 1993.

[21] CSPC, 'Lobbying et trafic d'influence: la prévention de la corruption par la prise de conscience des risques' in J Cartier-Bresson (ed), *Pratiques et contrôle de la corruption*, Montchrestien (AEF-CDC, finance et société 1997) 171.

[22] CSPC, Activity report 1993/94 Lobbying et trafic d'influence.

[23] CSPC, Activity report for 2006, June 2007, Ch. III, 101 109.

B. Inefficient Rules

Criminal law generally appears to be powerful because of its dissuasive intentions. The penalties incurred are usually high enough to make the prohibition productive. However, applied to lobbying, a number of factors, both legal and practical, render regulation by criminal law inefficient.

The conflicts of interest, established by the OECD when 'the public agent has a private interest, that could unduly influence the way he fulfils his duties and responsibilities',[24] have an obvious link to lobbying. As lobbyists defend certain interests in front of public authorities, they naturally and unavoidably maintain an intimate link with them, which easily generates conflicts of interest. French law regulates conflicts of interest by two categories of rules. Firstly, those concerning employment restrictions (or incompatibilities) which target their prevention; and secondly, criminal provisions penalising illegal acquiring of interests. These provisions apply therefore to numerous types of lobbying. This enables public officials to avoid two situations. Firstly, as decision makers are targeted by lobbying, it helps them to avoid being affected by influences too close to their own interests. Secondly, as former public officials begin working for private entities – which potentially implies lobbying their former administration – criminal regulation avoids any temptation to obtain undue favours[25] which would benefit the newly taken private function. Any public official who takes the revolving door retains an important centre of influence which may benefit the private company employing him. He can therefore be employed 'to lobby his original administration, in the company's private interests'.[26] Furthermore, this is often the very reason for his employment by the company: 'the official who has taken the revolving door is at once, and of equal importance, a lobbyist and a manager for the company'.[27] The report underlines numerous 'deontological risks' induced by the transfer of a civil servant representative of the public authority from the administration to the private sector: 'specific orientation of files which could be important for the private company in which the State employee is about to enter by taking the revolving door – illegal acquiring of interests […],

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[24] OECD guidelines for managing conflict of interests in the public service, 2005, 11.

[25] GJ Guglielmi (ed), *La faveur. Rouage du droit ou indice du non-droit?* (PUF 2009).

[26] CSPC, Report 2000, Ch. III.

[27] Ibid, Ch. III, III-3.

traffic of influence'. The report uses the term 'illegal lobbying'[28] in reference to trading in influence and in so doing, proposes a new management of public officials' second careers, in order to avoid 'the manipulation of public administration by lobbying manoeuvres'.

But the use of essentially repressive regulation – to fight against corruption, as well as against influence peddling or conflicts of interest – loses the major part of its efficiency when applied to lobbying. Four particular reasons explain this counterproductivity: the first is tied to the inadequacy of criminal repression to condemn mere 'appearances'; the second concerns the difficulty in establishing a clear standard of proof for these offences; the third pertains to the application of immunities; and the fourth relates to the low frequency of convictions.

Criminal provisions aim primarily, in the current state of the law, to create a certain balance between the ambiguity of particular lobbying practices, and general principles of French law. Indeed, they look to ensure non-corruptive lobbying, by dissuasive regulation. Even if the factual elements comprising the offences of corruption, influence peddling and illegal acquiring of interests remain uncertain, they do reconcile lobbying with fundamental constitutional principles.

In summary, French criminal law reconciles lobbying and general public interest without regulating it. It does therefore respect the constitutional order, such as articles 3 and 27 of the French Constitution relating to national sovereignty and the prohibition of mandatory instruction. However, the doubt surrounding these ambiguous practices persists, damaging the people's confidence in public institutions. It is our position that only specific acknowledgement of the need to bring clear limits to the exercise of lobbying will suffice.

II. LOBBYING AND CONFIDENCE IN PUBLIC INSTITUTIONS

In that lobbying represents category-specific interests, on the one hand, but that it exerts its influence on public officials, on the other, it could threaten State sovereignty. As a result, it is the people's *confidence* in public institutions which is as stake, as the regulation of lobbying maintains its confusing proximity with corruption and conflicts of interests. Confidence is damaged as long as doubt subsists. Guarantees capable of re-establishing public confidence must therefore take into

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[28] Ibid, Ch. III, III-2.

account the difficult problem of appearances (A) and seem to reside primarily in the recommendation of 'best practices' (B).

A. Ensuring Appearances

We have seen that the deficiencies tied to the absence of direct regulation of lobbying in French law maintain confusion, and compromise the very appearance of lobbying, even when exercised in conformity with democratic principles. Under such circumstances, all lobbying practices are tinted by an aura of a lack of impartiality affecting representatives, members of the Executive branch and civil servants. This shows how important appearances are in the area of corruption and of conflicts of interests. They are so significant that in 2004 the World Bank even qualified French laws as *intrinsically corrupting*.[29] Therefore, clarifying the borderline between virtuous and corruptive lobbying is the first step towards preventing such situations. Unfortunately, as shown earlier, the principal defect of the current state of the French lobbying law is that it is confined uniquely to criminal offences. However, three particular guarantees aim to prevent the conflicts of interests.

- Even more than the guarantee of effective separation of powers,[30] the French Constitution and all organic laws[31] establish clear employment restrictions, so-called '*incompatibilities*', so as to preserve the autonomy of elected representatives from other public authorities, as well as private influences. The creation in 2011 of an internal 'ethics officer'[32] for each parliamentary assembly, responsible for the declaration of interests and for giving advice to the House ethics committee, is hoped to be, from this point of view, an additional preventive guarantee.

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[29] World Bank, *Doing Business 2004* (Oxford University Press, 2004) Figs 2.6, 4.4, and 24, 47, 78; B du Marais, 'One size fits all', AJDA 2004, 1273.

[30] E Pierre, *Traité de droit politique électoral et parlementaire* (I, first published 1902, Loysel 1989) 363; French Declaration of human rights and the citizen (1789), art 16.

[31] Organic ordinance 58-998, 24 October 1958, organic law 72-64, 24 January 1972; 2000-295, 5 April 2000; F Ancel, *Les incompatibilités parlementaires sous la Vème République* (PUF 1975).

[32] Office rule of the House 6 April 2011, art 1; G Bergougnous, 'La prévention des conflits d'intérêts au sein des assemblées: soft Law et droit parlementaire' 2 Constitutions 2011, 188.

- Conflicts of interests involving civil servants follow particular rules: in addition to the regulation of professional restrictions (or incompatibilities), Parliament instituted an ethics commission placed under the direction of the Prime Minister, which may annexe reservations to its decision, concerning any time span prior to the official three-year period covered by law.[33]
- Criminal provisions, punitive when applied by criminal courts, become preventive when applied, controlling the legality of an act, by the administrative judge. As early as 1969, the highest French administrative court, the Council of State (*Conseil d'État*), held that criminal statutes could be applied by the administrative judge so as to annul an administrative act ordering the detachment of a civil servant.[34] This possibility was later extended to the annulment of any nominative administrative act.[35] The former precedent was confirmed by the *Conseil d'État* in the *Lambda* case.[36] If the judge annuls the act by which the civil servant was nominated, the prohibited offence is de facto avoided. Otherwise stated, the administrative judge directly applies the Criminal code, thus avoiding any repressive judicial action.

Above all, the weak point of these preventive measures resides in the fact that they are attached – as a matter of speaking they merely extend – to given offences of illegal acquiring of interests, influence peddling or corruption. In the first part of this chapter, we observed in detail the fact that, as they pertain to lobbying, these infractions are not only inadequate, but also show a certain number of limits, which – in the absence of direct regulation of lobbying – create and maintain unclear borders between corruptive and non-corruptive lobbying. In order to ease the doubts surrounding the 'subversive' aspects of lobbying other measures must be taken in order to allow lobbying to become a 'visible' practice. Hence, transparency guarantees appearances.[37]

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[33] Art 87-VI, al 1, 26 January 1993 Act.

[34] Conseil d'Etat (Council of State) Ass 24 January 1969, Ministre du travail v. Syndicat national des cadres des organismes sociaux, Rec 39.

[35] Conseil d'Etat (Council of State), 9 November 1984, Mme Laborde-Casteix, Rec 356.

[36] Conseil d'Etat (Council of State), Ass, December 6, 1996, Société Lambda, Rec 466.

[37] Y Mény, La corruption de la République, 250, 251.

Transparency constitutes the first and foremost guarantee of legitimate lobbying.[38] Indeed, it is by requiring public proclamation of certain activities and by informational means that the general public is able to control the influence of interest groups on elected representatives. Indeed, *only* this direct control is capable of creating conditions which nurture confidence, because it permits the objective analysis of a solicitation which is necessarily subjective and interested. In order to ensure this type of control, the mere participation in the decision-making process is not sufficient; specific measures concerning transparency are necessary.[39] Maintaining transparency is essential to guarantee a lobbyist's respect for democratic principles. Moreover, transparent lobbying eradicates *ab initio* any doubt regarding potential corruption of MPs' representative functions or of other public officers' obligations relating to public interest. Under these conditions, lobbying no longer represents a black cloud hanging over democratic principles, but, on the contrary, represents its very continuity: instead of an ambiguous 'vitiating factor', it may be seen as democracy's '*driving force*'.[40] Various levels of legal transparency may be observed. A minimal *legal obligation* imposes the entry of certain types of intervention on a public register. In France, both the House and the Senate modified their office rules in 2009, creating such registers for any parliamentary lobbying (art. 26-III and ch. XXII bis, respectively).[41] However, transparency is not completely guaranteed, since the inscription on the register remains optional. As a result, lobbying carried out upstream and downstream, outside parliamentary debates, as well as meetings between lobbyists and MPs away from Parliament's chambers or MPs' offices, may still be conducted without any inscription on the register. *Reinforced legal obligation* which exists in the United States and under European Union law has not yet been completely included in French law. This upgraded transparency consists in the formal publication of divers lobbying practices. In the United

[38] Y Mény, 'La légitimation des groupes d'intérêts par l'administration française' RFAP 1986, 483.

[39] L Dubin and R Noguellou, 'La participation des personnes privées dans les institutions administratives globales' 3rd session of the seminar 'Administrative Law Compared, European and Global Perspective: L'émergence d'un droit administratif global' (Sciences-Po, 11 May 2007).

[40] M Mekki, 'L'influence normative des groupes de pression: force vive ou force subversive?' JCP G 2009, 47.

[41] Amendments of the office rules of the Houses, 2 July (Assembly) and 7 October 2009 (Senate). Order of Questure 2010-1258, 1 December 2010 defining the rights of access of the interest representatives to the Senate.

States, lobbyists must present a quarterly declaration which must include the means used to convince the public officer, as well as numerous data intended to facilitate the evaluation of the influence under scrutiny, its origin and its goals.[42] Recent European Union Parliament rules aim to bolster transparency by proposing to publish a 'legislative footprint':[43] publishing the diverse influences which could have targeted the MPs during the legislative process. Once again, however, this system is limited, due to the complexity of the European Union's lawmaking process.

Even more than its legitimising purpose, transparency transforms decision making, bringing it closer to modern 'good governance' theories. The Green Papers, published by the European Union Commission before initiating bills, are an example.[44] In the present state of French law, other than the aforementioned optional inscription on the parliamentary registers, no reinforced legal obligation ensures the transparency of lobbying activities.[45]

French mistrust of lobbying stems initially from the fear of its threat to 'national sovereignty'. Even more than this, however, the lack of confidence comes from the secrecy surrounding lobbying practices. Its covert reputation suffers from its actual 'outlaw' situation in French law. It is incontestable that surreptitious operations favour abusive or corrupting practices, whereas transparency guarantees their loyalty. It is also true that new transparency obligations in French law concerning public

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[42] Lobbying Disclosure Act (1995), Sec 4; 2 USC 1603f.

[43] A Stubb, 'On the development of the framework for the activities of interest representatives in the European Union institutions' 2 March 2008 (European Parliament, Committee for Constitutional Affairs, session paper 2007/2115 INI) 4.

[44] D Dero-Bugny, '"Le livre vert" de la Commission européenne' 41 RTDE 2005, 8.

[45] For example: the government was able to consult, during the elaboration of the ordinance of June 17, 2004, on public–private partnership contracts, all primary actors of civil engineering companies and construction builders. However, since the implementation of the constitutional revision of July 23, 2008, obligatory *ex ante* impact studies are more widespread. Apart from some texts specifically listed, the government is under the legal obligation to annex an impact study on all bills introduced by the Cabinet into Parliament with an organic law of April 15, 2009 which enforces the provisions of article 39 of the Constitution. If these studies can provide an excellent means for checking lobbies in technical areas where they have useful information in the design of the bill, nothing legally ensures transparency, see: F Fages and F Rouvillois, 'Lobbying: la nouvelle donne constitutionnelle' D 2010, 277.

procurement contracts[46] may prove to be efficiently applied to lobbying. However, we have seen that the guarantee of appearances is not enough. Confidence in public institutions implies a body of adapted rules, designed to secure good practices. In summary, it calls for true lobbying ethics.

B. Ensuring Good Practices

If transparent lobbying creates conditions conducive to confidence, only a true culture of professional ethics will enable its long-term stability. Naturally, both written and unwritten codes of ethics have therefore become the '*passage obligé*' for interest groups and lobbyists: accordingly, European Union institutions have recently reinforced such rules.[47] Ethics is such a *sine qua non* to non-corruptive lobbying that direct regulation can no longer remain merely facultative. Although only a few years ago lobbying was simply a minor branch of political science, it has progressively became an obvious domain of legal studies: its role is intimately linked to both the lawmaking process and to its content. Lobbying no longer escapes specific professional ethics. Reinforcing legal and political responsibilities of the targeted public officials is insufficient: without proper regulation, lobbying – given the prejudice of French public opinion against such activity – will remain suspicious and unduly associated with corruption and conflicts of interest, altering, even unconsciously, the confidence in public institutions.

Besides the institution of '*ethics officers*' and the '*code of ethics*' for the MPs of each house,[48] French parliamentary law has adopted general '*codes of conduct*' which regulate the action of interest groups' activities before each of the assemblies. These instruments, which remain on the whole in the realm of *soft law*, participate nonetheless in the 'emergence' of a '*culture of ethics*' in French public life.[49] These codes of conduct are, unfortunately, not identical in both of the assemblies. However, common grounds join the two codes on certain obligations, notably on the duty for each lobbyist to obtain, and to wear publicly, an access badge. Moreover, as ethics is non-separable from appearances, the codes

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[46] B Laurent and M Suchod, Senate Report 122 (5 December 1990).

[47] European Parliament Internal Regulations (16th edn, July 2004, JOCE 15 February 2005 L-44) Title I art 9; App I and IX.

[48] G Bergougnous, 188–190. The office of the House has, by order enacted in 2011, appointed professor Jean Gicquel as 'ethics officer' of the House.

[49] Report of the Committee of reflection for the prevention of conflicts of interests in the public life 'Pour une nouvelle déontologie de la vie publique', 68.

of conduct try to ensure honest lobbying with regard to parliamentary and legislative functions. For this reason, the codes prohibit any fraudulent or commercial use of any parliamentary documents. The Senate code even expressly prohibits congressional seminars financed by interest groups.[50] Some obligations of this embryonic body of professional ethics take into account the criminal risk which weighs on the lobbyist's activity in the absence of any specific (hard law) rules. The lobbyist, for example, must communicate to the Senate's office any invitations proposed to Senators which might imply overseas travel.[51] In spite of this undeniable improvement, the absence of rules common to both assemblies, and uneven legal foundations, create 'random' or 'variable' lobbying ethics depending on the institution receiving the lobbyist. The lower assembly has not announced any such evolution of its professional ethics code. If these provisions clearly seek to maintain citizens' confidence in parliamentary institutions, they remain incomplete, given the complexity of the lawmaking process and the separation of powers. Ethical lobbying will be achieved only by unified legal regulation of all lobbying practices. Only such a specifically adapted body of ethics for lobbying, by reducing doubt and secrecy as much as possible and by creating appearances of integrity, may ensure true confidence in public institutions.

Such unity and specificity, which French law will not be able to avoid much longer, will constitute incipient 'hard' regulation of lobbying. As we have seen in the previous discussion, French lobbying law is still embryonic and does not yet have a global vision of interest groups' activities. Indeed, since 2009, only the 'parliamentary step' into 'legislative lobbying' is lightly regulated, whereas no particular legal efforts have been taken towards 'regulatory lobbying' or 'administrative lobbying' – although the JM Sauvé report concerning the prevention of conflicts of interest commends such regulation.[52] Futhermore, new forms of 'judicial lobbying' induced by the new *ex post* constitutional review by the Constitutional Court (PQC)[53] need specific attention.[54] Whatever path these different projects may choose in order to unify French regulation of

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[50] Senate code, art 4.

[51] Ibid, art 10.

[52] 'Pour une nouvelle déontologie de la vie publique', 61–65.

[53] French constitution, art 61-1 (revision 23 July 2008) providing the Preliminary Question of Constitutionality.

[54] J Barthélémy and L Boré, 'Des portes moins étroites' 1 Constitutions 2011, 72.

interest groups, lobbying will only engender confidence when it has legal status, and when therefore it will cease to be solely an ambiguous factual situation.

Even if present propositions dealing with conflicts of interests are praiseworthy, they unfortunately do not tend to unify the diversity of the legislation actually in force. They also fail to take into account the fact that conflicts of interest are merely a minor aspect of lobbying. Even very recent propositions concerning deliberative democracy[55] contain no observations whatsoever on lobbying. The global context leads one to wonder if these anarchic and heterogeneous reforms are merely a pretext for not directly regulating lobbying?[56]

[55] Conseil d'Etat (public report for 2011) 91.

[56] On the theory of an impossible lobbying in the continental law tradition system: G Houillon, *Le lobbying en droit public*, 423.

6. Condemning corruption and tolerating conflicts of interest: French 'arrangements' regarding breaches of integrity

Pierre Lascoumes

Over the past fifty years, a telling evolution has taken place in the perceptions and definitions of 'corruption' and abuses of power by public officialdom. Up until a certain point, the problem was framed in either moral terms (self-interested abuses of power) or in juridical terms (any legally defined breach of public integrity[1]). To be sure, 'corruption' was presented as an evil that had to be fought, but such symbolic affirmations dispensed with the task of interrogating either the complexity of the phenomenon, the considerable weakness (even absence) of any control, or the tolerance exercised towards numerous transgressions. The thinking on corruption has since evolved, becoming more realistic in the process, and approaching the question with a sociological and economic lens.[2] This evolution is attested to by the recent attention brought to bear upon conflicts of interest in public decision-making in many countries around the world.

In France, over the past years, the first elements of a debate had been stirred up by discussions concerning the revolving door separating high-ranking officials from the private sector, and the ability to combine positions of elected office with certain professions (lawyer, consultant). During the summer of 2010, a new 'crisis', provoked by media scrutiny focusing on a certain minister, sparked reactions of both the political and institutional kind. The problem resided in the combination of the

[1] In France the relative laws are to be found in chapter 5 of the Criminal code '*Des manquements au devoir de probité*' [Concerning breaches of the duty of integrity], articles 432-10 to 432-7.

[2] Pierre Lascoumes, 'Change and Resistance in the Fight against Corruption in France', French Politics, Culture and Society, 19(1), 2001, pp. 49–62.

functions of one of the budgetary ministers (in charge of taxes) with those of the treasurer of the majority party, also in charge of a fundraising network. This posed a rather sensitive question: could it be that Liliane Bettencourt, one of France's most well-to-do *grande dame*s and a notably generous political donor, might have received fiscal advantages? This situation perfectly corresponds to the definition of conflicts of interest given by the European Council in 2005: 'A 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'. The French Council of State published a report on the subject, and legislation was prepared. In the end however … it remained in suspension. Such alternation, between vocal protest and a lack of normative decision-making, is symptomatic of the ambivalence regarding breaches of integrity by officials.

This is by no means a recent observation. Ever since Heidenheimer,[3] researchers have attempted to analyze the diverse ways in which society perceives and reacts to conduct labeled by some as 'corrupt', but which others judge acceptable. In order to test the robustness of such research – produced in English-speaking contexts – we undertook our own qualitative and quantitative studies in *European* contexts, whose presentation and examination occupy the following pages.

MINORITY CIVIC CULTURE

The problem of 'political corruption' – illegal acts and abuses of power committed by those who govern during the performance of their official duties – has become a major dimension of that which is variously labeled the 'crisis of politics', the 'crisis of political representation'[4] or 'the distrustful society' [*la société de la défiance*].[5] In France, several convergent opinion polls bear evidence of the view that 'politicians tend

[3] Arnold Heidenheimer, *Political corruption: readings in comparative analysis* (New Brunswick, N.J.: Transaction, 1970).

[4] Donatella Della Porta, Yves Mény, *Démocratie et corruption en Europe* (Paris: La Découverte, 1995); Maureen Mancuso et al., *A Question of Ethics: Canadians Speak Out* (Toronto: Oxford University Press, 1998); Robert Neild, *Public Corruption: the dark side of social evolution* (London: Anthem Press, 2002).

[5] Yann Algan, Pierre Cahuc, *La société de défiance, comment le modèle français s'auto-détruit* (Paris: Editions rue d'Ulm, 2007).

to be corrupt'.[6] While in 1977 only 38% of respondents shared this view, it encompassed 55% of respondents in 1990 and grew to 64% in 2000. Since that point the figure has oscillated at a reasonably high level: between 60% and 65%, with a few spikes of 70% during moments of crisis, such as the autumn of 2010 (with the Woerth–Bettencourt affair described above).

Ever since 'corruption' became an object of the social sciences at the beginning of the 20th century,[7] most research has sought to understand a certain paradoxical situation: while a strong sentiment of disapproval regarding breaches of integrity resides within citizens, it coexists with a de facto tolerance of certain abuses of power in elected office by officials, and even with considerable tolerance towards the near absence of political consequences. On the one hand, the denunciation of 'political scandals' and the stigmatization of 'corruption' in the name of morality and virtuous democracy are both relatively common. Yet on the other hand, the political and social impacts of such accusations remain very uncertain. Scandals, it would appear, even when they are recurrent, are often without any lasting effects either on the individual image of the political actor, or even on their electoral scores. This phenomenon has long been an object of studies in the US.[8] In France, ever since the scandal involving Member of Parliament Daniel Wilson (1887),[9] many examples demonstrate that breaches of integrity are anything but the systemic causes of political indignity. It is hardly anomalous to see the reelection of candidates that, despite being previously condemned for illicit

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[6] The SOFRES (French polling institute) has posed this question in exactly the same manner for 25 years now: 'As a general rule, would you say that elected officials and political leaders tend to be honest, or that they tend to be corrupt?'

[7] Lincoln Steffens, *The shame of the cities* (New York: P. Smith, 1904); H.J. Ford, 'Municipal Corruption', Political Science Quarterly, 19(4), 1904, pp. 673–86.

[8] Barry S. Rundquist, Gerald S. Strom, John G. Peters, 'Corrupt Politicians and Their Electoral Support: Some Experimental Observations', American Political Science Review, 31(3), 1977, pp. 954–63; Susan J. Pharr, 'Are Citizens Lax or Cynical? Corruption Tolerance and One-Party Dominance', European University Institute, Robert Schuman Centre, Conference on Political Corruption and Parties, March, 1999; Eric C. Chang, 'Electoral Incentives for Political Corruption under Open-List Proportional Representation', Journal of Politics, 67(3), 2005, pp. 716–30.

[9] This member of the lower house of Parliament and son-in-law of the President Jules Grévy used his position to attribute medals in exchange for favors and to carry out a great many operations. In spite of a sizeable scandal (1887–1888) he pursued his career as an elected official and was reelected (mayor in 1892 and Member of Parliament in 1893).

acts, succeed in making a political comeback. Politicians whose election has been invalidated for fraud are reelected in considerable proportions and in healthy electoral conditions (high levels of participation).[10]

Numerous observations thus demonstrate that, contrary to the sort of discourse we might expect, the respect for laws and moral principles are not the only criteria employed to judge political conduct. This is just as true for politicians as it is for their electors. If the latter do not systematically sanction breaches of public integrity, it is because the recourse to principles based on honesty and on the respect for legality in politics is often tempered by other arguments that are just as powerful. In this way, ideological factors (sharing the same convictions), in addition to pragmatic ones (the effectiveness of local implementation) or symbolic ones (the ability to represent the electorate), play a considerably important role in citizens' judgments of elected officials and leaders. This second set of factors modulates the first, and their combination translates into diverse forms of tolerance and pardon.

This paradox – between the denunciation of corruption and the uncertainty surrounding the political effects of such denunciation – invites us to theoretically interrogate the categories that underlie our evaluations of political conduct. A dual register is at work: that of axiological principles and norms (which entails strong disapproval of contraventions of the common good); and that of the practical principles employed in instances where a precise judgment must be brought to bear upon a concrete person or situation. The sort of information produced through polling cannot sufficiently render the complexity of the phenomenon under analysis. Indeed, approaching politics from the angle of breaches of integrity inevitably creates apparent extreme discordance in attitudes, gaps between disapproving judgments and forms of tolerance, and clear distinctions between perceptions and attributions of seriousness that can only be explained through a process of contextualization and by controlling for a host of variables. With regard to the extant literature, we attempted to carry out an original study employing both qualitative and quantitative methodology. This collective research was composed of three parts. Firstly, three monographic studies of contrasting municipalities shed light on the diverse range of expectations that citizens hold with regard to the role of the elected official, and helped to better understand the different forms of tolerance towards transgressive behavior. Following

[10] A study by Jean Chiche of municipal by-elections in 2009 demonstrated that of the 18 incumbent candidates, 14 were reelected. CEVIPOF, Sciences Po, 2009.

this, we conducted a series of twelve focus groups each composed of socially homogeneous participants who reacted to a range of scenarios. This served to specify the diverse criteria used to class deviant situations according to their seriousness, as well as those used to justify the severity or leniency that the scenarios provoked in respondents.[11] Finally, a quantitative study carried out using a representative sample of 2028 people tested the extent to which systems of norms and values, as well as conceptions of the role of officialdom, affect perceptions of and reactions to breaches of integrity. In the following, I will present some of our results, emphasizing the 'grey zone' of judgment in which conflicts of interest are to be situated.

Corruption: Consensus and Discord à la Française

Our inquiries served to make clear the range of conceptions of 'corruption' that coexist within the French context.[12] One part of our questionnaire presented respondents with a series of political misdemeanors in the form of small scenarios,[13] which they were asked to classify into four categories ranging from 'not serious' to 'very serious'.[14] Focus group studies enabled us to collect the arguments underlying such classifications. The subsequent mapping of judgments can be organized into three main zones.

The black zone of consensual disapproval

The zone of very marked disapproval is composed of situations judged 'serious' and 'very serious' by more than 75% of respondents. Across all scenarios, the 'very serious' judgment alone represents some 40% of responses, and in many cases more than 50%. This black zone converges

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[11] Jean-Michel Lecrique, Pierre Lascoumes, Philippe Bezes, 'Classifying and Judging Political Transgressions: The contribution of a focus group approach employing quantitative methods to analyze qualitative data', Revue française de science politique. Forthcoming.

[12] Pierre Lascoumes, Odette Tomesco-Hatto, 'French Ambiguities in Understandings of Corruption: Concurrent Definitions', Perspectives on European Politics and Society, 9(1), 2008, pp. 24–38.

[13] The scenarios ranged from legally-defined forms of corruption ('In exchange for a municipal water contract in his city, the mayor asks a local business to finance part of his reelection campaign'), to petty street-level clientelism ('In order to obtain a spot in the municipal daycare center, a family consults with the wife of the mayor').

[14] For this series of questions, the rate of 'non response' and 'do not know' responses was very slight: < 1%.

around four dimensions: corruption (in a juridical sense) in all of its diverse manifestations; the misappropriation of public funds; duplicity and lying; and the pursuit of private economic interests.

The diverse manifestations of corruption. Legally defined forms of corruption by the elected official and by the civil servant are the most apparent dimensions. Even if the term 'corruption' was not deliberately employed in respondents' discourse, the majority identified such situations as fraudulent, ascribing to them an elevated level of seriousness. Such is the case for the scenario, 'In order to obtain the building contract for the construction of a new tram line, a large business offers the mayor of the city a large sum of money'. Here, the corrupt act serves to pervert the conditions of procurement of a public contract. It is judged Serious (S) or Very Serious (VS) by 87% of respondents (cumulatively). A similar situation prompts a comparable disapproval: 'A small-business owner offers to renovate the country house of an elected official in exchange for the approval of a contract by the Regional Council' (S + VS = 88%). Negative judgment becomes even harsher if the term 'big-business' is used (S + VS = 89.4%). Cases in which a civil servant solicits inducements for services included in their official duties are also judged severely: 'A civil servant requests a gift or money in exchange for his or her services' (S + VS = 83.2%).

When a citizen uses money to induce political actions in his or her favor, and, in so doing, becomes the corrupting influence, judgments are of the same register: 'After an audit by the tax department, a baker offers 2000 euros to his local parliamentary representative to talk to the fiscal authorities in his favor' (S + VS = 93.2%). It is quite clearly the illicit conduct that is denounced. For indeed, if we keep constant the amount and substitute the baker for a singer (a less consensual figure) the results hardly differ: VS = 52.3%, S + VS = 94.7%. This result is comparable to that obtained for direct attempted corruption of a civil servant by a civilian: 'Offer 200 euros to a police officer in order to avoid a heavy penalty' (S + VS = 87.3%). Thus, with regard to practices that can be legally defined as corrupt, disapproval is generally very elevated, especially when it involves the public sector, but also certain private activities. It happens then that the following example provokes rather severe judgment: 'An employee secretly sells their company's list of clients to the competition' (S + VS = 90.3%). This situation also corresponds to an existing sanction against private corruption.[15]

[15] Article L 152-6 of the French Labor Code [*code du travail*] sanctions whoever solicits corrupt favors and whoever instigates or accepts.

The second dimension of the space of disapproval concerns the misappropriation of public funds. The level of negative judgments is very elevated. It is stronger when the perk obtained through corrupt acts is private (a vacation), than when the goal is political in nature (financing of an electoral campaign). The procurement of personal advantages: 'A minister makes a national airline pay for his flights during a vacation' (S + VS = 91.2%). Political justification of illegal misuses of public money somewhat mitigates the seriousness that is attributed, but the disapproval remains strong: 'A minister makes a national airline pay for his flights during his electoral campaign' (S + VS = 85.2%).

The third component of the space of disapproval concerns the lack of sincerity on the part of an elected official, regardless of whether the deceit involves his public or private activities. Respondents generally expect a certain level of ethical exemplarity from their elected officials, particularly in regard to telling the truth. It is indeed this very dimension that prompts the most elevated judgmental severity of the entire 'black zone'. 'In order to ensure his reelection a mayor rigs the accounts of the municipality' (S + VS = 98.4%). If such interference is justified by indebtedness, the judgments are somewhat less severe: 'In order to ensure his reelection a mayor hides the size of the city's debt during his electoral campaign' (S + VS = 94.3%). The importance of this dimension is confirmed by the fact that a lie told by an elected official in the private sphere is condemned with an almost equally high level of severity. 'In order to protect a friend facing prosecution, a member of parliament lies under oath' (S + VS = 97.4%). If political stakes are mentioned (relating to a politician's career), the attenuating effects upon the judgment are nevertheless nonexistent: 'In order to save the political career of a friend, a member of parliament lies under oath' (S + VS = 97.5%). At several points during recent years, certain ministers have been made to resign for having made and repeated misleading statements. Even if the stakes are minor at first glance (official residence, building permits), they have each been judged serious enough to erode the political credibility of the perpetrators.

The fourth component concerns elected officials' dependence on private interests, especially where the latter are economic in nature. Recall that in the preceding analysis the fact of having substituted the term 'big-business' for 'small-business' added some eight percentage points to the severity attributed to attempted corruption. Economic prowess is often associated with a potential for corruption. Thus, business-owners are considered the principal co-conspirators of official corruption (chosen first out of three choices by 33% of respondents, and by 66.4% when the three choices are

cumulated).[16] After political parties, financial actors and businesses are considered to be the most corrupt sectors.[17] We find evidence here of the suspicion held by many citizens, according to which the political milieu is permeable to the influence of powerful interest groups. 'A member of the upper house of parliament who is the representative of a tourism-dependent region proposes legislation that would facilitate the construction of hotels along the waterfront' (S + VS = 75.0%).

The white zone of consensual tolerance

This zone of tolerance, or of very slight disapproval, concerns deviant situations which, while not illegal, strictly speaking, bear evidence of unfair treatment and sometimes of a disregard for procedural norms. We have retained cases in which the responses 'Not Very Serious' (NVS) and 'Not Serious at All' (NSA) account for at least 70% of the total. Often the judgment 'Not Serious at All' alone represents some 30% of responses, and sometimes over 50%. This white zone converges around two dimensions: street-level relations with elected officials, and the denial of conflicts of interest.

The street-level or friendly relations that citizens maintain with their elected officials constitute a complex domain that encompasses very different practices and perceptions.[18] One area of such relations falls within the 'grey zone' that will be dealt with in the following section. But certain other relations are clearly classed in the 'white zone'. They are met with considerable tolerance and perceived of as ordinary political practice. In a certain sense they are related to a sort of customary clientelism, which is accessible to everybody and not perceived of as posing any particular juridical or moral problem. The most significant examples relate to citizens appealing to the authorities to intervene in their favor when they have filed a demand with a public institution. If these appeals concern a coveted good (a spot in a daycare center, social housing), such practices are immediately downplayed and made out as

[16] 'When an elected official has been accused of corruption, other persons are often found to be complicit, who are such people in your opinion?' Combining the three choices in 1st, 2nd, and 3rd place: business-owners, 66.4%; bank directors, 57.2%; civil servants, 50.3%; family members, 39%.

[17] 'In your opinion, in which sector is there the most corruption amongst the following sectors?' Combining the three choices in 1st, 2nd, and 3rd place: political parties, 75.9%; financial milieus, 66.5%; businesses 41.2%; administration, 19.9%.

[18] J.L. Briquet, F. Sawicki, *Le clientélisme politique dans les sociétés contemporaines* (Paris, PUF, 1998).

normal by respondents. Of course, certain procedural norms regulate the attribution of said goods (submission of an application, decision by attribution comities, fulfillment of eligibility criteria), but many respondents accept the circumvention of such procedures. Thus, 'Asking an elected official for a letter of recommendation in order to obtain a spot in a daycare center' (NSA 27.9%, NSA + NVS = 72.3%). Another type of intervention is judged in an equivalent manner: 'In order to obtain social housing a member of the municipal council advises you to ask the Mayor for a letter of recommendation' (NSA 29.6%, NSA + NVS = 73.2%). The elected official is often perceived as having a social function, and it is therefore legitimate to request his or her assistance. In this light, given that access to employment is today a crucial problem, the use of a political connection has become a broadly accepted practice: 'Using one's political connections in order to find a job for a friend' (NSA 24.0%, NSA + NVS = 70.2%).

The second area in the zone of consensual tolerance concerns political practices that appeared to be justified in light of *the defense of the common good*. Even if personal goals sometimes underlie such actions, this dimension is not taken into account, or it is compensated by contribution to a higher purpose. The conflict of interest that might exist between two roles is thereby made light of; often, it goes altogether unperceived. And if it is perceived, it is compensated for by the apparent defense of the common good. Thus, 'A member of the upper house of parliament who is the representative of a tourism-dependent region proposes legislation that would reinforce environmental protection of the waterfront' (NSA + NVS = 76.5%). Here, the general objective of the action prevails, even if it is a source of political gain for the elected official.

The grey zone of discord

We now come to one of our principal conclusions: the importance of ambiguities in the criteria employed to define 'corruption', or an absence thereof. In many circumstances, qualifying something as a breach of conduct is both variable and context-dependent. To better clarify this 'grey zone' of judgment, we have grouped together behavior for which the distribution of responses between 'Seriousness' and 'Tolerance' is the least extensive, the least polarized. We shall see that in several cases, this distribution is only several points wide, sometimes less than 10%. In other cases the range is broader but the judgments remain in median positions, and above all, extreme judgments are always minor (less than 15%). Finally, we have retained situations in which the introduction of a variable (a new protagonist, another objective) clearly aggravates or

attenuates the initial judgment. Behavior that previously fell within either the 'white' or the 'black' zones is thereby classed in the 'grey zone'. This zone of uncertainty converges around three kinds of situations that are each a variant on the muddling of roles, on the intertwining of public and private functions (cf. Table 6.1).

The first dimension falls under the rubric of '*Clientelism*' *in which political processes are instrumentalized*. It describes more or less direct or indirect exchanges between a political actor or organization and potential electors. The positive side of such relations resides in the closeness they afford between citizens and their representatives. Elected officials on both sides of the political spectrum vaunt this aspect because it is the principal source of legitimacy for politics in general.[19] However, such 'street-level politics' [*la politique de proximité*] combine social functions (white zone) and favoritism in access to services. In our study, some 16.5% of respondents admitted having appealed to an elected official in order to resolve a personal matter.[20] Confronted with difficulties that they could not resolve on their own, certain citizens believed that their representatives' mandate includes dealing with individual problems. For local officials, such requests present an opportunity to consolidate their presence through the attention paid to citizens during visiting hours and written correspondences. Yet in other cases such behavior clearly involves the manipulation of political mechanisms to the benefit of self-serving agendas. Thus, 'Adhering to a political party in order to obtain social housing' is typically a very provocative conduct: judged Serious by 39.2%, but Not Serious by 35.9%. Combining responses gives the following picture: VS + S = 50.3%, NSA + NVS = 49.0%. Discord over the acceptability of this sort of conduct is palpable.

Other cases of the *instrumentalization of political processes* are even more strongly condemned (by more than two-thirds of responses) due to their financial aspect: 'In order to help his son find work, a father donates 1000 euros to the political party to which the mayor of his commune belongs' (NSA + NVS = 29.8%, S + VS = 70.1%). The aggravating effect of the financial factor is confirmed by the fact that, if the donation increases from €1000 to €10 000, the S + VS responses reach 77.5%.

If the instigator of the action is a political actor, the discord persists despite being more condemnatory in nature. This trend is constant: for

[19] Alain Boudin, Annick Germain, Marie-Pierre Lefeuvre, *La proximité, construction politique et expérience sociale* (Paris: L'Harmattan, 2005).

[20] For those that did make such demands, problems involved: housing 32%; employment 13.5%; conflicts with neighbors 12.6%; financial assistance 11%; urban planning and roads 9.3%; spot in the school or daycare center 5.4%.

equivalent facts, judgments are more severe when brought to bear on elected officials than on citizens. Responses remain however within the median 'grey' zone (a variation of only three points): 'In order to obtain social housing a member of the municipal council decides to request a letter of recommendation from the wife of the Mayor' (NSA + NVS = 51.3%, S + VS = 48.1%). Here, for a portion of the respondents the involvement of the wife, and the confounding of public and private roles, modifies the seriousness of the judgment. The discord remains significant however. Another scenario in which the political actor is also in a central position gives a different result: 'A left-wing elected official advises an unemployed person to adhere to his party in order to obtain a position as an employee of the municipality' (NSA + NVS = 31.4%, S + VS = 68.0%). If it involves a right-wing official the result varies very little (NSA + NVS = 28.8%, S + VS = 70.5%). The partisan exploitation of a person's fragile situation is construed as an abuse of the official position, and explains the relative severity. However, close to a third of respondents excuse such actions on behalf of their latent social purpose.

The second dimension of the grey zone is constituted by the *political practices in which private and public interests are confounded*. This clearly influences judgments brought to bear on the scenarios. Thus: 'In order to obtain the building contract for the construction of a new tram line, a large business offers to renovate the municipal stadium for the Mayor' (NSA + NVS = 37.0%, S + VS = 62.8%). If we consider this version alongside that presented in the 'black zone', the difference is considerable. Where the previous version perfectly exemplified corruption as it is juridically defined (perversion of a public Call for Tenders), here the renovation of the municipal stadium is seen by a significant portion of the respondents as an acceptable justification for the action. The apparently general purpose attenuates or even occults the initial transgression. VS judgments are not more than 21.5%. Correspondingly, NSA and NVS judgments increase from 12.8% to 37.0%.

The third dimension of the 'grey zone' concerns *private corruption*, such as the corruption of an employee by a competing business. For as much as the explicit practices, such as the secret sale of a client list to a competitor, are strongly condemned (90%), those that constitute a mere *potential* conflict of interests provoke more ambiguous judgments. 'As part of his job, an employee accepts a paid cruise gifted by a client', S 32.7%, but NVS 32.4%, NSA + NVS = 52.7%, S + VS = 46.4%. The result is so divided because respondents identify above all with the compensated employee and not with the employer. However, when one asks them to put himself or herself in the place of the employer, the judgments become harsher.

Table 6.1 The 'grey zone' of perceptions of corruption – space of discord

Space of discord	Domain	Not serious at all + Not very serious	Serious + Very serious
Clientelism Instrumentalization of political processes	Instrumentalization of a political party: – by adhesion – by financial donation	51% 30%	49% 70%
	Recommendation from the wife of the mayor	52%	48%
	Municipal job contingent upon party adhesion	32%	68%
Confounding of private and public interests	Corruption covered up by contribution to common good	37%	63%
Confounding of private and collective interests	Corruption of an employee	53%	47%

We have thus demonstrated the diverse range of judgments brought to bear upon conducts constitutive of breaches of integrity. The domain of 'corruption' is comprised of considerable heterogeneity. And this is true in two ways: on the one hand, due to the multiple ways in which people qualify deviant situations; and on the other hand, due to the multiple degrees of seriousness that people ascribe to such situations. In order to further clarify the ambivalence of judgments made in this domain, we have composed a typology that finalizes the distinction between 'black', 'grey' and 'white' zones of perception.

Tolerance of favoritism and distrust in institutions: Two major dividing lines

A diverse range of attitudes. The statistical study, which was undertaken following several qualitative explorations, confirms the diversity of

attitudes with regard to public integrity.[21] The extent of the phenomenon's multidimensionality was further demonstrated through data analysis employing a series of statistical methods. We carried out a Specific Multiple Correspondence Analysis (SMCA). Accordingly, we were able to demonstrate the existence of links between the definition of political corruption given by respondents, and the estimation of its seriousness. We selected a set of eight variables that best differentiate the opinions collected in our study.

The first result of the analysis is unexpected. The attitudes concerning petty favoritism turn out to be the most determinant factor of distinction amongst the population under analysis (explaining some 50% of the variance in responses), and not their judgment pertaining to the degree of corruption, which is placed second. This first fundamental division thus involves the attitude towards street-level favoritism and the attempt to procure personal advantages. It sets those who tolerate such practices against those who condemn them. This initial dividing line was constituted on the basis of judgments brought to bear on four acts that are very strongly correlated with one another: recommendation from an official for a spot in daycare center; using political connections to find a job for a friend; adhering to the party to obtain social housing; and an employee accepting a paid cruise from their client. In first place, this result confirms Michael Johnston's hypothesis:[22] the perception and judgment of 'minor matters' (here the instrumentalization of political processes and favoritism) are determinant. Further, the degree of tolerance/disapproval with regard to favoritism is the attitude that most clearly differentiates the population under analysis. And finally, attitudes that are tolerant towards petty favoritism (59.3%) clearly predominate over those that are disapproving thereof (40.7%).

In light of other studies, this outcome is less surprising than it might at first appear. Thus, in France, the tolerance regarding under-the-table deals ('*arrangements*'),[23] scheming, and favoritism has already been underlined by the ESS (European Social Survey, 2006). The comparison with twenty other countries demonstrates that the French are altogether more tolerant

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[21] The details of these results are provided in: Pierre Lascoumes (Dir.) *Favoritisme et corruption à la française, petits arrangements avec la probité* (Paris: Presses de Sciences-Po, 2010); and Pierre Lascoumes, *Une démocratie corruptible, arrangements, favoritisme et conflits d'intérêts* (Paris: Seuil, 2011).

[22] Michael Johnston, 2006, op. cit.

[23] TN: here the French *arrangement* is meant in the sense of 'coming to an arrangement', a tacit and pragmatic agreement between actors that permits transgression.

than average when it involves private integrity (insurance fraud) and more still regarding public integrity (fiscal fraud). Yann Algan and Pierre Cahuc provide very comparable results.[24] The French are at once more suspicious than most other Europeans (as much with regard to other citizens as to institutions), but at the same time their level of tolerance for incivility is very elevated compared to other countries (fiscal fraud and bribery in particular). Moreover, work carried out on the basis of the most recent ESS data demonstrates the heterogeneity in the opinions of the French compared to other European citizens. They are very dissonant in a normative sense (both very rigorous and very lax) and heterogeneous where matters of trust are concerned: rather distrustful with regard to private actors (especially economic ones), they have trust in certain institutions (the police, the administration), but are very distrustful of others (justice system, party system, political actors).[25]

The general judgment applied to the level and forms of corruption constitutes a second major dividing line (explaining 14% of the variance in responses). This second axis demonstrates the importance of distrust towards institutions. Five variables that are strongly correlated with one another assist our appreciation of the way in which respondents evaluate breaches of integrity in public and private institutions: honesty of political personnel, temporal evolution of the phenomenon, types of complicity, corruption according to sector (Table 6.2) and an 'attitude scale' summarizing the perception of institutional corruption.

The 'attitude scale' relates to the level of corruption perceived in the principal political institutions: the Presidency of the Republic, Government, the National Assembly (lower house), the Senate (upper house), sub-national legislative bodies, and municipalities. The study population is distributed into four groups virtually equivalent in size, namely, those who perceive institutions as: thoroughly corrupt (25.2%); corrupt (26.0%); not very corrupt (23.5%); not at all corrupt (25.3%).

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[24] Yann Algan, Pierre Cahuc, *La société de défiance*, above note 5.

[25] Viviane Le Hay, Pierre Lascoumes, 'Tolérance de la fraude et relations de confiance', in Daniel Boy et al. (eds.) *Les Français, des européens comme les autres?* (Paris: Presses de Sciences-Po, 2010, pp. 73–107).

Table 6.2 Variables for the evaluation of breaches of public integrity

Would you say that, as a general rule, French elected officials and political leaders tend to be:		*Do you think that in France there is:*	
– Honest	34.8%	– More corruption than before	32.6%
– Corrupt	60.2%	– Just the same amount	61.6%
– Don't know	5.0%	– Rather less	4.4%
		– Don't know	1.4%
When an elected official has been accused of corruption, other persons are often found to be complicit. Who are such people in your opinion?		*In which sector is there the most corruption*:	
– Business-owners	33%	– Political parties	41.5%
– Family members	17%	– Financial milieus	24.5 %
– Civil servants	16%	– Companies	11.5%
– Bank directors	16%	– Media	8.0%
– Others	14%	– National administration	5.5%
– Don't know	4%	– Others	7.0%
		– Don't know	2.0%

The results of this section of the study amply confirm French citizens' distrust regarding both political personnel as well as institutions. But these figures should not be considered on their own, contrary to common practice in polling. In order to understand their significance, one must combine these results with those of the first axis that relates to the degrees of tolerance vs disapproval with regard to favoritism and the instrumentalization of political processes.

Four divergent attitudes. By combining people's positions across the two previous axes, we have distinguished four types of corruption perception (Table 6.3). Their differences validate the hypothesis according to which ambiguity plays an important role in formulating judgments of 'corruption'. Accordingly, while two types are indeed coherent (numbers 1 and 4), they represent little more than a half of the population, 55.5% to be precise. The other portion of respondents (types 2 and 3, 44.5%) is distributed into groups with contradictory positions.

Two groups are coherent in their disapproval or tolerance. The group whose position is the most predictable is that of the *Denunciatory pessimists* (number 4). Its members believe that in France corruption is a widespread phenomenon, and they are distrustful of institutions. They condemn petty favoritism and the instrumentalization of political processes by private interest groups. They share a broad definition of breaches of integrity, which corresponds to the classic conception of

Table 6.3 A typology of perceptions of corruption

	Perceived degree of corruption		
	WEAK	STRONG	
ELEVATED TOLERANCE	*Except for finance and business* *1 – Tolerant optimist* 32.2% (n = 654)	*3 – Concerned pragmatist* 27.1% (n = 549)	59.3%
ELEVATED DISAPPROVAL	*2 – Disapproving realist* 17.4% (n = 353)	*4 – Denunciatory pessimist* 23.3% (n = 472)	40.7%
	49.7%	50.3%	

republican integrity. One could almost have assumed this to be the dominant type, as it were. Such is not the case, for it only concerns but a quarter of the sample (23.3%). For adherents of this worldview the judgments in 'grey' and 'white' zones are few and far between. One of the characteristics specific to this group is a heightened awareness of nepotism. More than the others, this group considers that connections between close friends, electors and family members of officials are important factors in corruption.

The other group with coherent positions is that of the *Tolerant optimists* (number 1). It expresses positions inverse to those previously discussed. Its members believe that there are few breaches of public integrity and they trust in institutions. They are also tolerant of petty favoritism. This group is the largest (one-third of the sample, 32.2%). They hold a very narrow definition of 'corruption', which limits it to only its most flagrant manifestations. The specificity of this group is to consider economic and financial spheres as important factors in corruption. It is here that the tolerant optimism of this group meets its limits.

Two groups are contradictory in their disapproval or tolerance. The other result of this study is to highlight the importance of positions that are ambivalent, or even contradictory. This subset constitutes almost one-half of the population under analysis (44.5%). Ambiguity is made manifest in two unique forms.

The group of *Concerned pragmatists* (number 3) is the second largest, representing more than a quarter of the population (27.1%). It holds contradictory viewpoints. On the one hand, its members believe the incidence of breaches of integrity within political institutions to be relatively high. Yet, on the other hand, these persons are tolerant of

preferential treatment and minor favors. These then are the 'pragmatists' who fit into the 'culture of "*arrangements*" *à la française*'.[26] They seek to reconcile universalist principles with the satisfaction of individual needs. Their position is thus partly cynical insofar as they condemn serious breaches of public and private integrity, accepting all the while the incidence of favoritism and the instrumentalization of political processes. One might interpret this paradoxical position as the expression of a tension between the condemnation of 'corruption' on the part of the powerful, and a tolerance towards the everyday misdemeanors of the average Joe. Street-level favoritism would then be accepted insofar as it involves a fairly common practice that is beneficial to those who are socially disadvantaged. On the opposite end of the spectrum, 'big-time corruption' would then be strongly condemned insofar as it involves the elite, structurally abusing their powers.

Finally, the group of *Disapproving realists* (number 2) condemns favoritism, believing all the while that breaches of public integrity do not constitute a major problem. Those belonging to this group are realist insofar as they consider that 'corruption', when it exists, does not reach proportions that pose a threat to the continued function of institutions. They do not however altogether lack rigor, condemning the minor forms of this corruption such as petty favoritism and the instrumentalization of political processes. They tolerate neither abuse of official position, nor preferential treatment, but without making too big a deal out of such acts.

In both of these groups there is thus a normative conflict, a tension between general, abstract judgment (on the general level of hard or soft corruption), and judgment that serves to evaluate concrete cases (favoritism as disapproved of or tolerated).

CONCLUSION

We have shown that the perceptions of 'corruption', and of breaches of integrity in their various forms, constitute a foggy assortment. The judgments that citizens bring to bear upon this subject are often ambivalent. The boundaries that separate the condemned from the acceptable not only shift from person to person, but also shift according to the facts of the case under evaluation and the context in which they take place. The confusion of public and private interests, and the resultant conflicts,

[26] Yves Mény, 'De l'arrangement à la corruption: principes universalistes, comportements particularistes' in *La corruption de la République* (Paris: Fayard, 1992) pp. 165–204.

generally escape disapproval. More often than not, conflicts of interest are not perceived of as such, which is to say, as likely to pervert public decision-making processes and to lead to unfair treatment. When they are identified, they are frequently justified with recourse either to the specific requirements of political office (the role as intermediary with civil society), or to pragmatism and the importance allotted to outcomes (the ends justify the means).

Finally, reservations are clearly justified with regard to the surface-level indignation that generally occurs alongside the denunciation of a given abuse of position. Despite numerous theoretical debates, no consensus reigns among authors with regard to the defining criteria that would allow one to distinguish clearly between that which constitutes 'corruption', and that which constitutes an atypical manner of exercising power ('grassroots politics' or 'business as usual'). What's more, over the past years, contemporary forms of power such as 'governance', 'public–private partnerships', privatization of public services, and the acceleration of the revolving door between high-level public office and the sphere of private enterprise, have only served to worsen the confusion of public and private roles. In the case of France we have demonstrated that there exists a vast range of practices whose level of illegality or acceptability is subject to all sorts of uncertainties and controversy (the 'grey zone'). Rejected by some, they are accepted by others, and even justified by them. Finally, our statistical analysis enabled the distinction of unique ways of perceiving breaches of integrity. This diversity throws the inherited ways of thinking about the subject into disarray, showing the 'rigorous' and 'legalist' position to be a minority one in relation to the prevalence of positions that are 'lax' and ambivalent.

7. Integrity in English and French public contracts: Changing administrative cultures?

Yseult Marique*

I. LAW AND ADMINISTRATIVE CULTURES IN ENGLAND AND FRANCE

Public contracts contribute to *c*.15 per cent of French and English GDP,[1] which make them fertile ground for diverting taxpayers' money away from the common good. When awarding a public contract, a public authority relies on the work of staff to prepare decisions and on elected representatives acting in procurement bid commissions to select bidders. Then the contract has to be performed: goods and services must be delivered and prices paid for these goods and services. In theory, public money has to be spent on goods and services in a way that best contributes to the public good. Normally, competition and equality between the bidders and transparency in the contract award are means to ensure that the chosen bid is the one most able to fulfil this aim. However, corruption may disturb this process: staff may disclose bids to competitors or give more information to some bidders; the award process and selection criteria may be tweaked in a way favorable to one bidder; interpretation in decision-making may be directed towards carrying out

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[1] http://www.oecd-ilibrary.org/sites/gov_glance-2011en/09/01/index.html?contentType=/ns/StatisticalPublication,/ns/Chapter&itemId=/content/chapter/gov_glance-2011-46-en&containerItemId=/content/serial/22214399&accessItemIds=&mimeType=text/html.

bidders' interests instead of the public good; contract performance may intentionally be poorly monitored. Reasons for these courses of action may lie in direct or indirect benefits that staff or elected representatives or their family members obtain, such as securing a better-paid commercial position in the future, pleasing influential friends or funding their future electoral campaigns. In these forms, or related versions,[2] corruption in relation to public contracts is a common problem. Administrative cultures, though, bring differences across legal systems. They encompass techniques, institutions and processes which transform general policies into concrete actions on a day-to-day basis. They also give rise to specific forms of corruption as well as to different ways in which corruption is tackled. Yet administrative cultures are not fixed and are changing, albeit slowly.

Traditionally, English and French approaches to corruption have differed particularly in their use of criminal law and ethics (especially codes of practice).[3] English law relies more on an ethical framework to set standards and rarely on criminal law for sanction, although audit mechanisms provide alternatives to sanction. The French have predominantly relied on criminal law to set standards and as a sanction, while administrative law has played a supporting role in policing contractual practice. These differences regarding techniques for addressing corruption tie in with three differences between English and French administrative cultures: the organization of local–central relationships, the relationships between the public and private spheres, and the interplay between norms and factual situations.

Over the last decennia, England has developed into a strongly centralized state with nearly no overlap between central and local representatives and one where local government depends heavily on central funding. French local government is heavily fragmented with more than 36 000 local entities and local politicians holding multiple mandates at various institutional levels, in such a way that informal decision-making runs in parallel to official decision-making processes. Furthermore, England does not delineate strongly between public and private interests and mostly relies on private law to organize the relationships between public and private entities. In contrast, French administrative culture is characterized by a strong distinction between public and private interests and between public and private law. Finally, England makes, overall, serious attempts

[2] For a typology of corruption: OECD, *Bribery in Public Procurement – Methods, Actors and Counter-measures*, 2007, 74–97.

[3] J Bell, 'English Law and French Law – Not So Different?' [1995] CLP 63, 90–95.

to implement ethical standards and legal norms in practice and to achieve their genuine integration by the people carrying out administrative duties. France relies more on the symbolic power of rules and sanctions, with few means to implement these standards and rules.

English and French administrative cultures have thus evolved from two different starting points. However, both England and France currently have to comply with the same European and OECD obligations and have had to deal with scandals following extreme situations of corruption. Both administrative cultures have hence gradually changed. However, there is an inherent resistance to changes in both administrative cultures: the gap between integrity in standards of behavior and practice still needs to be bridged. Therefore, this chapter suggests that changing administrative culture is a Herculean task, where any little help – including that from the law – is needed. Provided it is built adequately into the administrative culture, the law may help to clarify the distinction between public and private interests and facilitate processes for changing administrative cultures.

This chapter identifies the components of English and French administrative cultures related to corruption in public contracts (section II). It then moves on to analyze how spontaneous changes have been processed in both cultures from the 1990s onwards (section III) and how the two systems have resisted European and international pressures (section IV). Based on this comparative analysis of corruption in public contracts in England and France, the chapter concludes with the potential contributions of the law to developing high standards of conduct within administrative cultures (section V).

II. DISTINGUISHING BETWEEN INTERNATIONAL AND LOCAL PUBLIC CONTRACTS

As a way to give direction to otherwise chaotic techniques, institutions and processes, administrative culture develops from the interactions between the administration and the public interest. In this respect, public contracts play a distinctive role as they offer unique opportunities for, on the one hand, public functions and collective interests and, on the other hand, private advantages and profit, to interplay. France developed an entire conceptual framework for public contracts from the early 20th century on, while England has no such systematic approach to public contracts. Therefore, 'public contracts' are used here in a broad sense encompassing contracts between public and private entities whereby private entities provide public authorities with goods, works or services

for their own or the community's use. They can be purely domestic or signed with foreign public authorities. Both England and France have used private corporations to carry out their international agendas. The United Kingdom relied on incorporated companies to develop its colonies,[4] which found echoes in the BAE–Al Yamamah case, as will be discussed below.[5] France fostered a dense network of privileged relationships based on privatized corporations (once state-owned) in French-speaking Africa.[6] Elf, for instance, set up to secure the French strategic priority of energy autonomy, was also used to provide funding for French political parties,[7] leading to a major corruption scandal in the 1990s.[8] However, the administrative organizations of English and French local–central relationships are structurally different and follow inverse evolutions: from a central state to decentralization in France; from local self-government to centralization in England. This explains the differences in corruption in local politics between England and France.

English local government has enjoyed mostly fragmented powers, only recently extended to encompass the pursuit of economic, social and environmental wellbeing.[9] Up to World War I, local government had been able to develop extended local service provision but, after World War II, their powers shrank in the face of nationalizations (eg energy, hospitals, national assistance, etc). Reforms in the 1970s limited local tax resources and made local government overly dependent on policies framed at the central level.[10] Up to the time the UK joined the EU, no specific legal rules existed for the procurement of public contracts. When the Poulson scandal broke out in 1972, it was revealed that Poulson had been bribing a range of officials in return for contracts for his architectural practice. No violation of any procurement procedure was invoked, only the *Public Bodies Corrupt Practices Act* 1889 and the *Prevention of Corruption Act*

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[4] A Adonis, 'The UK: Civic Virtue Put to the Test' in D Della Ponta and Y Mény (eds), *Democracy and Corruption in Europe* (Pinter 1997) 103, 106.

[5] See below, section IV.

[6] JF Médard, 'France-Africa: Within the Family' in D Della Ponta and Y Mény (eds), *Democracy and Corruption in Europe* (Pinter 1997) 22–34.

[7] JF Médard, 'Les paradoxes de la corruption institutionnalisée' (2006) 13:4 Revue internationale de politique comparée 697, 708.

[8] J Garrigues, *Les scandales de la République – De Panama à l'affaire Elf* (Robert Laffont 2004).

[9] Local Government Act 2000 s 2.

[10] M Loughlin, *Legality and Locality – The Role of Law in Central–Local Government Relations* (Clarendon 1996) 97–98.

1906 were used.[11] Despite a range of problems regarding this framework,[12] no major legal changes were implemented. Yet in the 1980s the use of contracts and competition by local government became a common way for local government to tender the services they needed. Local spending was constrained by standards of regularity and *value for money* (shorthand for economy, efficacy and efficiency). Although the modalities of central control have evolved over the last thirty years, the Treasury remains strongly in control of local spending.[13] In this context, corruption in national politics has not featured prominently in public contracts but has in a range of other behaviors, such as claiming parliamentary expenses for personal benefit.

Against this English backdrop of relying on increasingly strong central control over local finance and competition to award public contracts, France presents three differences: instrumental, institutional and functional. First, public contracts have been a means for political parties to secure funding for their electoral campaigns. In the 1970s, the Socialist Party especially became aware of the need to mobilize financial resources if it wanted to provide a President of the French Republic.[14] Firms which wished to bid for public contracts had then to become involved in a complicated system of fake invoicing by consultancy in parallel to public contracts. This system led to the major 'Urba' scandal at the end of the 1980s.[15] Secondly, a process of decentralization started from 1982 onwards. This resulted in a new institutional design, with multiple layers of powers which were perceived as confusing and ineffective. Therefore,

> a whole culture of accommodation and rule-bending has come to being. […] it enables administrative paralysis to be avoided. But it also enables the conviction to grow that the norm exists to be violated or circumvented

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[11] For the details of this scandal and the political implications at national level: see J Tribe, 'The Poulson Affair: Corruption and the Role of Bankruptcy Law Public Examinations in the Early 1970s' (2010) 21:3 KLJ 495–528.

[12] Highlighted in the inquiries following the Poulson scandal: Lord Salmond, *Royal Commission on Standards of Conduct in Public Life* (Cmnd 6524, 1976).

[13] S Bailey, *Cross on Principles of Local Government Law* (3rd edn, Sweet & Maxwell 2004) chap 9.

[14] J Evans, 'Political Corruption in France' in M Bull and J Newell (eds), *Corruption in Contemporary Politics* (Palgrave 2003) 79, 81–82.

[15] Y Mény, 'France: The End of the Republican Ethic?' in D Della Ponta and Y Mény (eds), *Democracy and Corruption in Europe* (Pinter 1997) 7, 13.

> whenever it is convenient; sometimes to further desirable ends, yet frequently for less worthy reasons.[16]

As a consequence of this system, a third French feature has to be mentioned: the *cumul des mandats*. This feature allowed one representative to hold multiple offices, at local, departmental and central levels. These numerous posts increased local representatives' influence and put them in a position to act as personal go-betweens across various levels of powers outside the legal processes of decision-making. They oiled the administrative and political machinery. Yet time constraints and over-commitment meant that these many roles could not be performed well or else they resulted in a blurring of the lines between different functions. Therefore a 1986 reform attempted to limit the *cumul des mandats* to two mandates.[17] However it only applied to expressly regulated positions, leaving the *cumul* widely practiced where it was not forbidden. This administrative context and its circumstances shape what administrative actors perceive as problematic practices.[18]

Against this different background to the use of public contracts, English and French administrative cultures developed different focuses to address corruption and conflicts of interest. England did not single out corruption or conflicts of interest in public contracts as deserving special treatment, but France organized a fully fledged regime especially tailored to tackle corruption in public contracts, distinct from the repression of other corrupt practices.

III. SPONTANEOUS ANTIDOTES: DOMESTIC NORMS AND INSTITUTIONS

Over the years the English and French administrative cultures have defined whether and how corrupt practices develop in the field of public contracts. In the early 1990s, England and France reacted to scandals involving corruption and conflicts of interest.[19] However, they adopted different strategies. While England chose a soft law and self-regulatory

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[16] Ibid 17.

[17] Evans above (n 14) 86. For examples of current limitations see: electoral code art. LO 137ff.

[18] H Rayner, 'Corruption in France: Structural and Contextual Conditions' in D Tänzler, K Maras and A Giannakopoulos (eds), *Social Construction of Corruption in Europe* (Ashgate 2012) 107.

[19] J Bell, 'Legal Means for Eliminating Corruption in the Public Service' (2007) 11:3 Electronic Journal of Comparative Law.

approach, criminal law was heavily and symbolically relied on in France. England focused its efforts on conflicts of interest in public decision-making at all levels of power; France focused on corruption in local public contracts. Yet the two countries highlight the fact that the normative framework is more nuanced and that institutions, their very existence and their real powers, play a tremendous role in breathing life into otherwise empty ideals.

A. England: Looking beyond the Ethical Framework

When political scandals emerged in England in the 1990s,[20] the reaction was to set up the Nolan Commission.[21] This commission identified seven principles for standards in public life (selflessness, integrity, objectivity, accountability, openness, honesty, leadership) which apply to all holders of public office: elected representatives, civil servants or staff in local government.[22] The Nolan recommendations were promptly implemented.[23] Conflicts of interest were considered to be an internal matter to the administration and self-regulation was the privileged way forward.[24] Officials were to register and disclose their interests. A number of commissions were then set up to issue a code of conduct and monitor its implementation. A ministerial code[25] and a civil service code[26] were published. At the local level, a model for the code of conduct was issued.[27] Although the whole system applied to all decision-making, the question of public contracts was given no particular attention. The only exception to this was the formulation of objectivity as a principle for standards in public life, where the award of contracts was especially included.[28] This ethical framework applies to all holders of public offices, elected representatives or not. It explains how English administrative

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[20] For the context: see D Oliver, 'Standards of Conduct in Public Life – What Standards?' [1995] PL 497.

[21] A Doig, 'Political Corruption in the United Kingdom' in M Bull and J Newell (eds), above (n 14) 178, 186.

[22] Committee on Standards in Public Life, *First Report*, 1995 (Cm 2850-1). See Cecily Rose's contribution to this book.

[23] Oliver above (n 20) 499–501.

[24] Currently: Cabinet Office, *Ministerial Code*, 2010.

[25] Currently: *Civil Service Code*, 2010.

[26] Now with a legal basis: Constitutional Reform and Governance Act 2010, s 5.

[27] Local Authorities (Model Code of Conduct) Order 2007.

[28] Objectivity is defined in relation to '*carrying out public business, including making public appointments, awarding contracts, or recommending*

culture depends on the political environment in which it evolves. However, the above does not give a full picture of the regulation of conflicts of interest in England. At least three points need further explanation in order to clarify the relationships between criminal law and ethics.

First, criminal law has been minimized under this ethical approach. However, it has always existed in the background and has been enforced.[29] A criminal offence of misconduct in public office exists and, despite begging legal questions of predictability, is enforced.[30] Furthermore, criminal sentences have been secured against public officials. For instance, civil servants in the Ministry of Defence have been sentenced to suspended imprisonment and confiscation orders on the grounds that they had shown favor in the tendering of CCTV contracts.[31] Criminal law exists and is enforced in England, even if it is reserved for the most serious cases. The main feature of English administrative culture may then be not so much the absence or presence of criminal law but the interpretation given to criminal offences in their overall context.

Secondly, next to these soft law and hard law approaches, one of self-regulation and one of criminal sentencing, a third approach has developed in England, showing the interactions between the judiciary and auditing when dealing with troubling practices related to public contracts. In this respect, the Porter scandal needs mentioning. During the 1980s, the Westminster Council, the leader of its council, Dame Shirley Porter, and a couple of its councilors implemented a policy of selling council houses to electors, based on the belief that home-owners would be more likely to vote for their party. Public decisions were overridden by party political gains: their future re-election.[32] The investigations were carried out by an independent auditor and did not constitute criminal prosecutions.[33] The scandal did not give rise to criminal sentences but to the payment of damages to the local council by the leader of the council and her colleagues.[34] Often invoked to illustrate English administrative culture in relation to corruption in local affairs, this case indicates clearly

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individuals for rewards and benefits, holders of public office should make choices on merit'.

[29] Eg: Donnygate: http://www.guardian.co.uk/society/2002/mar/13/uknews.

[30] S Parsons, 'Misconduct in a Public Office – Should It Still Be Prosecuted?' [2012] Journal of Criminal Law 179.

[31] http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/sentencing-in-northern-ireland-contracts-corruption.aspx.

[32] I Leigh, *Law, Politics and Local Democracy* (OUP 2000) 124–27.

[33] Bell above (n 3) 93.

[34] *Porter v Magill* [2001] UKHL 67.

the high importance of audit procedures in investigating possible fraud in the system. This crucial role played by audit mechanisms brings the current proposal to abolish the Audit Commission by 2015 into question.[35] While auditing has helped to detect possible corruption, even resulting in reparation if not criminal sanction, the current changes in local auditing would need to maintain such articulation between ethics and deterrence.

Thirdly, the ethical framework has been subject to recent changes, most notably with the abolition of the Standards Board for England.[36] The reasoning behind this move was that the system hinging on the board was ineffective because it was too easy for citizens to challenge councilors' conduct, which undermined local democracy. Therefore the appropriate way forward was to leave local authorities free to issue their own codes, on the one hand, and, on the other hand, to make it '*a criminal offence for councillors to deliberately withhold or misrepresent a financial interest*'.[37] Therefore, identifying proper conduct is left to local guidance and individual judgment in the hope that the prospect of criminal charges will work as an efficient deterrent. This rebalancing illustrates English administrative culture at two levels: first, criminal law is actually relied on in these matters; secondly, increased personal responsibility under the patronage of the central government exercising its most extreme coercive powers is designed into the system. Therefore this system strongly depends on the effectiveness of criminal justice in this respect. This move does not seem to have taken into account the fact that local government is currently brought into unchartered territory regarding how local services should be delivered and the increased involvement by charities in the delivery of local public services. Central guidance mapping out the possible conflicts of interest between charities and local government might have been welcomed. Supposedly taken to restore citizens' faith in local democracy, recent changes in the framework of local authorities' spending and contractual relationships possibly herald deep internal transformations of English political and administrative culture: the distance between the individual councilor and central government is now mostly framed by local standards and criminal law, with limited national guidelines and changing audit procedures. Overall,

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[35] Draft Local Audit Bill (2012 Cm 8393).

[36] Local Government Act 2000 s 57 and schedule 4. Powers to abolish it: Localism Act 2011 schedule 4 part 2.

[37] CLG, *A Plain English Guide to the Localism Act*, 2011, 5. [my italics]

English administrative culture aspires to focus on implementing 'standards', defined through ethical guidelines and framed by criminal law or individual conscience rather than by a rule-based system.[38]

B. France: From Criminal Law to Ethics?

France has followed a radically different symbolic approach to corruption in local politics. In the 1980s, a string of scandals was uncovered and Parliament decided on general amnesties for representatives involved in corruption, acknowledging thereby the extent of corrupt or borderline practices.[39] However these statutes met with unusual uproar from citizens.[40] In reaction, representatives sought to demonstrate their good will in tackling corruption and passed two rigorous statutes, in 1991 and most crucially in 1993. This later statute, known as the 'Loi Sapin',[41] aimed primarily to moralize public life.[42] It sets out three structural elements for a French administrative culture of anti-corruption: first, a distinction between public procurement and delegation; secondly, dedicated public authorities; and thirdly, specific criminal offences. The *Loi Sapin* also highlights the limits of French administrative culture, which relies on symbolism to address corruption in local public contracts. Changes, such as the recent Sauvé report, have thus been attempted, although they repeatedly meet with resistance.

The first pillar of the *Loi Sapin* consecrates a new category of public contracts: the delegation of public service (*délégation de service public*),[43] which was supposed to bring together many of the various contracts passed by public authorities, most notably service concessions (*concession de service*). The *Loi Sapin* establishes a distinction between

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[38] Cf PASC, *Ethics and Standards: The Regulation of Conduct in Public Life* (2006–2007 HC 121-I) summary.

[39] Loi (nr 88-828) 20 July 1988 *portant amnistie* art. 2, 5 and loi (nr 90-55) 15 January 1990 *sur le financement des partis politiques et des campagnes électorales* art. 19.

[40] G Drouot, 'Le financement des campagnes électorales et les activités politiques: les nouvelles règles du jeu. La loi du 15 janvier 1990 et la loi organique du 11 mai 1990' [1990] D 125.

[41] Loi (nr 93-122) 29 January 1993 *relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques.*

[42] JC Douence and P Terneyre, 'Marchés publics et délégations de service public: Nouvelles modifications législatives' [1995] RfDA 971.

[43] JC Douence, 'Les contrats de délégations de service public' [1993] RfDA 936; G Marcou, 'La notion de délégation de service public après la loi du 29 janvier 1993' [1994] RfDA 691.

public procurement, which needs to follow all requirements following on from the implementation of EU directives on public procurement,[44] and delegations, where more flexibility is allowed. In public procurement, the public authority awarding the contract pays a price to the private entity delivering the goods or services. In the delegation of public service, the public authority delegates the management of the public service to a private entity,[45] whose earnings depend on the profits generated by the public service.[46] Therefore, users of the service, and not the public authority, pay the private entity in charge of the public service. Concessions, as the predecessor of delegations, were previously supposed to feature a high level of confidence between the public authority and private contractors, resulting in a blurring of public and private interests, common good and private profits. The *Loi Sapin* was supposed to reframe these relationships towards more transparency and to prevent corruption from arising too endemically in delegation. Subject to subtle case law regarding the origin of the monies exchanged for services,[47] this carefully drawn balance between public procurement and delegation is central to the award of French public contracts, allowing the reining in of extreme practices while maintaining autonomy for local authorities.

The second pillar of the *Loi Sapin* pertains to the commissions it entrusts with its implementation: the *Mission interministérielle d'enquête sur les marchés* (MIEM) and the *Service central de lutte contre la corruption* (SCLC). First, the *MIEM*,[48] set up in 1991,[49] has extended powers to investigate the regularity and impartiality with which public

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[44] Currently: Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] JO L134/114.

[45] To keep it simple here. Public bodies may also carry out public services under a delegation.

[46] Currently: art. 28 *Loi Sapin* as modified by *Loi* (nr 2001-1168) 11 December 2001, art. 3; art. L 1411 Code général des collectivités territoriales.

[47] L Richer, *Droit des contrats administratifs* (7th edn, LGDJ 2010) paras 1066ff.

[48] http://www.minefi.gouv.fr/mission_marches/role.htm; JP Gohon, 'Le délit de favoritisme' [1994] AJDA 109; G Pancrazi and M Radenac, (2005) fasc 210 JCCMP, *Mission interministérielle d'enquête sur les marchés et les conventions de délégation de service public (MIEM)*.

[49] *Loi* (nr 91-3) 3 January 1991 *relative à la transparence et à la régularité des procédures de marchés et soumettant la passation de certains contrats à des règles de publicité et de mise en concurrence* art. 1er.

procurement and delegations of public service are awarded and performed. However, the *MIEM* became inactive between 2003 and 2005.[50] Secondly, the *SCLC*[51] exercises missions such as the centralization of information regarding corruption, supporting the judiciary in their investigations, advising administrative authorities, training to prevent and detect corruption, involvement in French international actions, and carrying out awareness-raising campaigns in private firms. However, the *SCLC* was originally intended to exercise wider powers. On the one hand, parliamentary debates transformed the power to gather information on its own initiative into the power to centralize information gathered by other bodies, therefore making the *SCLC* dependent on other organizations' diligence.[52] On the other hand, the *SCLC* was also supposed to be granted powers in relation to the investigation, hearing and transmission of documents. The *Constitutional Council* (*Conseil Constitutionnel*) judged, however, that such powers would be unconstitutional:[53] as the *SCLC* was supposed to be an administrative body and not a judge it could not be granted such judicial powers. Although the *SCLC* minimizes this curtailing of powers,[54] its powers, although useful, are mostly symbolic.[55] For sanctions to work concretely as a deterrent they should not only exist on paper. Individuals also need to perceive the risks of being caught.[56] If there are few administrative structures in charge of monitoring problematic behavior, or if they have only reduced powers or limited human resources, the seriousness of the probability of detection decreases sharply, resulting in the criminal offences being mostly symbolic.

The third pillar of the *Loi Sapin* relates to its criminal part. Two offences especially targeted corruption in public contracts: *prise illégale*

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[50] J Benoit, 'Responsabilité pénale des élus: Favoritisme et prise illégale d'intérêt' Encyclopédie Collectivités Locales, folio 12090-1/47; C Prebissy-Schnall, 'Corruption dans la commande publique, V. Instruments de la détection de la corruption' (2009) fasc 35 JCCMP para 84; Richer above (n 47) para 403.

[51] *Loi Sapin* art. 1er – 4.

[52] G Drouot, 'La loi n 93-122 du 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques' [1993] D 153.

[53] Décision n 92-316 DC, 20 January 1993, *Loi relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques*.

[54] J-P Bueb and A Maillé, 'Le Service central de prévention de la corruption' (2006) 57 Contrats Publics 52.

[55] P Lascoumes, *Une démocratie corruptible – arrangements, favoritisme et conflits d'intérêts* (La République des idées, Seuil 2011) 99.

[56] J Lager, 'Overcoming Cultures of Compliance to Reduce Corruption and Achieve Ethics in Government' (2009–10) 41 McGeorge L Rev 63, 71.

d'intérêt (*illegal taking of benefit*, currently article 432-12 of the Criminal code (*Code pénal*)) and *favoritisme* (*favoritism*, article 432-14 of the Criminal code). In its current form, article 432-12 of the Criminal code makes it a criminal offence for a person exercising public authority, a public mandate or a public mission to have (in)directly any interest in an undertaking while s/he takes public decisions related to this undertaking. Although article 432-12 of the Criminal code refers to 'undertaking', and not especially contracts, it is actually often applied to public procurement and other public contracts awarded by local authorities.[57] A *prise illégale d'intérêt* occurs, for instance, when members of a commission in charge of procurement have interests that conflict with some bidders.[58] Article 432-14 criminalizes an even wider range of people exercising public authority, a public mandate or a public mission when they (attempt to) provide an advantage to a third party in breaching public procurement rules.

The *Cour de Cassation* has developed an extensive approach to these two criminal offences. For instance, the *Cour de Cassation* interprets the legal text in such a way that a mere violation of the public procurement rules leads to the offence of *favoritisme* being committed.[59] With this extensive interpretation, the *Cour de Cassation* may be seeking to affirm high standards symbolically, and trying to eradicate any situations where doubt may arise regarding the interests involved in the decision-making about what the general interest should be. This symbolic reaffirmation of a requirement for impartiality could be seen as very important because first line institutions like the *MIEM* and the *SCPC*, which should assess this impartiality, are not fulfilling this role. However, the *Cour de Cassation*'s case law is mitigated by the pragmatic implementation of the Criminal code by the prosecuting authorities[60] and by pragmatic balancing of the sanctions applied (always suspended sentences, for instance, for *prise illégale d'intérêt*,[61] or discretion used to mitigate ineligibility[62]).

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[57] Benoit above (n 50) 23.

[58] For illustrations: Cass crim 21 June 2000 nr 99-86.871, [2000-IV] JCP 2411, Gross; Cass crim 3 May 2001, nr 00-82.880 *Ponzo*, [2001-IR] D 2876, [2001-IV] JCP 2216; Cass crim, 9 February 2005, nr 03-85.697, *Procureur de Bastia,* [2005] AJDA 854; Cass crim. 19 November 2003, nr 02-87.336 *Patrick M, Guy M and Gérard M*, [2004-somm comm] D 2753, G Roujou de Boubée; [2004-I] JCP 157, chron Maron, Robert et Véron.

[59] Benoit above (n 50) 71.

[60] Ibid 62.

[61] Ibid 41.

[62] Ibid 43–44.

This even strengthens the symbolism of the *Cour de Cassation*'s efforts and challenges the effectiveness of legal norms in such a way that citizens may become cynical and not inclined to value highly either the legal system or the standards that officials are supposed to apply.

This extension of criminal offences to deal with corruption and conflicts of interest in public contracts leads to inconsistency with administrative law. For instance, local authorities may take an overly cautious approach and reject a bid for fear of committing an offence, while the *Conseil d'Etat*, France's highest administrative court, may judge that such a rejection actually prevented a bidder from having free access to procurement.[63] In another instance, the *Cour de Cassation* applied article 432-12 to members of a local council who were involved in decisions related to subventions awarded to local associations they were chairing as representatives of the local council.[64] This kind of double function may actually contribute to good administration as a local council needs to know how the associations it funds work.[65] Here, institutional design needs to be revisited to ensure that relationships between local governments and their local associations rely on appropriate procedures, including for instance reporting techniques (such as the transmission of deliberations, accounts, approbation of specific acts, etc). By contrast, criminal sentences for individual councilors are not appropriate procedures for engineering such administrative reforms. Here again a strong symbol is wasted with no concrete efforts being made to resolve the real issue.

However, administrative law is also evolving to address criminal law's rigor: it seeks to develop impartiality as a more comprehensive principle. The existence of an act taken on the basis of a *prise illégale d'intérêt* or *favoritisme* does indeed need to be addressed. The sentencing of the physical authors does not lead to the act being expunged from the legal order. A traditional basis for making void an administrative act has been a soft form of power abuse (*détournement de pouvoirs*) but this is scarcely accepted by the *Conseil d'Etat*.[66] Therefore impartiality seems to have become the new principle applied to decisions,[67] to public bodies

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[63] CE, 9 May 2012, nr 355.756.

[64] Cass crim 22 October 2008, nr 08-82.068, *Janine* [2008] AJDA 2144 obs MC de Montecler.

[65] Benoit above (n 50) 18.

[66] P Cassia, 'Conflit d'intérêts et passation des contrats de la commande publique' [2012] AJDA 1040.

[67] V Degoffe, 'L'impartialité de la décision administrative' [1998] RfDA 711. *Rapport de la commission de réflexion pour la prévention des conflits*

making public decisions,[68] to the members of such a public body,[69] and to the overall process of decision-making.[70] However, the lack of specific delimitation of the concept gives the impression that all actors involved in the decision-making process, the decision and the procedure need to be neutral, as if all private and personal interests could ever fully be set aside. This highly demanding requirement may not pass the test of concrete circumstances. Yet it does highlight the ideals that French administrative culture seeks to pursue.

Against this background in which symbolism is prominent, corruption and other conflicts of interest have continued to mar public life. In 2010, a new wave of problems surfaced, leading to the Sauvé Commission being set up especially to tackle conflicts of interest in public life. According the Sauvé report, the individual consciences of public actors cannot be left alone in dealing with conflicts of interest and need to be embedded in a collective culture supporting ethics in public life.[71] A minimal statute needs to frame the relevant ethics. This statute would need to define the notion, reaffirm key values, specify a number of techniques and set up a special agency. The report defines a conflict of interest as interference between a public mission and a private interest and narrows its scope in specifying that the private interest needs to be of '*such a nature and intensity that it can reasonably be considered to be of such a nature that it will influence the independent, impartial and objective exercising of public functions*'.[72] The report then emphasizes the symbolic need to proclaim in one single legal text fundamental principles of public action such as impartiality, integrity, objectivity and probity.[73] Impartiality is especially echoed in legal scholarship as being

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d'intérêts dans la vie publique, 26 January 2011 (Sauvé report) pp 45–47 found that the principle of impartiality relates more strongly to the legality of the public decision than to the agents' behavior.

[68] B Quiriny, 'Actualité du principe général d'impartialité administrative' [2006] Rev.dr.pub. 375; E Mittard, 'L'impartialité administrative' [1999] AJDA 478.

[69] Quiriny above (n 68); Degoffe above (n 67).

[70] Mittard above (n 68).

[71] Sauvé report, part III.VI and esp pp 12 and 95; JM Sauvé, 'Conflits d'intérêts et déontologie dans le secteur public' [2012] AJDA 861.

[72] Sauvé report, p 19 and proposal nr 1, p 114 (my translation).

[73] Sauvé report, proposal nr 2; Sauvé above (n 71). Comp with the Nolan principles, section III.1 above.

the prominent justification for regulating conflicts of interest.[74] Techniques of ethical regulation, such as interest disclosure and whistleblowing, also need to be statutorily enshrined. Finally, the report calls for the setting up of a single agency, stronger than the difficult-to-identify fragmented sectoral authorities.[75] The report focuses on the problems arising from article 432-12 of the Criminal code,[76] but only touches upon public contracts without highlighting possible specificities as a tool for governing.[77] It is not clear whether the Commission considers that conflicts of interest would apply equally to public contracts or whether the regime under article 432-14 of the Criminal code is deemed appropriate.

The contents and implementation of the report illustrate the structural features of French administrative culture. Regarding its contents, the report emphasizes the role of the statute in giving a strong anchor to the overall system. It looks carefully for definitions, proclaims principles such as impartiality, and favors a central agency gathering together a range of existing authorities supported by a network of experts embedded in the various public authorities subject to the new ethical framework.[78] The implementation of this report has met with resistance, though. First, the government bills did not make any progress.[79] Secondly, bills have been proposed focused on increased transparency in the interests held by officials.[80] Parliamentary discussions revealed strong doubts related to the potential benefits of transparency in improving public trust and questioned the addition of a new agency to an already complex institutional

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[74] Eg: CL Vier, 'La notion de conflit d'intérêt' [2012] AJDA 869; J Moret-Baily and D Truchet, 'Actualité et enjeux' [2012] AJDA 865; JB Auby, 'Conflits d'intérêts et droit administratif' (2010) étude 24 Dr.adm. para 34.

[75] Sauvé above (n 71).

[76] Sauvé report, pp 30–40, proposal 12, p 116.

[77] Eg: Sauvé report 17 or 22.

[78] Sauvé report, 91–92.

[79] AN, *Projet de loi relatif à la déontologie et à la prévention des conflits d'intérêts dans la vie publique* (nr 3704, 27 July 2011); Sén, *Projet de loi relatif à la déontologie et à la prévention des conflits d'intérêts dans la vie publique* (2011–2012 nr 517, 4 May 2012).

[80] AN, *Proposition de loi organique relative à la transparence de la vie publique et à la prévention des conflits d'intérêts* (nr 3838, 18 October 2011); AN, *Proposition de loi relative à la transparence de la vie publique et à la prévention des conflits d'intérêts* (nr 3866, 19 October 2011).

landscape.[81] Thirdly, the issue of conflicts of interest has been tackled from the perspective of local representatives. The problem of the *cumul des mandats* has been discussed as a separate issue related to a wider reform of ethics in public life. A report to the President of the French Republic suggested reforming the system in a phased way: after a transition period in which an increased number of functions could not be joined, more extensive limitations would follow.[82] Gradual balancing of citizens' demands and political acceptance was advised. Another report submitted to the Senate acknowledges that the *cumul des mandats* is central to French political culture.[83] It, however, mostly recommends an updating of the functions, which cannot be exercised cumulatively without proposing a general principle to guide conflicts of interest.

Therefore, the impact of the Sauvé report thus remains limited as of July 2012: a new commission has been set up with a wider mandate to identify principles of ethics in public life. Its report focuses again on the need to define principles preventing conflicts from arising, to identify ethical duties and practices and to set up an agency for ethics in public life.[84] The report awaits further implementation. However, small steps may point to changes. For instance, recent guidelines on public procurement encourage public authorities to issue codes of conduct.[85]

French administrative culture seeks to neutralize interference between public and private interests by creating either criminal offences or administrative principles. The general interest is supposed to be the outcome of rigorously impartial authorities, officials and procedures. The means to this end are, however, difficult to achieve. Besides the fact that public authorities lack the powers to implement this ideal, this would also require not only tackling corruption and conflicts of interest in public contracts but also revisiting the overall French institutional design. By contrast, English administrative culture accepts interplay between public and private interests, although solutions need to be devised for regulating

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[81] AN, *Rapport sur la proposition de loi organique et la proposition de loi relatives à la transparence de la vie publique et à la prévention des conflits d'intérêts* (nr 3997 and 3998, 23 November 2011) discussion générale.

[82] JP Giran, *Rapport au Président de la République – 42 propositions pour améliorer le fonctionnement de la démocratie locale*, 2012, proposals 21–23.

[83] Sén, *Rapport d'information sur le cumul des mandats* (2011–2012, nr 365, 14 February 2012) 5.

[84] Commission de rénovation et de déontologie de la vie publique, *Pour un renouveau démocratique*, 2012, partie II, chap 3.

[85] Circulaire du 14 février 2012 relative au Guide de bonnes pratiques en matière de marchés publics, conclusions point 3.

this interplay. It seems to retreat from preventive and controlling measures to give more autonomy to local councils and local councilors under the general umbrella of criminal law. Both England and France have also adapted their cultures under the pressure of external factors. Entrenched specificities highlight English and French administrative cultural differences even further when it comes to the integrity of public contracts influenced by international and European law.

IV. RESISTANCE TO EXTERNAL DRIVERS

Corruption in public contracts is embedded in local and domestic settings as well as in international relations. While in England, as in France, scandals have resulted in normative and institutional frameworks bearing the marks of their respective administrative cultures, international and European initiatives have also triggered changes. Besides the EU directives on public procurement, the OECD Anti-Bribery Convention[86] has led to changes and resistance in both England and France in ways highlighting the institutional and cultural soft spots of each country. The OECD Convention is peculiar for its monitoring mechanism, the OECD Working Group on Anti-Bribery, which reviews the implementation of the Convention in successive phases. During its assessments, the working group may take into account the domestic integration of other OECD instruments:[87] for instance, the principles of integrity in public procurement[88] or the typology it has developed regarding bribery in public procurement.[89]

The current English system of fighting against corruption and its implication for public contracts needs to be explained against the backdrop of the high-profile BAE–Al Yamamah case. The key ingredients of English administrative culture can thus be highlighted: limited interest in criminal law, resistance to external pressures and institutional fragility.

In 1985, the UK government signed a major arms contract with Saudi Arabia, under which BAE was the main contractor. The Serious Fraud

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[86] Convention on combating bribery of foreign public officials in international business transactions, adopted on 21 November 1997 (United Kingdom: ratification on 14 December 1998; entry into force on 15 February 1999; France: ratification on 31 July 2000; entry into force on 29 September 2000).

[87] OECD Working Group on Bribery, *Annual Report 2009*, p 11.

[88] OECD, *Principles for Integrity in Public Procurement*, 2009.

[89] OECD, *Bribery in Public Procurement – Methods, Actors and Counter-Measures*, 2007.

Office (SFO) director launched an investigation into the conclusion of these contracts in 2004. However, the SFO director decided to discontinue the investigation on the grounds of safeguarding national and international security in 2006. Two civil society groups challenged this decision. The Queen's Bench Divisional Court, the administrative division of the High Court, decided that the SFO had exercised its discretion unlawfully but the House of Lords found it was a lawful exercise of discretion.[90] This case explains the slow implementation by the UK of the OECD Anti-Bribery Convention. Attempts to reform bribery law were shelved because of the political sensitivity of the BAE case.[91] Only when the case had been brought to an end did the reform of bribery become possible. The BAE case brings to light three main features of the English system: first, the framework developed by the UK Bribery Act 2010; secondly, its complementarity with public procurement; thirdly, the strategy followed by the SFO.

Incorporating the OECD Anti-Bribery Convention into the UK, the Bribery Act 2010[92] is the first major feature of the English system. It provides for four offences: active corruption, passive corruption, corruption of a foreign official, and corruption by a corporation or another legal entity directly or indirectly due to weak anti-corruption internal procedures. Two main elements show pragmatism. First, the Bribery Act 2010 focuses on the concept of inducing or rewarding another to act 'improperly' or requesting or receiving an advantage from doing so.[93] To assess whether an act is improper, a test '*of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned*' is applied.[94] Therefore the system hinges upon standards of behavior as applicable under a given context,

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[90] *R. (on the application of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

[91] Law Commission, *Legislating the Criminal Code: Corruption* (Law Com no 248, Cm 2370, 1998); Law Commission, *Reforming Bribery* (Law Com no 313, 2008 HC 928); OECD, *United Kingdom: Phase 2bis: Report on the Application of the Convention on Combatting Bribery of Foreign Officials in International Business Transactions and the 1997 Recommendation on Combatting Bribery in International Business Transactions*, 2008 For a detail of the various stages, see C Nicholls and others, *Corruption and Misuse of Public Office* (2nd edn, OUP 2011) 53–67; C Rose, 'The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention' [2012] ICLQ 485.

[92] Entry in force 1 July 2011.

[93] Nicholls and others above (n 91) para 1.03.

[94] Bribery Act 2010 s (5)(1).

which is far from being an objective yardstick or automatic sentence.[95] Secondly, the Bribery Act has a broad scope of application, as only a tenuous link with the UK is required for an individual to fall under it.[96] To mitigate this extensive jurisdiction, the Bribery Act provides for adequate procedures to be developed in corporate bodies so that they can bring a defence in cases of investigations for bribery. The Minister of Justice's guidance details these adequate procedures allowing a defence to be invoked. Its case studies are most relevant to public contracts with foreign countries.[97] Very much in keeping with the OECD guidance itself,[98] the guidelines emphasize the need to embed a different culture into business organizations.[99] Part of this change of culture may be demonstrated by individual organizations self-referring when they discover corruption in their businesses.[100] The guidelines also leave space for pragmatism: they accept that enterprises may have different resources and that no procedure could ever fully prevent corruption. They also advocate a risk-based approach, taking into account the individual circumstances of commercial organizations and leaving scope for prosecutorial discretion.[101]

The second main feature of the English system is the potential complementarity between criminal law and public procurement law. The Public Contracts Regulations 2006[102] implementing the EU procurement directive[103] in England provide for 'debarment', a specific basis for rejecting bidders in cases where they have been convicted of corruption.

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[95] Compare with the situation for French *favoritisme* and *prise illégale d'intérêt*, above, section III.2.

[96] For a comparison with the even more extensive American system: J Warin, C Falconer and M Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight against Corruption' (2010–2011) 46 Tex Int'l L J 1, 15–16; B Breslin, D Ezickson and J Kocoras, 'Legislative Comment – The Bribery Act 2010: Raising the Bar above the US Foreign Corrupt Practices Act' (2010) Company Lawyer 362.

[97] See Cecily Rose's contribution to this book.

[98] Rose above (n 91) 496–97.

[99] MoJ, *The Bribery Act 2010 – Guidance about Procedures which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (section 9 of the Bribery Act 2010)*, 2011, p 21.

[100] Ibid para 12.

[101] Ibid paras 49–51.

[102] SI 2006/5, reg 23.

[103] Directive 2004/18 of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] JO L134/114, art. 45.

The exclusion is mandatory, with no discretion for any public authority involved in the award of public contracts being allowed. The philosophy behind this bears on the decision-making of corporations: the threat of being automatically excluded from the market with governments across the EU could sufficiently deter corporations from taking such a high commercial risk. Currently, the EU is looking into fine-tuning debarment and developing 'self-cleaning' or '*measures taken by the interested economic operator to remedy a negative situation affecting his/her eligibility*'.[104] The English government does not have a specific statutory provision to frame self-cleaning, even though this procedure gets more attention in political[105] and scholarly[106] circles. These steps, however limited they still are, may well, in conjunction with the 'adequate procedures' of section 7 of the Bribery Act 2010, lead to concrete changes in organizational cultures, both at home and abroad.[107]

The third main feature of the English system is the role played by the SFO director, who featured prominently in the *Corner House* case discussing the BAE–Al Yamamah scandal. His office is involved in the policing and enforcement of cases related to major fraud.[108] The SFO is affected by the current English government's drive to reduce agencies. However, its specificity as an agency dealing with very complex economic crimes has so far kept it outside the restructuring of the National Crime Agency. However, this context of reorganization drives the agenda of the institution: it needs to develop a strategy to justify its own existence and its budget and, if possible, it needs to secure good success stories. The SFO has thus sought to achieve convictions under the

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[104] European Commission, *Green Paper on the Modernisation of EU Public Procurement Policy – Towards a More Efficient European Procurement Market* COM(2011) 15 final p 52.

[105] United Kingdom response to the European Commission Green Paper on the modernisation of EU public procurement policy (COM(2011) 15 final) p 21.

[106] S Arrowsmith, HJ Priess and P Friton, 'Self-cleaning as a Defence to Exclusions for Misconduct: An Emerging Concept in EC Public Procurement Law?' [2009] PPLR 257.

[107] For instance, French legal scholarship gave due attention to the Bribery Act 2010, considering how it might affect French multinationals (see E Daoud and A André, 'La responsabilité pénale des entreprises transnationales françaises: fiction ou réalité juridique' [2012] AJ Pénal 15).

[108] Criminal Justice Act 1987. Bribery Act 2010 s (10)(1) puts the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions in charge of proceedings under the act. See Lacey, Wells and Quick, *Reconstructing Criminal Law – Texts and Materials* (CUP 2010) 463–66.

Bribery Act 2010.[109] Furthermore, it succeeded recently in securing sentences for corruption in international contracts.[110]

This also means that while the UK had, for a long time, been one of the least compliant state members of the OECD Anti-Bribery Convention,[111] it now appears to have developed another approach to this convention through legislation with a wide scope of application, the principles that its guidance has set for adequate procedures, and through being a country where effective implementation of the convention seems to have genuinely started. However, one year of applying the Bribery Act is not enough to draw any definitive conclusions and to pinpoint desirable improvements.

In contrast, France has been through a different process of change under international and European pressures. The OECD Anti-Bribery Convention has been easily accepted in principle, although some of its implications met with caution. The EU public procurement directives and their current reforms are, however, receiving entrenched opposition.

The OECD Anti-Bribery Convention was incorporated in France in 2000[112] and further statutory adjustments carried out in 2007.[113] A chapter of the Criminal code was rewritten:[114] for instance, the offence of corruption was broadened in terms of international bribery. Yet the OECD maintains pressure on France to adapt its corruption law. First, France's enforcement rate is minimal: only two convictions and two acquittals up to 2010,[115] with two new sentences by 2011.[116] Therefore, to gain positive reporting from the OECD, the French Department of Justice issued guidelines encouraging increased prosecutions in 2012.[117]

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[109] Eg *R. v Patel (Munir Yakub)* [2012] EWCA Crim 1243.

[110] http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/four-guilty-in-70-million-contracts-corruption-case.aspx; http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/prison-terms-for-corruption-in-oil-and-gas-contracts-.aspx.

[111] Rose above (n 91) 487.

[112] *Loi* (nr 2000-595) 30 June 2000 *modifiant le code pénal et le code de procédure pénale relative à la lutte contre la corruption*.

[113] *Loi* (nr 2007-1598) 13 November 2007 *relative à la lutte contre la corruption*.

[114] Chapter V title III book IV.

[115] OECD Working Group on Bribery, *Annual Report 2010*, p 17.

[116] OECD Working Group on Bribery, *Annual Report 2011*, p 14.

[117] Circulaire du 9 février 2012 relative à l'évaluation de la France par l'OCDE en 2012, présentant de nouvelles dispositions pénales en matière de corruption internationale, et rappelant des orientations de politique pénale; S Scemla and A du Chastel, 'L'évaluation de la France par le Groupe de travail de

Secondly, technical issues have been highlighted. Only the public prosecutor may bring an action; victims are excluded from bringing civil actions in corruption cases.[118] This position has been nuanced in the Karachi case:[119] the families of the victims of the Karachi attacks were allowed as *parties civiles* (plaintiffs claiming damages). However, the specific nature of the case, where physical injuries were invoked and linked to corruption allegations, may not provide for a general change in the law. Thirdly, whistleblowing, which is promoted by the OECD Working Group on Bribery,[120] faces strong opposition in France as being foreign to its traditions and culture.[121] The opposition to whistleblowing is anchored in the belief that such a system would lead to abuse, and therefore personal conscience should not be entrusted with enforcing standards of integrity/conduct. This point echoes a fundamental distrust of human nature bitterly learnt from World War II memories. The past seems to prevent the integration of a new element which would potentially be a constitutive part of the internalization of integrity within organizational culture.[122]

While OECD incorporation faces only mild issues, inescapable in any incorporation of an international instrument, the French position towards EU public procurement directives also begs questions at a technical level and probably thornier ones at the level of principles. At the technical level, the European Commission suggested new mechanisms for preventing conflicts of interest and fighting corruption, excluding unsound

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l'OECD risque d'entraîner un renforcement de la répression en matière de corruption' (5 July 2012) nr 27 JCP Entreprise et Affaires act 428.

[118] C Cutajar, 'Le droit à réparation des victimes de la corruption: Plaidoyer pour la reconnaissance d'un statut des victimes de la corruption' [2008] D 1081.

[119] Cass Crim, 4 April 2012, nr 11-81.124, note H Matsopoulou, 'Affaire Karachi: Recevabilité des constitutions de partie civile pour corruption et abus de biens sociaux' [2012] Rev soc 445.

[120] OECD Working Group on Bribery, *Annual Report 2011*, p 32.

[121] J-P Bueb and A Maillé, 'Le Service central de prévention de la corruption' (2006) 57 Contrats Publics 53; O Tomescu-Hatto and others, 'Les réactions sociales à la corruption: Divulgation et système répressif' in P Lascoumes (ed), *Favoritisme et corruption à la française – Petits arrangements avec la probité* (Sciences Po Les Presses 2010) 219, 240.

[122] Contra, a dissident perspective: V Rebeyrol, 'La réception du "whistleblowing" par le droit français' (14 June 2012) nr 24 JCP Entreprise et Affaires 1386.

bidders and avoiding unfair advantages.[123] The French Senate stressed that the French legal framework was already highly comprehensive.[124] It implied that no revision should be carried out in France, despite the Sauvé recommendations issued only a few months earlier suggesting that the French framework needed development.

At the level of principles, the Europe Union would like to submit service concessions to more stringent award procedures more akin to the ones applicable to work concessions, which are a lighter version of those with which public procurement has to comply. France opposes this reform. Three items illustrate its categorical approach to the European proposals. Firstly, the Senate attempts to limit the notion of conflicts of interest as much as possible.[125] Secondly, the Senate rejects the European proposal to create domestic monitoring bodies in charge of recording corruption and conflicts of interest and investigating related claims from individuals and firms. These bodies were dismissed, most notably as not fitting within the French administrative landscape because of their hybrid administrative–judicial natures.[126] Yet they could have become strong enforcers of any regulation of conflicts of interest. The *MIEM* story highlights the destiny of such bodies in France.[127] Thirdly, the Senate took a defensive and categorical stance on the classification of public contracts under public procurement or delegation/concession, a most revealing aspect of French administrative culture. As section III.2 mentioned, this distinction is part of the French approach to corruption in public contracts and aims to promote transparency in the award of public contracts. However, the EU has been trying to make the system more uniform so as to avoid loopholes.[128] France has expressed strong defiance

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[123] European Commission, *Green Paper on the Modernisation of EU Public Procurement Policy – Towards a More Efficient European Procurement Market* COM(2011) 15 final pp 48–53.

[124] Sén, *Résolution européenne relative au Livre vert sur les marchés publics* (2010–2011 nr 128, 2 June 2011).

[125] Sén, *Résolution européenne sur les propositions de directive 'marchés publics' et 'concessions de services'* (2011–2012 nr 112, 13 March 2012).

[126] Sén, *Proposition de résolution européenne sur les propositions de directive 'marchés publics' et 'concessions de services'* (2011–2012 nr 381, 16 February 2012).

[127] See above section III.2.

[128] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, *Fighting Corruption in Europe*, COM(2011) 308 final 6 June 2011, para 4.2; and a triple proposal: Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts 20 December 2011 COM(2011) 897 final art. 21;

in the face of threatening changes, warning against disturbing the balance reached by the *Loi Sapin*.[129] Furthermore, the application of public procurement regulations to concessions would rigidify the system, leading to increased costs for public authorities.[130] This seems to be pure speculation as no impact assessment is invoked. Finally, the Senate also strongly regrets the choices the European Commission has made regarding concessions, especially despite French 'strong reservations'.[131]

Therefore the French position regarding the EU proposals needs to be watched carefully once the European proposals become definitive. Resistance to changes or symbolic adaptation are likely before more fundamental changes to French administrative culture occur. As for English administrative culture, changes in French administrative culture are driven by external factors but are only gradually woven into administrative practice. Various layers of resistance, including categorical rejection, political hindrance, institutional fragility, patchy implementation and low enforcement, make the realization of EU and OECD standards slow and laborious. The law is only one of the ingredients in the effective institutionalization of an administrative culture of integrity.

V. LAW: FACILITATING INTEGRITY IN ADMINISTRATIVE CULTURES?

Law and administration interplay in facilitating as well as in regulating corruption. Administrative culture may be used to explore transformations in webs and logics across techniques, institutions and processes, linking legal norms and standards to their implementation. Administrative culture slowly changes as the legal framework and the techniques, institutions and processes in administration are adapted. Central to the moving of administrative culture towards integrity is the process of converting standards into concrete decisions and the need for public

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Proposal for a Directive of the European Parliament and of the Council on public procurement 20 December 2011 COM(2011) 896 final art. 36; Proposal for a Directive of the European Parliament and of the Council on public procurement on procurement by entities operating in the water, energy, transport and postal services sectors 20 December 2011 COM(2011) 895 final.

[129] Sén, *Résolution européenne sur les concessions de service public* (2010–2011 nr 96, 14 April 2011) last sentence.

[130] Sén, *Rapport sur les propositions de directives marchés publics et concessions de services* (2011–2012 nr 465, 6 March 2012) 21–22.

[131] Ibid p 3.

actors to internalize integrity in their decision-making. The law could be facilitative of these transformations. Relying on the law in this way requires three steps: first, understanding the role of the law within administrative culture; secondly, understanding how the law shapes the relationships within which administrative cultures develop; thirdly, using the law over time, as facilitating processes for change towards integrity, taking into account lessons from the past or abroad.

First, law needs to be integrated in administrative culture in a way suitable for the relevant administration if the law is to be used for embedding integrity within that administration. The traditional roles of the law in relation to administrative culture differ from one legal system to another and need to be taken into account before the law is relied on for implementing changes. England uses the law instrumentally, as a deterrence technique or to nudge actors towards changes. Institutions such as the SFO tend to enforce criminal norms in England, although more systematic research on this enforcement, its consistency and the effectiveness of criminal law is required. Relating to the nudging use of the law, official statements connect either criminal law or procurement law to cultural changes in organizations, but a more detailed articulation of adequate procedures and self-cleaning still needs to be worked out. France, in contrast, seems to have developed a legal culture which is highly detached from the administration that the law is supposed to regulate. Symbolism is prominent in how the law is interpreted and implemented, with administrative bodies enjoying limited powers. Therefore, comparative research invites us to look for techniques and processes that allow the law to adjust to administrative reality and the administration to follow legal developments. Comparative research helps us to suggest that more informal tools would be in line with English administrative culture and more formal tools with French administrative culture. Yet the consequences of a gradual embedding of the law within administrative reality may entail very different consequences for the fostering of a culture of integrity, depending on the law's effectiveness in responding to public officials' needs and the common good.

Secondly, law is part of the institutional design within which administrative cultures develop: indeed it delineates the interplays between public and private spheres. Legal changes may be needed to adapt this delineation to the needs of a modern administration relying heavily on private actors to carry out public missions for the common good. In France, all attention is devoted to isolating the general interest from any influence from private interests, as widely understood. This separation is epitomized by criminal offences that the *Cour de Cassation* has interpreted extensively but mostly symbolically. The adverse consequences of

this approach are noticeable when local councils reject bidders too hastily because they fear conflicts of interest, or when the institutional design leads to functional conflicts of interest without providing mitigating measures, as section III.2 showed. In England, the distinction between public and private interests is not so rigorous. Yet some situations need to be regulated for the specific risks they cause to arise, and need to conform to ethical frameworks following the Nolan principles. Currently, more scope is given to local practice and individual officials to decide what they deem to be the proper conduct of their office, with remote reliance on criminal law in extreme cases. Therefore, the distinction between public and private spheres needs to take into account how the law frames the interfaces between central and local government. Relying on this provisional conclusion, further research could firstly investigate if and how France deals with a potential fragmentation of the public interest when it seeks to exclude all situations of apparent conflicts from its institutional design. Secondly, it could consider if and how England develops techniques to ensure a minimum level of uniformity across local government through means other than the law (eg through professional standards and requirements applicable to specific office holders or national training programs). This would help to clarify risks, develop strategies and understand what legal changes may be required so that the institutional design ensures a distinction between the public and private spheres that best fits an administrative culture of integrity as understood in either country.

Finally, the comparison between English and French administrative cultures highlights the potential contribution of the law in establishing processes of changes in administrative cultures. Many factors come together to bear on changes in administrative cultures. Changes, such as the role of lawyers in the administration, techniques of administrative or financial control over public authorities and their spending, and processes of accountability, to name a few, all impact on embedding a culture of integrity in administration. They possibly have a conflicting influence and blur the overall understanding of how an administrative culture may be transformed into a culture of integrity. Such transformation is not a linear development. Changes also come across hesitations and resistance. If both England and France seem to react to scandals as they arise, no trace could be found of lessons learnt from past investigations. Although corruption and conflicts of interest have been recurring in their modern forms for two centuries, few official efforts seemed to have been made to analyze patterns of interactions between legal, ethical and social norms, institutions, administrative requirements and contextual incentives over this period. Yet reflecting on these interplays may help to formulate key

principles related to institutional design more clearly and to embed ethics through legal norms. In this respect, the law may set a framework in which reflective practice and systemic assessment of recurring weaknesses are integrated in the institutional design, connecting an awareness of the values of integrity to their concrete implementation in the minds of individual actors. If individual commitments to integrity and factual implementation are indeed outside the law's reach, the law may facilitate these transformations. To do so, it would need to remain in line with administrative cultures while moving them forward, to address both public/private and local/central institutional design and learn lessons from the past and abroad. The best mix is yet to be found!

8. Policy considerations when drafting conflict of interest legislation

Richard E. Messick

PURPOSES

Conflict of interest laws prevent decisions about public policy from being tainted by the financial interests of the decision-maker. Whether a question of what government should buy, whom it should hire, or any of the other myriad of decisions governments regularly make, citizens of modern states expect that when weighing up the costs and benefits of alternative courses of action, policymakers will not be influenced by how the decision will affect their wealth or income. Conflict of interest laws can also increase citizen confidence in government. As the head of one ethics agency has explained:

> An effective conflicts of interest system [creates a culture of integrity]. … Mayor Bloomberg in New York City is a billionaire. And when he was first elected, we received phone calls from all over the world and there were stories in newspapers all over the world suggesting it was a conflict of interest for him to own all that he owns and be mayor of the City of New York. Those phone calls and those stories stopped the day after our agency issued an advisory opinion approving the plan we worked out for the mayor to avoid conflicts of interest. In other words, a conflicts of interest system can help create a sense of public confidence in the integrity of public officials.[1]

A well-written conflict of interest law can also take the politics out of ethics. Many political decisions – from how to combat the global recession to whether and where to build a new oil refinery – involve complex technical, economic, and legal issues. Rather than contesting such decisions on their merits, opponents often find it easier to claim the

[1] Mark Davies, 'A Practical Approach to Establishing and Maintaining a Values-Based Conflicts of Interest Compliance System' paper delivered at IV Global Forum on Fighting Corruption, Brasilia, June 2007.

decisions were 'wrong' because a conflict of interest was involved. But when the rules are clear and adhered to, such claims will have little credibility.

Many kinds of considerations beyond financial considerations can cloud or impair an official's judgment. An official educated in the United Kingdom may favor British interests. Someone whose property was destroyed during the Iraqi occupation may be biased against today's government in Iraq. In countries where officials are chosen by elections, an elected official's political interest in pleasing those who voted for him or contributed money to his campaign may affect his judgment. Examples of such 'political' conflicts include a Member of Parliament pressuring a government agency to award a contract to a supporter or a minister hiring those who voted for her.

While such biases can distort an official's judgment, to date no country has enacted legislation that effectively controls them. For one reason, it is much harder to measure the impact of a 'non-financial' bias. An official educated in the United Kingdom may favor British interests when making decisions, but he may have come away from his experience in Great Britain with distaste for the British and disfavor their interests. It thus very hard to make the kind of distinctions required to write a law.

This is particularly true of political conflicts. A Member of Parliament elected with the support of private banks may introduce legislation that favors private banks as a reward for their support. But it may also be true that the member long ago concluded that national prosperity is more likely with a strong private banking sector. Rather than 'buying' his views through campaign contributions, private banks may have contributed to his campaign because of his already formed views, and his legislation, rather than rewarding the banks for their support, may reflect his genuine opinion on what is best for the nation.

Preventive vs Disclosure Laws

Conflict of interest legislation operates in two ways: it either prevents decision-makers from being put into a position that *might lead* him or her to take account of a personal consideration or else it ensures that the official's supervisor or the public generally is alerted to the possibility that a personal financial issue may cloud the decision.

Preventive laws ensure the conflict never affects the decision by making it an offense for an official with the interest to participate in the decision. The classic example is the award of a contract to a firm the official owns. A preventive law bans officials from awarding contracts to firms they own.

Disclosure laws require officials to reveal their interests so that potential conflicts can be examined before a decision is taken. Depending upon to whom the disclosure is made, it will allow their supervisor, the legislator, the media, or even the public at large to judge whether they should participate in a decision. Or, if they do make a decision, whether it reflects self-interested bias. Over 120 countries now require public servants to disclose – either to their supervisor, an anticorruption agency, or to the public – what properties they own and what outside interests they have.

Pros and Cons of Preventive vs Disclosure Laws

Where to draw the line between conflicts that should be outlawed per se and those where disclosure is sufficient depends upon the level of public trust in government and the country's size. Where the level of public trust is high, citizens may be willing to accept a rule that permits an agency head to hire his or her relatives so long as the relationship is disclosed in advance. Where the public is suspicious of government, a rule banning the hiring of relatives may be needed.

In drafting conflict of interest legislation, a country's size cannot be ignored. If the brother of a hospital administrator is a leading heart specialist, an absolute ban on the administrator hiring a close relative will deny patients the brother's services. In a populous nation with a large pool of heart specialists, the cost may be minimal. In small nations the cost could be significantly greater. Likewise, banning an official from participating in any decision that might affect a relative, no matter how distant, may have little impact in a government with a large number of technical specialists. But in a government with fewer people, a broad ban could deny government the expertise required to make a wise decision.

The flexibility disclosure laws provide in addressing conflicts is why a number of countries use them to address possible political bias. Members of a legislature, for example, will disclose who contributed to their campaign and how much each contributor gave. It is then up to the public at the next election to decide whether the contributions biased his/her actions or not.[2]

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[2] Alessandra Fontana, *Money in Politics: Transparency in Action*, Bergen (U4 Anticorruption Resource Center, 2007).

Conflict of Interest as Financial Conflict

Almost any illegal or corrupt conduct can be characterized as a 'conflict of interest' in the sense that the conduct 'conflicts' with the public interest. But, as the Organisation for Economic Co-operation and Development has explained, among the industrialized nations 'conflict of interest' has come to be limited to those situations where there is 'a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities'.[3] The most obvious conflicts of interest involve a direct clash between the personal and/or financial interest of a government decision-maker and citizens' interest in good public policy, for example, an employee awards a contract to a firm which he owns.

Besides what is termed 'naked self-dealing,' the other kinds of corrupt behavior generally classified as 'conflicts of interest' include:

Nepotism. An official in the position to hire a relative or a friend is also in a position where his judgment may be impaired. He may choose the relative or friend over a more qualified individual. One example is where an employee is given a high performance rating by a relative or friend. The relationship clouds the manager's judgment. There is thus a conflict between the duty owed to the public – an accurate rating – and the duty owed to the friend or relative – favorable treatment.

Undue influence. In 1997 then Canadian Prime Minister Jean Chrétien lobbied the head of the Canadian development bank to make a loan to a tourist hotel that adjoined a golf course he owned. Although the bank's head was technically independent of the government, in deciding whether to extend a loan his judgment could well have been impaired by the Prime Minister's lobbying. Thus such situations, where one official lobbies another official, are treated as conflicts of interest.

Abuse of office. In the late 1970s U.S. Congressman Mario Biaggi lobbied an agency of the American government to award contracts to Wedtech, a company represented by a law firm in which he was a partner. As Wedtech received more and more contracts from the federal government, it hired Biaggi's firm to do more and more work, thus paying it ever higher legal fees. Biaggi argued that there was nothing corrupt about this arrangement as the firm provided services for the fees it received.

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[3] OECD, *Managing Conflict of Interest in the Public Service*, Paris: Organization for Economic Cooperation and Development, 2008, p. 58.

The American courts disagreed.[4] They ruled that Biaggi's judgment had been impaired because he would feel grateful to Wedtech for hiring his law firm and his judgment when advocating on its behalf would thus be colored.

Payment for public service. An employee of the Boeing Company quits to work for the U.S. Department of Defense. Boeing agrees to make regular payments to him over a five-year period as part of his deferred compensation policy. The conflict of interest arises because the employee's judgment may be colored by his ongoing financial relationship with Boeing. The solution adopted in the United States and approved by its Supreme Court is for the employer to make a lump sum payment to the individual before he or she joins the public payroll.[5]

Private gain from public office. When public officials leave office, they often try to capitalize on their personal relationships with people still in government, sometimes to advance their own interests, sometimes to advance the interests of clients who hire them. When making a decision affecting the former official or his clients, current employees' judgment may be skewed by their friendship for the former official. A particular example that is becoming more important with the growth of international trade and investment agreements is 'side switching'. A negotiator for a government leaves and provides advice to the government on the other side. Or a lawyer who represented the government in a case against a private firm leaves the government and appears as an advocate for the company in the same case.

Creating an Agency or Agencies to Regulate Conflicts of Interest

Although there is no consensus on how to structure agencies to enforce conflict of interest laws, it is common to find different agencies for the different branches of government. Parliaments are reluctant to subject themselves to control by any agency of the executive and thus almost always have their own office, committee, or entity responsible for monitoring members' conflicts.[6] The judiciary typically also has an office, often located in the Judicial Council, for overseeing possible conflicts of judges. Often within the executive branch is a central agency,

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[4] U.S. v. Biaggi, 909 F. 2d 662 (2d Cir. 1990).

[5] Crandon v. U.S., 494 U.S. 152 (1990).

[6] For a discussion of the methods the American state legislatures have adopted, see Peggy Kerns and Luke Martel, *Ethics Committees: Internal Oversight of Ethics Laws* (Washington, DC: National Conference on State Legislatures, 2008).

typically a civil service commission that oversees conflicts of employees in all ministries. When there is a violation of the law, the public prosecutor will also become engaged.

One problem with a common agency is that the conflict issues differ from ministry to ministry. Although the principles are the same, the types of conflicts that may arise in the health ministry will be different than those that arise in the oil ministry. One solution, which the U.S. adopted in 1978 to bring some consistency to executive branch rules, is the creation of a small, central office to set broad principles with each agency left to devise their own detailed set of rules consistent with these principles.[7]

Techniques for Mitigating Conflicts

There are four means to mitigate conflicts of interest: recusal, divestiture, disclosure and incompatibility. Three of them are preventive measures in that, as explained above, they prevent any conflict from arising. Recusal means excusing oneself from participating in a decision. If the member of a procurement committee owns an interest in one of the companies bidding for the contract, he or she declines to participate in the contract award decision. Divestiture means that the official sells off the conflicting interest. A person named as minister of defense would sell, or divest himself, of all stocks in defense contractors. Incompatibility refers to the holding of two or more positions that may be in conflict. Many countries have laws that prohibit members of parliament from serving on the board of directors of a company. Armenia bans members of parliament from managing a private company.

Disclosure is the most common method of addressing conflicts.[8] An employee participating in a decision over where to build a road might be required to disclose to his superior that he owns land near one of the possible paths being considered. His superior might decide that he should recuse himself from the decision-making process. Or he might allow him to participate but take into account his potential bias when weighing his advice.

Special considerations apply when regulating conflicts of interest involving members of parliament. Unlike civil servants, parliamentarians

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[7] Jane Ley, *Managing Conflicts of Interest at the U.S. Federal Level*, December 2001, pp. 14–16.

[8] Richard E. Messick, *Income and Assets Declarations: Issues to Consider in Developing a Disclosure Regime* (Bergen: U4 Anticorruption Resource Center 2009).

do not hold their job for life; they may be voted out of office at the next election. In addition, in many countries the job of a legislator is not a full-time position and the legislator is thus not paid enough to support himself and his family. So an outside job, as a lawyer, business owner, or whatever is necessary.[9]

In the case of members of parliament, many countries require each member to disclose to the public their financial holdings: stocks owned, companies they work for, and so forth, so that the public can judge whether they are putting their own interests or those of their political supporters ahead of the public interest.[10]

Applicant Disclosure

Disclosure can also be required of those wishing to do business with the government. 'Applicant' disclosure can be required of an entity bidding on government business or requesting a permit or license from the government. Bidders on public contracts or applicants for a government position are required to identify any ties with government officials expected to participate in the decision. Example: 'Mr. Lee, an owner of a company bidding on a contract, is the brother of Dr. Jho, the Ministry's Director of Purchasing.'

Because applicant disclosure alerts other firms to an actual or potential conflict, it can be an important source of information on possible violations. Competitors have a financial interest in ensuring the competition is fair, and thus a reason for 'blowing the whistle' on violations. A second source of information on violations is fellow employees. When properly trained on what the rules are, and offered ways to blow the whistle on colleagues that violate them, the honest employee can be a key element in an enforcement effort.

Rules vs. Standards

Like anticorruption laws generally, those that aim to prevent or regulate conflicts of interest can consist of a set of detailed rules or, alternatively, contain broad standards. The former would list separate provisions that prohibit self-dealing, nepotism, undue influence, abuse of office, and so

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[9] Quentin Reed, *Sitting on the Fence: Conflicts of Interest and How to Regulate Them* (Bergen: U4 Anticorruption Resource Center 2008).

[10] National Democratic Institute for International Affairs, *Legislative Ethics: A Comparative Analysis*, Washington, DC: NDI, 1999.

forth. This approach requires a careful evaluation of what conduct society is willing to tolerate and what it wants to condemn.

Alternatively, the legislation could simply ban 'conflicts of interest' and leave it to an enforcement or ethics agency to flesh it out. The problem with such sweeping language is that bureaucratic and political rivals may invoke it to question perfectly innocent actions. Or the press may recklessly charge conflict of interest on the basis of information provided by an opponent.

In a highly charged political environment, the preferable approach is to write a law that is easy to understand, simple to apply, and demands little or no judgment in determining its applicability. This will minimize the use of ethics laws for political purposes. Laws written this way are said to contain 'bright line rules' and are contrasted with those containing standards, which are open to interpretation by enforcement agencies, the press or the public.[11]

Recommended bright line rules

Below is a list of ten suggested bright line rules.[12] Together they prohibit the types of conduct considered to be egregious, 'hard core', 'conflicts of interest':

1. Misuse of office. You may not:
   - (a) take any action or fail to take any action as a government officer or employee if doing so might financially benefit
     - (i) you;
     - (ii) a relative in the __ degree;
     - (iii) any person or entity for which you are an attorney, agent, broker, employee, officer, director, trustee, or consultant;
     - (iv) any person or entity with which you have a financial relationship;
     - (v) any person or entity with which you had a financial relationship during the previous twelve months; or
     - (vi) any person or entity from which you received a gift, or

[11] Richard E. Messick, *Writing An Effective Anticorruption Law,* Washington, DC: World Bank, PREM Note 58, 2001.

[12] These are adapted from Mark Davies, 'Ethics in Government and the Issue of Conflicts of Interest,' in Yassin El-Ayouty, Kevin J. Ford, and Mark Davies, eds., *Government Ethics and Law Enforcement: Toward Global Guidelines* (Westport, CT: Praeger, 2000).

any goods or services for less than fair market value, during the previous twelve months; or

(b) hire any individual in violation of the rules of the Civil Service Commission.

2. Gifts. You may not request or accept a gift from anyone that you know or should know is doing business with the government.

3. Gratuities. You may not request or accept anything from any person or entity other than the government for doing your government job.

4. Confidential information. You may not disclose confidential government information or use it for any non-government purpose, even after you leave government service.

5. Appearances and representation. You may not accept anything from any person or entity other than the government to communicate with any agency of the government or to represent any person or entity in a matter that involves the government.

6. Future employment. You may not discuss possible future employment with anyone that is doing business with your government agency.

7. Post-government employment. For ___ year(s) after leaving government service, you may not accept anything from any person or entity to communicate with your former government agency; you may never accept anything to work on any particular matter that you personally and substantially worked on while with the government.

8. Inducement of others. You may not cause, try to cause, or help another officer or employee of the government to do anything that would violate any provision of the Conflicts of Interest Law.

9. Prohibited outside positions. You may not be a paid attorney, agent, broker, employee, officer, director, trustee, or consultant for any person or entity that you know, or could reasonably learn, is doing business or seeking to do business with the government or that you know, or could reasonably learn, has or is seeking a license, permit, grant, or benefit from the government.

10. Prohibited ownership interests. You may not own any part of a business or entity that does business with your government agency nor may your spouse nor may any of your children who are less than __ years old.

The conduct identified in each of these ten sections would be made illegal. The punishment for violations could be a mix of administrative and criminal sanctions. Minor violations might be punished through a reprimand or demotion in rank determined by the employee's agency with an appeal to the civil service commission. More serious violations could be referred to the public prosecutor for criminal action. These provisions could then be complemented by a law requiring public officials to disclose details of the personal finances so that the public or their supervisors could determine whether there were decisions they should recuse themselves from.

Effective implementation

Implementing conflict of interest laws requires more than just punishing those who violate them. A series of positive steps – education and training of government employees, the press and civil society and an advance ruling system – is essential as well.[13]

In the American federal government all new employees are trained on ethics rules. By law, each year all senior officials are trained on ethics principles and standards, any special rule applicable to their agency, and the conflict of interest statutes. They must also be given the names, titles, and office addresses and telephone numbers of the designated agency ethics official and any other agency ethics officials available to advise them on ethics issues. Each agency has one or more officials designated to answer questions about the ethics rules that apply to that agency. These officials must receive refresher training every two years on ethics matters.

In addition to training, the federal government has created an advance ruling system. Employees concerned about whether proposed conduct is lawful or not can ask the Office of Government Ethics (OGE) to give them an opinion on its legality. If, based on the facts disclosed, OGE concludes that the action proposed would not constitute a violation, the employee cannot later be prosecuted for the action.

An advance ruling procedure has three benefits. First, it creates a body of decisions to help guide both employees and courts about what is

[13] Mark Huddleston and Joseph Sands, 'Enforcing Administrative Ethics' *Annals of the American Academy of Political Social Science*, vol. 537, no. 1 pp. 139–49 (1995).

permitted and what is not. Second, it can turn what could be an adversarial relationship into a cooperative one as civil servants work with ethics officers to structure transactions in ways consistent with the law. Finally, if a questionable action is later discovered that was not blessed with an advance ruling, it is one sign that intent to evade the law was present.

CONCLUSION

A system for managing conflicts of interest legislation serves two important ends. First, it bolsters citizens' confidence in government by providing assurance that decisions are based on the best interests of the public as a whole rather than those of the official making the decision. Second, it helps prevent corrupt behavior by reducing the likelihood that decisions will advance personal interests at the expense of the larger public interest.

But regulating conflicts of interest is not costless. It can deny government quality people or it can prevent qualified officials from participating in decisions. Furthermore, in the U.S., where the regulation of ethical conduct is extensive, a growing number of critics contend that ethics laws have reduced trust in government. '[E]ver more transparency, ever higher standards and tighter regulations create ever more violations of ethical rules, more scandals and more investigations, thus undermining the legitimacy of the institution and destroying public trust and creating collective costs that far outweigh the individual benefits'.[14] As a recent study for the European Union concluded, to the degree this is the case policymakers confront a paradox. Citizens across the EU demand more ethics regulations in the name of boosting confidence in government, but to the extent that more regulation leads to more charges of unethical or corrupt behavior, confidence will be lessened.[15] Citizens and policymakers must thus be mindful of both the costs as well as the benefits when writing conflict of interest legislation.

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[14] Nathalie Behncke, 'Ethics as Apple Pie: The Arms Race of Ethical Standards in Congressional and Presidential Campaigns,' Leuven: June 2005.

[15] C. Demmke and colleagues, 'Regulating Conflicts of Interest for Holders of Public Office in the European Union: A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU Institutions', Maastricht: European Institute of Public Administration, 2007.

9. Conflict of interests of government members and the risk of corruption: An assessment of pre-revolutionary Tunisia and Egypt

Carolyn Moser

INTRODUCTION

'The Arab spring is about justice and equity as much as it is about democracy,' Jean-Marie Guéhenno explained in an article published in the *New York Times* in April 2011.[1] This statement encapsulates the complexity of the protests at stake, as the claims put forth were of social, economic, political and moral nature at once. Autocratic rule has been a major source of discontentment in the Middle East and North Africa (MENA)[2] region. But the frustration and disillusion prompted by the consequences of widespread corruption have equally played an essential role in triggering the revolutions in late 2010/early 2011.[3]

What the protesters were essentially demanding was better governance, not to say good governance. Even though the exact content of what constitutes 'good governance' remains vague in the absence of a consensual definition, some key features have been identified by the Venice Commission: accountability, transparency and participation. In turn the infringement of human rights and the absence of the rule of law are

[1] Jean-Marie Guéhenno, 'The Arab Spring Is 2011, Not 1989' *The New York Times* (New York, 11 April 2011).

[2] According to the World Bank, the following 21 countries belong to the MENA region: Algeria, Bahrain, Djibouti, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Malta, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, West Bank and Gaza, Yemen.

[3] Stuart Levey, 'Fighting Corruption after the Arab Spring' (*Foreign Affairs*, 16 June 2011) http://www.foreignaffairs.com/print/67826 accessed 26 April 2012.

characteristic of bad governance regimes, as is (large-scale) corruption.[4] One major factor which facilitates corrupt behaviour is the lack of preventive measures and the absence of effective accountability mechanisms.

The regulation and management of conflicts of interest – understood for the purpose of this chapter as 'an *intrapersonal* conflict arising within a human or an institution which is entrusted with […] decision-making'[5] – are of utmost importance in this context. As we will demonstrate through the examples of pre-revolutionary Tunisia and Egypt, the lack of adequate conflict of interest legislation applying to members of government as well as inexistent or incomplete implementation thereof has left doors wide open to corruption of leading political figures. But shortcomings in this regard have only become a matter of general public debate in the aftermath of the Arab Spring. By consequence much information stems from journalistic sources, even though academics increasingly show an interest in the topic.

The present chapter underlines the general significance of encompassing conflict of interest regulation for public officials and members of government as a preventive anti-corruption measure (part I.A). Prevention being part of a wider governance framework, common governance patterns of the MENA region will be outlined (I.B). More detailed retrospective case studies on pre-revolutionary Tunisia and Egypt will be developed in the second part to illustrate the manifest negative effects of rampant conflicts of interest of members of the executive (II.A) – in terms of scale (II.B) and impact (II.C). Finally some remarks on how to address the matter in the MENA region in the future will be made (part III).

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[4] European Commission for Democracy through Law (Venice Commission), 'Stocktaking on the notions of "good governance" and "good administration"' Study no. 470/2008 CDL-AD(2011)009 §§ 66–69.

[5] Anne Peters, 'Conflict of interest as a cross-cutting problem of governance' in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press 2012) 5.

I. THE WIDER CONTEXT OF CONFLICT OF INTEREST REGULATION AND MANAGEMENT

A. The Significance of Conflict of Interest Regulation in Preventing Corruption

In the public sector – the focus of our attention – a conflict of interest has been defined as a 'conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which could improperly influence the performance of their official duties and responsibilities.'[6] This definition applies to actual, not to perceived or potential, conflicts of interest, and the interest(s) can be of any nature. Furthermore the explanation at stake entails an element of eventuality – the public officer's proper performance of official duties could but does not necessarily have to be compromised by private interests. Preventing the eventuality from becoming a reality thus constitutes the primary objective of a conflict of interest regulation.

Conflicts of interest of both political leaders and members of government are subject to growing public concern worldwide. The matter is often addressed in the context of electoral campaign financing as the amount of money spent – and thus raised – for campaign purposes is increasing. Lobbying, particularly in industrialized countries, poses another considerable risk in this regard, as does the interlacement of political and economic elites. Public officials manage and allocate considerable amounts of money, for instance in public procurement procedures or privatization processes, and the potential of high-ranking public officials, especially of members of the executive, to find themselves in a situation of conflict of interest is heightened for several reasons: compared to junior-level colleagues, their decisional leeway is generally wider, their level of power and influence more pronounced, and their (informal) network broader.

To avoid improper influence through private-capacity interests, legislation on conflicts of interest should contain disclosure requirements on public officials' outside activities and additional employment, assets, investments and gifts or benefits potentially leading to a conflict of interest; restrictions on private sector employment after leaving public

[6] Organization for Economic Co-operation and Development (OECD), Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service [C(2003)107] Annex, Preface §10.

office; and incompatibility provisions.[7] It should moreover comprehend provisions and sanctions in case of non-respect. Legislation in this matter should ideally also comprise means to manage and resolve actual conflicts, for instance through recusal requirements from involvement in decision-making processes, or by divestment or liquidation of the private interest as proposed by the OECD.[8]

As aforementioned, conflict of interest regulation is part of a wider prevention scheme, which in turn falls within the scope of a broader governance regime. Before turning our attention to Tunisia and Egypt, governance patterns characteristic of the MENA region will therefore be identified.

B. Ascertaining Common Governance Patterns in the MENA Region

The realities one can encounter in the oil-rich Gulf States greatly differ from the situation in countries with few natural resources compared to their population, including Egypt, Yemen or Morocco. But despite considerable economic and socio-economic disparities, shared political characteristics can be identified throughout the region. First, in the vast majority of MENA countries political power tends to be bundled in the executive branch: with some exceptions, the executive has extensive powers and controls the legislature as well as the judiciary.[9] This in turn leads to a dysfunctional system of checks and balances.

Second, the recruitment and appointment of members of government is often limited to a small group of family members and close friends, a situation being particularly apparent in the Gulf monarchies.[10] Besides leading the public affairs of their country, these elitist groups also tend to control a considerable (not to say major) part of their country's economic resources and activity. This 'hold on the economy'[11] inevitably heightens the potential for conflicts of interest.

Similarities do also exist as regards the general perception of corruption. With reference to the research carried out by Alina Mungiu Pippidi

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[7] Quentin Reed, 'Sitting on the Fence – Conflicts of Interests and How to Regulate Them', U4 Issue 6 (2008) 13–14.

[8] OECD (n 6) 1.2.2.b); 2.3.1–2.3.3.

[9] Transparency International, 'Corruption in the MENA Region' (2009) Working paper 2/2009 2–3.

[10] Marie Chêne, 'Overview of Corruption in MENA Countries' (2007) U4 Expert answer 3–4.

[11] Samir Aita, 'Follow the money' *Le Monde diplomatique* – English edition (Paris, April 2011).

et al., we argue that in abstract terms the governance regime of pre-revolutionary Tunisia and Egypt can be described as a competitive particularism with society organized in a closed access order. In practical terms this means that the State was perceived as an instrument of personal enrichment of a few privileged and influential persons to the detriment of the many poor citizens. Unequal treatment being the societal norm, the citizenry's predominant motivation was to belong to the small group of privileged people rather than to change the existing structures, which aggravated the societal divide.[12] Yet the Arab Spring has demonstrated that the acceptance of social injustices and autocratic government patterns is breaking up. In this regard, Tunisia's and Egypt's lower scores in the 2011 Corruption Perceptions Index (CPI),[13] and partly in its 2012 version compared to 2010,[14] can be seen as an indication of the fact that the public awareness of corruption has increased, and that many Arab citizens now dare to publicly express the discontentment they feel.[15]

Thirdly and lastly, common patterns can be identified as regards conflict of interest regulation. No encompassing assessment of national provisions, including those governing conflicts of interest of members of the executive, has been undertaken in the MENA region so far.[16] The analysis of *de jure* and *de facto* issues carried out by the NGO Global Integrity provides, however, valuable information in this regard; this

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[12] Alina Mungiu Pippidi (ed and main author), *Contextual Choices in Fighting Corruption: Lessons Learned*, Report 4/2011 (Oslo Norwegian Agency for Development Cooperation 2011) 10–11.

[13] The CPI, developed and published by the international anti-corruption NGO Transparency International, ranks countries on a scale ranging from 0 (lowest score) to 10 (best score) according to perceived levels of public sector corruption. In 2012, countries have been ranked on a scale from 0 to 100.

[14] CPI 2010 (178 assessed countries): Tunisia ranked 59 (4.3/10) and Egypt ranked 98 (3.1/10). CPI 2011 (183 assessed countries): Tunisia ranked 73 (3.8/10) and Egypt ranked 112 (2.9/10). CPI 2012 (176 assessed countries): Tunisia ranked 75 (41/100) and Egypt still ranked 112 (32/100).

[15] Arwa Hassan, 'Corruption Perceptions Index 2011: After the Arab Spring' (*Transparency International*, 30 November 2011) http://blog.transparency.org/2011/11/30/corruption-perceptions-index-2011-corruption-and-the-arab-world/ accessed 25 May 2012.

[16] In the context of the third intersessional meeting of the Open-Ended Intergovernmental Working Group on Prevention focusing, amongst others, on conflict of interest regulation, only two MENA countries, namely Bahrain and Tunisia, have submitted a report pertaining to the matter.

holds despite certain methodological limitations of the assessment, notably the limited aspects of conflict of interest regulation covered[17] and potential errors in judgment of the evaluators.[18] What the assessments conducted from 2008 to 2011 in thirteen MENA countries[19] above all reveal is a striking implementation gap: even though most MENA countries are vested with at least some conflict of interest legislation (including provisions applying to members of government), implementation and enforcement thereof are non-existent. Yet almost all MENA countries are State Parties to the United Nations Convention against Corruption (UNCAC, 2003), and have ratified the instrument – including its provisions on preventing conflicts of interest contained in article 7.4 – with the exception of Syria and Saudi Arabia.[20] It might therefore not be entirely mistaken to assume that governments have initiated the ratification process to internationally demonstrate an anti-corruption engagement, but have then failed to follow up on their commitment at the national level by any concrete action – which in turn is indicative of a lack of political will.

The following part will show that these general governance patterns – autocratic rule by a small elitist circle, the conception that the State primarily serves the rich, and the absence of encompassing and adequately implemented anti-corruption legislation – could also be found in pre-revolutionary Tunisia and Egypt.

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[17] Asset declaration (not interest declaration); public access to these asset declarations; requirements for independent auditing of asset declarations; regulations governing gifts and hospitality; and restrictions on joining the private sector after leaving office are assessed, whereas the prohibition of certain activities; recusal and self-recusal from certain decisions; and interest declarations (including those of family members) are not covered by the analysis.

[18] The Global Integrity scorecards, including sub-category III-1 on executive accountability, are available at: http://www.globalintegrity.org/report accessed 26 June 2012.

[19] The MENA countries analysed were Algeria (2011), Egypt (2010), Iraq (2008), Jordan (2011), Kuwait (2008), Lebanon (2009), Morocco (2010), Qatar (2009), Syria (2009), Tunisia (2009), United Arab Emirates (2009), West Bank (2010), Yemen (2010).

[20] Oman plays a somewhat particular role as the Sultanate has neither signed nor ratified the convention at stake.

II. CONSEQUENCES OF RAMPANT CONFLICTS OF INTERESTS OF MEMBERS OF THE EXECUTIVE – CASE STUDIES ON THE CORRUPTION-RELATED IMPACTS IN TUNISIA AND EGYPT

A. Ineffective Conflict of Interest Provisions

Tunisia's political landscape has for more than two decades been dominated by the potentate Zine el-Abidine Ben Ali (hereafter referred to as Ben Ali): the latter ascended to the presidential office in November 1987 after a bloodless *coup d'Etat* and held this position until 14 January 2011. Some legislation governing conflicts of interest of the executive branch was in place during Ben Ali's tenure.[21] Government members and other types of public officials were, for instance, required to file an asset declaration form every five years, including on property owned by family members; monitoring was to be provided by the Court of Auditors. As the Tunisian authorities have explained in a report prepared in 2012 for the third intersessional meeting of the Open-ended Intergovernmental Working Group on Prevention,[22] this asset declaration system was deprived of its preventive function as declarations were not processed or followed up.[23] Interestingly in the same report the aforementioned asset declaration legislation (the official French title says *déclaration de biens*) was qualified as a legislation on income declaration (*déclaration de revenus* in French). As the report was submitted in English, it cannot be ruled out that a linguistic misunderstanding led to the terminological confusion when employing 'income' and 'asset' as interchangeable notions. But as the initial questionnaire to which the report responded

[21] E.g. Loi n 87-17 du 10 avril 1987, relative à la déclaration sur l'honneur des biens des membres du gouvernement et de certaines catégories d'agents publics, art. 4-5; Décret n 87-552 du 10 avril 1987 fixant le modèle et le contenu de la déclaration des biens des membres du gouvernement et de certaines catégories d'agents publics; Loi n 83-112 du 12 décembre 1983 portant statut générale des personnels de l'Etat des collectivités publiques et des établissements publics à caractère administratif, art. 5.

[22] The working group was established in 2009 by the Conference of the States Parties to the UNCAC through its resolution 3/2.

[23] Ministry of Justice of the Republic of Tunisia, 'Report on information relating to the agenda of the third intersessional meeting of the Open-ended Intergovernmental Working Group on Prevention' (2012) 2–3.

referred to asset and not income declarations,[24] we tend to believe that it primarily reveals a lack of understanding of the matter in general.

As to the legal framework regulating conflicts of interest of members of the executive, the situation was comparable in Egypt. The country was equally vested with several legislative texts on the subject matter, including for example asset declaration requirements. Most of these laws had been passed before Muhammad Hosni El Sayed Mubarak (hereafter referred to as Mubarak) came to power. The latter – Vice-President since 1975 – took over the presidential office in October 1981 (after the assassination of the then President Sadat) and quit office in February 2011. As in Tunisia, the Egyptian provisions on conflicts of interest[25] were considered ineffective in 'preventing and resolving conflicts of interest'.[26]

B. The Scale and Mechanisms of Corrupt Practices

A reference value with regard to Tunisia and Egypt is helpful to illustrate the disequilibrium sustained by rampant conflicts of interest in both countries. According to statements of Swiss authorities on the amounts frozen since early 2011, Mubarak and his friends held about CHF 700 million in Switzerland, and Ben Ali and his inner circle are supposed to have brought about CHF 60 million to Swiss bank accounts[27] – an amount which Enrico Monfrini, in charge of defending the interest of the Tunisian Republic, believes to be much higher.[28] Other countries have been more reluctant to disclose the amounts of assets frozen, and information generally stems from journalistic sources. In France twelve bank accounts with EUR 13 million belonging to

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[24] United Nations Office for Drugs and Crime (UNODC), Note verbale [CU 2012/28 (A)/DTA/CEB].

[25] E.g. Law no. 11/1968 on illegal profiting amended by Law no. 2/1977; Law no. 129/1960 establishing the Central Auditing Agency, amended by Law no. 144/1988 1988 concerning the promulgation of the Central Auditing Agency; Law no. 62/1975 establishing the Illegal Profiting Apparatus; Law no. 47/1978 regulating Civil Servants in the Public Sector.

[26] Heba Saleh, 'Conflict of interest fears afflict Egypt' *Financial Times* (London, 22 June 2010).

[27] These numbers were provided by the then Deputy Federal Public Prosecutor Maria-Antonella Bino in September 2012; s*wissinfo.ch* (21 September 2012) http://www.swissinfo.ch/fre/politique_suisse/Fonds_geles:_la_Suisse_espere_clore_l_instruction_en_2013.html?cid=33539656 accessed 30 December 2012.

[28] Jean-Michel Meyer, 'Biens mal acquis en Tunisie: "300 personnes dans le collimateur" de l'avocat Enrico Monfrini' *Jeune Afrique* (9 March 2012).

persons of Ben Ali's entourage were frozen in May 2011 and about 30 other assets were reported to have been identified in Paris and the city's surroundings.[29] Moreover assets of the Ben Ali entourage are suspected in numerous other jurisdictions, including Canada. In relation to Egypt the media has also revealed that in the UK, assets belonging to Mubarak, his family and closer friends, amounting to approximately USD 133 million, were frozen in 2011.[30]

As regards Tunisia, the circle of persons involved can broadly be limited to the Ben Ali and Trabelsi extended clans – an assumption largely confirmed by the list of persons targeted by asset-freezing measures of spring 2011.[31] According to Salah Dhibi, then vice-president of the order of certified public accountants, who was involved in the investigations undertaken in the wake of the Arab Spring, at least 350 companies with an estimated asset value of approximately EUR 1.5 billion have been part of what is called the 'Ben Ali system' – in addition to at least 600 land titles of an estimated value of approximately EUR 1 billion.[32] The Ben Ali and Trabelsi clans had indeed managed to control vast parts of the country's economy, including key economic sectors.

In Egypt a broader circle of persons has been involved as privileges and favours have been granted broadly (including private business and military officials) to gain political loyalty and electoral support and to ensure the regime's survival through the establishment of win–win arrangements.[33] An indication of this broader circle of 'profiteers' can

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[29] 'France seizes bank accounts of Ben Ali aides' *RFI* (12 May 2011) http://www.english.rfi.fr/africa/20110512-france-seizes-bank-accounts-ben-ali-aides accessed 26 April 2012.

[30] Amer Sultan, 'UK, Egypt resume talks on Mubarak assets recovery' *Abraham Online* (27 May 2012) http://english.ahram.org.eg/NewsContent/3/0/43036/Business/0/UK,-Egypt-resume-talks-on-Mubarak-assets-recovery-.aspx accessed 26 June 2012.

[31] Council Regulation (EU) No 101/2011 of 4 February 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia; Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la Tunisie du 19 janvier 2011, RS 946.231.175.8; Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations SOR/2011-78; Consolidated list of financial sanctions targets in the UK updated 12 December 2012.

[32] Julien Clémençot, 'Biens mal acquis: un empire à démanteler' *Jeune Afrique* (17–23 July 2011, no. 2636) 74.

[33] Amr Ismail Adly, 'Politically-Embedded Cronyism: The Case of Post-Liberalization Egypt'(2009) 11/4 Business and Politics 17–18; Sébastian Seibt,

again be found in lists of persons targeted by asset-freezing measures[34] which include family members of Mubarak but also high-ranking public officials.

The mechanisms in place to ensure the regimes' preservation were largely similar in both countries and could only function in the absence of effective conflict of interest regulations. First, political and economic structures, actors and interest were closely intertwined. It has been reported that in Tunisia most key economic decisions were taken at the highest political level so that the 'profiteers' were in a position to make or bring about decisions which were beneficial to their private economic activities. Second, the regimes used a strategy of favourable bank credit conditions for a number of selected persons. In Tunisia such financial privileges were offered above all to the members of the two extended families, whereas in Egypt favourable public loan conditions tended to be accessible to a small number of politically chosen businessmen who could receive funds without sufficient collateral.[35] Lastly, abuses of office were current in both regimes. These abuses occurred notably in privatization procedures which were carried out in a non-transparent way, leading amongst other things to underpricing.[36] Also problematic were compulsory partnerships of foreign investors and companies with local partners, holding a certain stake in the venture. In Egypt these compulsory partnerships constituted a great source of profits for politicians and close military allies.[37]

C. The Harmful Socio-political and Economic Effects

The poorly regulated and managed conflicts of interest have had similar effects in both countries. First and foremost, one can point to the loss of the population's trust in the ruling class and in public service. In an

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'Ben Ali's fortune and the Mubarak network: A misleading parallel' *France 24* (8 February 2011) http://www.france24.com/en/20110208-ben-ali-fortune-tunisia-hosni-mubarak-network-egypt-finance accessed 30 May 2012.

[34] Council Decision 2011/172/CFSP of 21 March concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt; Ordonnance instituant des mesures à l'encontre de certaines personnes originaires de la République arabe d'Égypte du 2 février 2011, RS 946.231.132.1; Regulations SOR/2011-78 (n 31); Consolidated list of financial sanctions targets in the UK (n 31).

[35] Adly (n 33) 11.

[36] Ibid 12.

[37] Philipp Inman, 'Mubarak family fortune could reach $70bn, says expert' *The Guardian* (London, 4 February 2012).

interview with the *Financial Times* in June 2010 Omnia Hussein, then in-country program coordinator for the global anti-corruption NGO Transparency International in Egypt, stated that '[t]he lack of transparency and accountability undermines the trust of citizens [leading] to apathy and cynicism, and to a questioning of the entire system.'[38] Similar popular discontentment could also be found in Tunisia and would eventually help trigger the protests.

In a second step, three major economic effects of the interlacement of public and private interests are to be outlined. First, the omnipresence and dominance of some privileged actors led to a very restricted number of market players inhibiting competition. Moreover the practice of granting privileges in relation to the allocation of financial resources greatly weakened, not to say paralysed, the banking sector. As discussed above, loans were offered to family members, friends and allies without examining the debtors' financial situation.[39] This banking policy resulted in relatively high rates of non-performing loans in both countries as indicated by the International Monetary Fund (IMF).[40] Third, the economic system in place harmed the investment reputation of both countries. Foreign investors and companies were discouraged from investing or engaging in business activities due to imposed unfavourable stakeholder shares or to more general corruption-related problems.

These findings reveal the importance of an effective regulation and management of conflicts of interests of government members. The concluding part will therefore attempt to present elements relevant for addressing conflicts of interest in the MENA region in the future. These elements are not claimed to be the unique remedy for effective conflicts of interest regulation or management in the region at stake, but they are to be understood as a starting point for further discussion and research on the topic.

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[38] Saleh (n 26).

[39] Adly (n 33) 11–12.

[40] In 2009 14.7 per cent of all loans were non-performing in Egypt – the same rate had reached a level of 18.2 per cent in 2005 (Country Report No. 10/94). In Tunisia the rate of non-performing loans of public banks was at 14.1 per cent in 2009, but had been at 22.1 per cent of the total of loans in 2005 (IMF Country Report No. 10/282).

III. FINAL REMARKS ON HOW TO DEAL WITH CONFLICT OF INTEREST IN THE MENA REGION IN THE FUTURE[41]

A. Managing Rather Than Prohibiting Conflicts of Interest

As previously seen, many MENA countries have a weak governance framework, which is however essential for preventing and combatting corruption. Legislation regarding at least some issues often is in place, the essential problem thus resides in the lacking or incomplete implementation of these legal texts. Future approaches to the matter should consequently focus on how to close the implementation gap.

In this context it is useful to recall the primary objective of conflict of interest regulation: to prevent the eventuality from becoming a reality. Potential for conflicts of interest will always exist and so the important point is whether these conflicts are managed in a way to preclude undue influence on decision-making. The OECD proposes inter alia that, if personal interests are at stake, recusal from decision-making processes or the restriction of access to particular information are possible options to resolve or manage conflicts of interest.[42] This however presupposes effective accountability and enforcement mechanisms, and it is uncertain whether this approach would produce the desired impact in countries where independent oversight institutions and the rule of law are weak.[43] Many MENA countries – including Tunisia and Egypt – are politically and economically governed by a small elite. Prohibiting government members, which is to say the few privileged ones, from engaging in business activities would most probably be ignored or circumvented in one way or the other. As stricter regulations are unlikely to be properly enforceable in the short to medium term, the emphasis regarding

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[41] The third part of this chapter had initially been prepared in cooperation with Dr. Jan Christoph Richter who regrettably passed away in early 2012. The author has reshaped the final section while bearing in mind Dr. Richter's valuable ideas on the matter, which can also be found in the following publication: Jan Christoph Richter, 'Conflict of Interest of Heads of State: The Example of Madagascar' in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press 2012) 250–52.

[42] OECD (n 6) 1.1.2.(b)–(c).

[43] Peters (n 5) 388.

implementation efforts should therefore lie in managing rather than prohibiting conflicts of interest.[44]

B. Stressing Societal Elements

With this mindset, it would prove useful to stress societal elements, echoing claims for democracy and social justice put forth during the Arab Spring. Fostering transparency and accountability to rebuild the citizens' trust in State institutions seems of utmost importance. This could, in a first step, be achieved by proactively disclosing the asset declaration forms filed by members of the executive. These documents should be easily accessible by the public, and their consultation free of charge.[45] Awareness-raising constitutes another key element in adequately addressing conflicts of interest of government members in the future. As the concept of 'conflict of interest' is relatively new to many MENA countries, it would certainly have a sustainable impact in raising awareness of the matter, while taking into account the respective cultural and legal context.

Furthermore initiatives aiming at promoting public governance, including anti-corruption regimes and the effective management of conflicts of interest, are generally multi-stakeholder projects. Comprehensive analyses of such projects have shown that, in order to guarantee their long-term success, one has 'to incentivize key groups and not just rely on the presumption that what is good for the country is also good for them'.[46] It is thus essential to ensure the inclusion of key stakeholders, be they State or non-State actors. The potentially important role to be played by these actors is, for instance, illustrated by the indicators used by the international anti-corruption NGO Transparency International when assessing a country's National Integrity System:[47] civil society organizations and the media are analysed together with business actors in the

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[44] Thought-provoking input in this regard has been provided by Quentin Reed, 'Regulating conflicts of interest in challenging environments: The case of Azerbaijan', U4 Issue 2 (2010) 13–15.

[45] Council of Europe, Recommendation Rec (2002) 2 of the Committee of Ministers on access to official documents, VIII.

[46] Mungiu Pippidi (n 12) 80.

[47] The National Integrity Study 'focuses on an evaluation of the key public institutions and non-State actors in a country's governance system with regard to (1) their overall capacity, (2), their internal governance systems and procedures, and (3) their role in the overall integrity system.' (Transparency International, National

pillars related to a country's 'culture'. It is indeed true that, if trained properly, investigative journalists can unveil potential conflicts of interests and can thereby contribute to the accountability of leading political figures and high-ranking public officials. In the same vein, local NGOs and academics can help increase transparency and strengthen accountability of public and private actors, especially at the local and the national level. In the Arab context, non-State actors have indeed been at the very heart of the protest movements. In the aftermath of the Arab Spring their leeway has widened in some Arab countries (e.g. Egypt, Tunisia), whereas in others civil society suffered repressive reactions (e.g. Bahrain, Syria, Yemen).[48]

International actors, too, can play an important role. Apart from helping develop solutions which actually fit the given context, donors could back initiatives aiming at strengthening civil society organizations and scholars pursuing anti-corruption efforts, including conflicts of interest. To cite only one recent example of this approach having been followed, the Social Development Civil Society Fund managed by the World Bank has, in the wake of the Arab Spring, awarded financial support to key anti-corruption NGOs and other non-State actors in the MENA region for the year 2012. Such cooperation can lead to an increased awareness of public and private actors regarding the potentially detrimental effects of poorly regulated or managed conflicts of interest – an awareness which, as mentioned above, is of utmost importance to remedy the problem in the medium and long term.

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[48] Arch Puddington, 'Freedom in the World 2012: The Arab uprisings and their global repercussions' (*Freedom House*) http://www.freedomhouse.org/report/freedom-world/freedom-world-2012 accessed 13 June 2012.

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10. Is (French) continental law efficient at fighting conflicts of interests?

Timothée Paris

IS CONTINENTAL LAW EFFICIENT AT FIGHTING CONFLICTS OF INTERESTS?

The question may sound peculiar. Peculiar, on the one hand, because continental law is surely not a monolithic bloc – and neither is the common law: although there *are* main lines of forces identifying the civil law legal system, each civil/continental law country has a different, and a singular approach to this system and to the enforcement of legal rules. The question may also sound peculiar, on the other hand, because 'fighting' or, better put, 'managing' conflicts of interests, although necessarily requiring the adoption of specific rules, is also and maybe rather the result of an organizational culture and of the voluntary implementation of conflict of interest policies specifically designed for public officials and for the civil service. And, on that score, the distinction between legal systems might sound irrelevant.

Nonetheless, the question of whether continental law is efficient at fighting conflicts of interests was inferred in France in 2011, although only incidentally, during the course of the elaboration of a draft statute for the prevention of conflicts of interests – which was finally adopted in 2013. This statute is the result of intense researches and thinking of an ad hoc commission – the State Commission looking at the prevention of conflicts of interests – chaired by the vice-president of the French Council of State (*Conseil d'Etat*) and composed of two other judges – one civil and one financial. This Commission handed its report, entitled 'For a New Public Ethic', to the French President of the Republic at the end of December 2010.

One of the observations made by the State Commission in its report was that France had had for a very long time a rather severe legislation which could be considered as intended to manage conflicts of interests: the 1810 Criminal code, for example, had already created a criminal

offence – which still applies today in a similar way – prohibiting the unlawful taking of interest.[1] The basic principles and the statutes which rule the organization and the functioning of the civil service – and have done for a long time – also contain general rules in relation to the management of conflicts of interests. What could be called the principle of exclusivity (i.e. the obligation for a civil servant to serve the civil service and the prohibition on combining this activity with other economical activities or interests) is one of those rules. Specific regulations in the political field, requiring, for example, that candidates in a public election submit asset declarations forms, have been in existence for a long time as well.[2]

But at the same time the Commission admitted that the existing French legislation, although apparently rather comprehensive and severe, had not been totally efficient in being able to create an effective culture that would not tolerate conflicts of interests in the civil service. One of the main explanations given by the Commission was that this legislation and the principles related to the management of conflicts of interests, though embedded in the culture of the French civil service, were too generally expressed, and therefore too disincarnated, to be actually and effectively implemented. The topic of this chapter – whether the (French) continental law system is efficient at fighting conflicts of interests – is the result of this observation. In other words, is there a link between the (French) continental law system, basically founded on the assertion and on the

[1] See 1810 Criminal code, article 175 and current Criminal code, article 432-12: 'The taking, receiving or keeping of any interest in a business or business operation, either directly or indirectly, by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate who at the time in question has the duty of ensuring, in whole or in part, its supervision, management, liquidation or payment, is punished by five years' imprisonment and a fine of €75,000'. See also, same code, article 432-13: 'An offence punished by two years' imprisonment and a fine of €30,000 is committed by any person who, in his capacity as a civil servant or agent or official of a public administration, and specifically by reason of his office, is entrusted with the supervision or control of any private undertaking, or with the conclusion of contracts of any type with a private enterprise, or who by services, advice or investment takes or receives any part in such an enterprise, before the expiry of a period of five years following the end of his office.'

[2] Article 28 of the 1848 French Constitution, for example, already prohibited Members of Parliament from exercising any other public lucrative activity. Article 23 of the current French Constitution prohibits members of the government from exercising any other professional activity.

implementation of general principles, and the failure to develop earlier in France an effective management of conflicts of interests?

If basic principles of the continental law system and the consecutive abstract conception on which public ethic was built in France may historically have undermined the efficiency of conflict of interest management (section I), the (French) continental law system is not bound to be less efficient in the management of conflicts of interests (section II).

I. DO THE BASIC PRINCIPLES OF CONTINENTAL LAW UNDERMINE THE MANAGEMENT OF CONFLICTS OF INTERESTS?

Has the efficiency of conflict of interest management been undermined? Basic principles of the continental law system and the consecutive abstract conception on which public ethics were built in France may historically have undermined the efficiency of conflict of interest management.

Though it may sound – at least today – a bit of a caricature, one of the main features of the civil/continental legal systems is that law is made of general principles, general rules – adopted by the Parliament or bylaws – which express the general will. Judges in this legal system are supposed to enforce preset rules in specific situations. Opposite to this, the common law legal system is mainly a judge-made law system, the principles of which were set by judges resolving actual cases.

This difference of conception of the origins of the legal rules is in most cases of no consequence on the regulation of society, for both legal systems come together at the end: they have legal rules enforced by judges. Nonetheless, in some cases, this difference may not be without its effect on the nature of the rules and on the cultural perception of these rules and of the legal system. And, at least historically, the management of conflicts of interests could be one of those cases. This idea can be illustrated in two different fields: the first one gives a comparative advantage to the common law legal system in the management of conflicts of interests and the second one a comparative disadvantage to the French continental law legal system.

A. The Continental Law System

Whereas the continental law system is historically more focused on the assertion of general principles rather than on procedural aspects of adjudication, the comparative advantage of the common law system in

the management of conflicts of interests seems to be both the importance of procedural rules – isn't the US administrative law 'largely about procedure'?[3] – and the natural tendency of judges, who make the law, to impose on the administrative adjudication process rules that were initially made for themselves.

1. The importance of procedural rules

The importance of procedural rules, in relation to the matter, resides in the fact that both the principles of natural justice – through their non-instrumental role – that were developed by the English common law courts, and the due process clause of the 5th and 14th Amendments of the Constitution of the United States – through the procedural due process – contain principles that are fiercely relevant for the management of conflicts of interests. The principles of natural justice, for example, imply that decisions should be made free from bias or partiality,[4] which can lead to the disqualification of the decision maker – be he a judge or a civil servant – when he has a pecuniary interest. Thus, in the *Dimes*[5] case, held in 1852, the House of Lords reversed a decision made by the Lord Chancellor in relation to a company in which he held some shares. Family relationships,[6] as well as commercial ties,[7] can also disqualify the decision maker. The implications of the due process clause in the United States seem to be quite similar: in *Goldberg*,[8] for example, the Supreme Court of the United States listed the requirements necessary to provide due process, amongst which figured the need for an impartial decision maker.

2. The comparative advantage of the common law system in the management of conflicts of interests

The comparative advantage of the common law system in the management of conflicts of interests is also emphasized by the fact that courts have had a natural tendency to extend the obligations imposed on the public administrations to abide by these principles – or at least to the need for an unbiased and impartial adjudicator – during the adjudication

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[3] W.F. Funk and R.H. Seamon, *Administrative Law* (Wolters Kluwer Law and Business, 3rd edition) p. 1.

[4] See P. Craig, *Administrative Law* (Sweet & Maxwell, 6th edition, 2008) 13-001 *et seq*.

[5] *Dimes v. Grand Junction Canal Co Proprietors* (1852).

[6] *Metropolitan Properties (LGC) Ltd v Lannon* (1969).

[7] *R v Hendon Rural District Ex p. Chorley* (1933).

[8] *Goldberg v Kelly*, 397 US 254, 1970.

process. In *Re HK* for example (1966) Salmon LJ, concurring with Lord Parker, explicitly admitted that a civil servant (namely an immigration officer) 'is obliged to act in accordance with the principles of natural justice. That does not mean, that he has to adopt judicial procedures or hold a formal enquiry'. In *Mathews v. Elridge*,[9] although the Supreme Court of the United States established a new test to determine whether the process provided is sufficient, therefore reducing the procedural protections as the particular situations demand, it held that the need for an impartial judge and, therefore, the need for an unbiased adjudicator still belongs to the due process requirements that are necessary in all cases.

B. The Comparative Disadvantage of the French Continental Law Legal System

The comparative disadvantage of the French continental law legal system in the management of conflict of interest is the specific cultural perception, within the civil service, of the general rules in relation to this matter.

1. Consequence of the role played by the holistic conception of the general interest

This specific perception can be understood as a consequence of the role played by the holistic conception of the general interest that has prevailed during the construction of the civil service and of the public administration in France. Although this particular conception of general interest is in some degree the consequence of a French idiosyncrasy which finds its roots in some historical and cultural dynamics that led to the construction of the State in this country, it is also linked to the civil law legal system in itself: statutes are acts of sovereignty – 'a solemn declaration of the intent of the sovereign power with regard to a matter of common interest' according to Portalis[10] – and, under such a conception, the function of the civil service is to implement the law and, if necessary, to interpret it and to complete it. With that aim, the public administration disposes of special powers, special rules – as distinct from the civil rules which apply to private persons. Therefore, the civil service in France is not only seen as the enforcement power of the law but also, in itself, as an incarnation of the general interest. In many ways, the carrier system and the strong hierarchical principle which prevail in the organization and in the

[9] 424 US 319, 1976.

[10] Portalis, *Preliminary address on the First Draft of the Civil Code* (English translation: Canada, Department of Justice).

functioning of the civil service in France are natural consequences of this conception of the general interest. The result – expressed in an intentionally caricatural way – is that the civil servant is not regarded as a private person – with his own private interests – working for the civil service, but as being himself an incarnation of the general interest. Hauriou – a professor at the university of Toulouse in the first half of the 20th century and whose contribution to the definition of the doctrinal foundations of French administrative law was profound – considered that the link between a civil servant and the civil service is made of 'moral bonds' which '*incorporate*' the civil servant to his function and therefore to the administrative institution.[11]

2. The link between the civil servant/the civil service and the general interest

This specific conception of the link between the civil servant/the civil service and the general interest has led, in regard to the management of conflicts of interests, to two main consequences.

The first consequence is a very strong commitment in public employees to the general interest: even though these two principles are not written in a statute yet, a strong culture of integrity and impartiality within the French civil service actually exists, as pointed out in the report of the State Commission looking at the prevention of conflicts of interests.

The second consequence may have been a lesser efficiency in the actual management or prevention of conflicts of interests. Indeed, as long as the public officer – the private person with his/her private interests – is 'incorporated' to his function and as long as the general interest is seen as a monolithic block excluding private interests, there are only two ways to preserve the general interest from being corrupted by private interests: either to pretend that there are no private interests, or to exclude them, provided that their intensity is strong enough to enter into conflict with the general interest. This kind of 'all or nothing' way of dealing with the matter obviously does not leave so much room for an effective management and for the prevention of conflicts of interests. The two main legal orientations that have been historically used to deal with conflicts of interests in the French civil service seem to reflect this difficulty.

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[11] Hauriou, *Précis de droit administratif et de droit public* (Sirey 12ème édition, Paris, 1933) new edition by Pierre Delvolvé and Franck Moderne (Dalloz, Paris, 2002) p. 737.

The first orientation, which was previously mentioned, is the criminal law, whose aim, according to Portalis, is not to 'regulate, in the strict sense, the relationships among men, but the relationships of each man to the laws enacted for the benefit of all'. However, by nature, the criminal law is supposed to deal only with the most intense situations of conflicts of interest, and its effect is rather an *ex post* one. The second orientation historically used to deal with conflicts of interests is the principle of exclusivity, which leads to two kinds of specific rules: the first one is the prohibition of exercising at the same time several public activities which could lead to conflicts of interests. It only applies to some specific public offices. The second rule is the general prohibition for a person exercising public authority on exercising at the same time or, under certain conditions, successively, public functions and on having a private lucrative activity. But the main default of such an *ex ante* principle is that, once again, it is founded on a binary conception of the management of conflicts of interests – all or nothing – and therefore does not leave much room for the taking into consideration of less extreme situations of conflicts of interests, yet which are regarded today as actual conflicts of interests.

II. THE MANAGEMENT OF CONFLICTS OF INTERESTS

Despite this historical construction, the (French) continental law system is not bound to be less efficient in the management of conflicts of interests.

A. Two Dynamics

This legal system can rely on two dynamics which can help bring about good management of conflicts of interests.

1. The first dynamic

The first dynamic is linked with a distinguishing feature of the civil law system, which is the *ex ante* general assertion of principles and rules in statutes and the codification. Building a culture of management of conflicts of interests in the public service is a goal which cannot be completely achieved by the sole evolution of the inner management practices in the public service. It requires, more generally, the development of general and specific voluntary public policies which may be better enforced through the adoption of codes, guidelines, regulations or statutes, and that both assert the fundamental principles guiding public

officials in the course of their duty, and clearly put in place the procedures enabling them to deal with potential conflicts of interests and the sanctions they might face in the case of actual conflicts of interests. To that end, the voluntary conception of the law in the civil legal system, which is perceived more as a positive act trying to change the future rather than a gathering of pre-existing rules, can surely be of great use. In addition, the pre-codification of the principles, rules and procedures in a matter – the management of conflicts of interests – which is comprised of many grey zones, can provide a better legal certainty for public officials and enable them to perform their duty without fear of being sued or sanctioned afterwards. As a matter of fact, most of the countries which, in the past ten years or even more, have undertaken the development of conflicts-of-interests management have adopted general or specific statutes on public administration, as well as regulations and/or internal codes of conduct. Australia, for example, adopted in 1999 a 'Public Service Act' and, in 2003, an 'Australian Public Service Values and Code of Conduct in practice', which is a guide to official conduct for Australian Public Service (APS) employees and agencies' heads. Canada also adopted a 'Values and Ethics Code for the Public Service' in 2003. Order 12674, adopted in 1989 in the United States, and entitled 'Principles of Ethical Conduct for Government Officers and Employees', leads in the same direction.

2. The second dynamic

The second dynamic on which the (French) civil law legal system can rely in order to bring about a good management of conflicts of interests is what could be called the transition from a logic of exclusion to a logic of conciliation between the general interest and private interests. This dynamic is strongly linked with the reinforced – and today generalized – taking into consideration, in French administrative law, of fundamental rights. Whereas French administrative law, and therefore the French conception of public ethics, in its earlier days, was undoubtedly essentially focused on the preservation of the general interest, it has fiercely evolved, in particular through the development of the principle of proportionality, into a logic of conciliation of the general interest in fundamental rights and, consequently, in private rights. This evolution is an important step towards the implementation of a good management of conflicts of interests. First, it enables the public ethics doctrine to assume that public officials are also human beings, with their own rights and their own private interests, irrespective of their public office. Second, it enables the finding of adequate, proportional solutions, in order to actually and effectively manage conflicts of interests. Although it is not

directly linked to what could today be called a conflict of interest – but which can nevertheless be discussed – the *Dehaene* case, decided by the French Council of State in 1950, can offer a good example of the transition from the logic of exclusion of private interests from the general interest to a logic of conciliation. This case was about the public service's right to strike. This right was not granted to civil servants at the beginning of the 20th century, as corporate interests were regarded as incompatible with the general/public interest. But in 1950, as the 1946 French Constitution had proclaimed the right to strike for all workers, the Council of State held that this right was also necessarily granted to civil servants. It ruled that the proclamation of this right in the Constitution had, as a consequence, that the general interest had to be conciliated to the 'professional *interests*,' which the right to strike aims to defend. The use of the word 'interest' by the Council of State in its ruling, in itself powerfully reveals the fact that the conception of public ethics was ready to accept that other interests could be in conflict with the general interest and that those private interests were not to be excluded from the latter, but had to be conciliated with it.

B. Propositions Made by the State Commission

The propositions made by the State Commission looking at the prevention of conflicts of interests and the consecutive draft statute may open a new era of effective management of conflicts of interests in France.

First, this may be so because these propositions are an expression of those two dynamics that were previously mentioned: both the report of the State Commission and the draft statute tend to rely on the idea that statutory law is a good vehicle to help change the future – namely to create a new administrative culture. The title of the report of the Commission, '*For* a *new* Public Ethic', is in itself an illustrative example. At the same time, the intention in creating this new public ethic is based, on the one hand, on a complete recognition of the fact that public officers do have private interests that can enter into conflict with the general interest and, on the other hand, on the need, not only to exclude the most extreme situations of conflict, but also to manage less extreme situations. Indeed, amongst its propositions, the Commission recommends the codification of a definition of conflicts of interest inspired by the one given by the OECD guidelines. It also recommends imposing on every important public official the obligation to submit asset declaration forms, and proposes the creation of a new quasi-autonomous non-governmental organization which will be competent to receive these asset declaration forms, to deliver opinions on specific situations of conflicts of interest

and to make general recommendations on ethical practices in the civil service. One indirect but necessary effect of these three measures would be the general assertion in a statute of the fact that civil servants and public officers do have private interests, and of the need not to reject or hide those interests, but to manage them transparently. Despite some initial resistances of the French historical conception of public ethic, those proposals were finally almost integrally adopted by the Parliament through several statute laws that were passed in 2013.

The second category of interesting developments which the Commission and the statute propose, is also not without connection to one of the dynamics of the common law legal systems that was previously pointed out: that is to say the extension to the public service of rules and obligations that were initially designed for judges. One of the statutes that was passed, for example, intends to assert the principle of impartiality among the general principles that rule the French civil service. This principle has already been recognized by the French administrative judge as a general principle governing the functioning of the public service. But up till now it has only been used as a condition for the legality of administrative decisions: it will now become a duty for civil servants. Moreover, the way this principle is detailed in the report of the Commission makes it obvious that its enforcement in the civil service would be – adequately – a transposition of the principle of impartiality governing the functioning of the judiciary: to summarize it, the propositions of the Commission in regard to impartiality in the public service led to the creation of a new principle, that 'impartial administration should not only be done, but should manifestly and undoubtedly be seen to be done', to paraphrase Lord Hewart of Bury. A second example of the Commission's propositions – and of the statute – that reveals a tendency to apply to the civil service rules coming from the judiciary is the creation of a procedure enabling a public officer to withdraw himself, to disqualify himself from the adjudication process, when a conflict of interest could arise: such a procedure, until now, did not exist in the French civil service, whose organization has always been governed by a strong principle of hierarchy. But it does exist in the judiciary: a judge has the obligation to disqualify himself in particular cases in which he thinks he could be regarded as having a personal interest.

To conclude I would like to point out some key elements which, according to my thinking about this subject, can be regarded as useful in helping to favor an effective management of conflicts of interest:

1. An effective management of conflicts of interest demands the actual recognition of the fact that public officers do have private interests.
2. The principle of exclusivity can be useful in preventing the most extreme situations of conflicts of interest, but a comprehensive management of conflicts of interests demands that this principle be combined with a logic of conciliation of private interests and the public interest, through both internal administrative procedures and a clear and transparent adjudication process.
3. Codes, statutes and regulations are a useful tool in helping to bring about a new culture of public ethics.
4. Finally: judges, through their natural and historically recognized strong obligations of independence and impartiality, can also bring an interesting point of view in the course of the development of conflict-of-interest policies.

11. Corruption and conflicts of interests in the United Kingdom

Cecily Rose

I. INTRODUCTION

The UK government largely deals with corruption and conflicts of interest as separate phenomena, with some important exceptions that this chapter explores. The UK's Serious Fraud Office ('SFO') serves as the lead agency in England, Wales and Northern Ireland for the investigation of domestic and overseas corruption, and it enforces the UK's Bribery Act 2010. The SFO appears to have adopted a somewhat questionable understanding of how corruption and conflicts of interest relate to one another.[1] The SFO's relatively sparse website includes, among other things, some definitions of 'corruption-related terms', including 'bribery' and 'conflict of interest,' although the website does not actually provide a clear definition of corruption itself.[2] According to the SFO, bribery refers to 'giving or receiving something of value to influence a transaction', while conflict of interest refers to a situation in which an 'employee has an economic or personal interest in a transaction.'[3] The SFO also provides definitions of an assortment of other corruption-related conduct, namely illegal gratuity, extortion, kickback, corporate espionage, and commission/fee.[4] The SFO's small glossary of corruption-related terms could be taken to suggest that corruption serves as an umbrella concept

[1] SFO, *Bribery & Corruption*, http://www.sfo.gov.uk/bribery–corruption/bribery–corruption.aspx.

[2] *Ibid.*; SFO, *What Is Corruption?* http://www.sfo.gov.uk/bribery–corruption/what-is-corruption.aspx.

[3] *Ibid.*

[4] *Id.*

that covers a wide range of conduct, including conflicts of interest, and some academic commentary supports this view.[5]

Yet, this understanding of the relationship between corruption and conflicts of interest is not necessarily the most persuasive. Corruption does indeed represent an umbrella concept that encompasses a range of conduct from bribery to trading in influence, but conflicts of interest are not easily classifiable as acts of corruption.[6] The term corruption is most commonly defined as the abuse of entrusted power for private gain.[7] Conflicts of interest, however, do not necessarily entail an actual abuse of power, private gain, or any sort of actual transaction, as the mere existence of incompatible private and public interests may be sufficient to create a conflict of interest. In other words, conflicts of interest may or may not result in private gain for an official.

In Chapter 1 of this volume, Susan Rose-Ackerman posits a more persuasive explanation of the relationship between corruption and conflicts of interest. Rose-Ackerman basically inverts the relationship between corruption and conflicts of interest, as she considers conflicts of interest to be an umbrella term that encompasses tensions between official and private roles, including corruption and fraud, two categories of conduct that specifically involve financial benefits for an official.[8] Rose-Ackerman's understanding of conflicts of interest is thereby broader than that of the SFO, as tension between public and private roles potentially encompasses a larger range of conduct than situations in which an 'employee has an economic or personal interest in a transaction.'

Rose-Ackerman's definition is also in keeping with Transparency International's definition of conflicts of interest, which implies that there must be a tension between official duties and private interests. According to Transparency International, the term conflict of interest refers to a '[s]ituation where an individual or the entity for which they work,

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[5] *See, e.g.*, Gerald E. Caiden, 'Undermining Good Governance: Corruption and Democracy', 5 Asian Journal of Political Science 1, 8–9 (1997).

[6] The UN Convention against Corruption addresses bribery in the public and private sectors; embezzlement, misappropriation or other diversion of property by a public official; trading in influence; abuse of functions; illicit enrichment; and embezzlement of property in the private sector. United Nations Convention against Corruption, New York, 11 December 2003, entered into force on 14 December 2005, UN Doc. A/58/422, 2349 UNTS 41.

[7] *See* Transparency International's widely accepted definition of corruption: Transparency International, *The Anti-Corruption Plain Language Guide*, July 2009, 14.

[8] Susan Rose-Ackerman, 'Conflicts of Interest and Corruption'.

whether a government, business, media outlet or civil society organisation, is confronted with choosing between the duties and demands of their position and their own private interests.'[9] By this definition, a conflict of interest entails a tension between official duties and private interests, but not necessarily a financial gain for the official who must choose between them. This definition also explicitly provides that individuals in both the public and private sectors may face conflicts of interest.

Leaving aside these definitional issues, the UK government appears to have appropriately recognized that regulating conflicts of interest contributes to the prevention of corruption – to the limited extent that it has addressed the two forms of conduct as related to one another. The Guidance to the Bribery Act 2010 explains that commercial organizations may wish to implement bribery prevention policies that address the avoidance of conflicts of interest.[10] This reference to conflicts of interest, however, represents the only acknowledgement in the Guidance that corruption and conflicts of interest are inter-related. Moreover, the Guidance to the Bribery Act 2010 only mentions conflicts of interest with respect to the private sector, thus leaving public sector officials outside its scope, and the Bribery Act itself makes no mention of conflicts of interest. While early efforts to reform the UK's laws on corruption and bribery took note of the relationship between corruption and conflicts of interest, the Law Commission in the late 1990s and 2000s appears to have been more narrowly focused on bribery. As a consequence, the UK government deals with corruption and conflicts of interest as largely separate issues.

The second section of this chapter provides some background information on the UK Bribery Act and the accompanying Guidance, and discusses the degree to which the Guidance addresses conflicts of interest. This section also discusses the Bribery Act in the context of the UK's treaty obligations. While the Bribery Act brings the United Kingdom into compliance with the OECD Anti-Bribery Convention, the United Nations Convention against Corruption arguably requires the United Kingdom to do more to regulate conflicts of interest in the context

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[9] Transparency International, *The Anti-Corruption Plain Language Guide*, 11.

[10] Ministry of Justice, *The Bribery Act 2010: Guidance about Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribery (Section 9 of the Bribery Act 2010)*, March 2011, para. 1.7 (hereinafter Guidance).

of corruption.[11] The third section of this chapter briefly explains how the UK government deals with the issue of conflicts of interest outside the context of the Bribery Act 2010.

II. THE UK BRIBERY ACT 2010 AND CONFLICTS OF INTEREST

A. Early Efforts at Reform

The Bribery Act 2010 represents the product of long-standing efforts to reform laws on bribery and corruption more generally in the United Kingdom.[12] Early attempts at reform, dating back to the 1970s, explicitly recognized the link between corruption and conflicts of interest, but by the late 1990s, reform efforts had largely moved away from focusing on this connection. These early and somewhat duplicative attempts were all responses to particular scandals, and the various reports on reforming the UK's laws did not lead to any changes. In the early 1970s, in response to widespread public concern about the conduct of local officials due to several corruption prosecutions, the Redcliffe-Maud Committee on Local Government Rules of Conduct undertook an examination of how local government law and practice could affect individuals facing a conflict of interest between their public functions and private interests. The Committee made recommendations for law reform in its 1974 Report on Conduct in Local Government, and the UK government welcomed the report but took little action in response to it.[13]

In the same year, the Salmon Commission on Standards of Conduct in Public Life was established following another corruption scandal involving John Poulson, an architect who had bribed councillors and local authorities in order to obtain public contracts.[14] The Salmon Commission, which had a broader mandate than the Redcliffe-Maud Committee,

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[11] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the negotiating conference on 21 November 1997, entered into force on 15 February 1999.

[12] *See generally*, Nick Kochan and Robin Goodyear, *Corruption: The New Corporate Challenge* (Palgrave Macmillan 2011) 55–61.

[13] Redcliffe-Maud Committee, *Conduct in Local Government* (Cmnd 5636, 1974); Law Commission, *Legislating the Criminal Code: Corruption* (Law Com No 248, 2 March 1998) para. 1.11.

[14] Law Commission, *Legislating the Criminal Code: Corruption*, para. 1.12; Kochan and Goodyear, above note 12 at 55–57.

investigated 'standards of conduct in central and local government and other public bodies in the United Kingdom in relation to the problems of conflict of interest and the risk of corruption involving favourable treatment from a public body.'[15] The Salmon Commission's terms of reference thus implied that such conflicts increase the likelihood of corruption and accordingly required it to focus on the relationship between corruption and conflicts of interest. The Salmon Commission recommended the consolidation and amendment of the Prevention of Corruption Acts of 1889 to 1916 with respect to their application to the private sector, but as with the Report of the Redcliffe-Maud Committee, the UK government took no action.[16]

B. More Recent Efforts

The mid-1990s saw a renewed focus on the relationship between corruption and conflicts of interest, but this did not carry forward into the major legislative reform that finally took place in the late 2000s. In October 1994, twenty years following the creation of the Salmon Commission, the 'cash-for-questions affair' led Prime Minister John Major to establish the Committee on Standards in Public Life ('Committee' or 'CSPL'), which will be discussed in greater detail below.[17] This scandal partly entailed allegations that Members of Parliament had accepted bribes in exchange for posing questions in Parliament which were favorable to the briber. The Committee's terms of reference required it to examine 'current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities,' and to recommend appropriate changes. In its First Report on Standards in Public Life, known as the Nolan Report, the Committee focused on Members of Parliament, ministers and civil servants, and quangos (quasi-autonomous non-governmental organizations).[18] With respect to corruption, the Committee recommended, among other things, that the UK government consolidate bribery statutes in a single act and clarify the law relating to the receipt of a bribe by a

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[15] Report of the Salmon Commission (Cmnd 6524, 1976), para. 6; Law Commission, *Legislating the Criminal Code: Corruption*, para. 4.17.

[16] Law Commission, *Legislating the Criminal Code: Corruption*, para. 1.12.

[17] Hansard (HC) 25 October 1994, col 758.

[18] Lord Nolan was the first chairman of the Committee on Standards in Public Life, http://www.public-standards.gov.uk/About/Previous_members.html.

Member of Parliament.[19] The Select Committee on Standards in Public Life, which was responsible for considering the Nolan Report, made a similar recommendation.

The CSLP also made non-binding recommendations that touched on conflicts of interest. Instead of recommending legislative reform with respect to conflicts of interest, the Committee set forth general principles and recommended their inclusion in codes of conduct for public officials. In a restatement of general principles of conduct for public life, the Committee formulated Seven Principles of Public Life, namely selflessness, integrity, objectivity, accountability, openness, honesty, and leadership.[20] A number of these principles concern the avoidance of conflicts of interest, although they do not actually use this term. Under the first principle of selflessness, public officials should act in the public interest, and not for financial gain or other benefit for themselves, family, or friends. According to the second principle of integrity, public officials 'should not place themselves under any financial or other obligation to outside individuals or organizations that might seek to influence them in the performance of their official duties.' Finally, the sixth principle provides that '[h]olders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.' Over the course of nearly half a dozen further reports, the Committee has made a series of specific recommendations concerning conflicts of interest, many of which have been implemented, as will be discussed in the last section of this chapter.

By the late 1990s, the issue of conflicts of interest had largely dropped out of efforts to reform anti-corruption laws in the United Kingdom. Reform efforts began in earnest in 1998, when the Law Commission produced a report that proposed the reform of bribery laws in the United Kingdom[21] and the government followed in June 2000 with a White Paper on corruption.[22] In response to the events of 11 September 2001, however, changes to the UK's anti-bribery laws took place outside this

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[19] Chairman Lord Nolan, Standards in Public Life, *First Report of the Committee on Standards in Public Life* (Volume 1: Report, Cm 2850-I, May 1995), para. 2.104.

[20] *Ibid.*, 14.

[21] Law Commission, *Legislating the Criminal Code: Corruption* (Report No. 248, 2 March 1998).

[22] *Raising Standards and Upholding Integrity: The Prevention of Corruption* (Cm 4759, 22 June 2000).

process of reform, as the Parliament included anti-corruption provisions in the Anti-terrorism, Crime and Security Act 2001.[23] These provisions brought UK laws into partial compliance with the 1997 OECD Anti-Bribery Convention by extending the UK's jurisdiction to corruption committed outside the United Kingdom by UK nationals and incorporated bodies.[24] The UK government intended to bring its laws into full compliance with the OECD Convention soon thereafter through this more comprehensive reform process, but due to various setbacks and the generally slow progress of reform efforts, this did not actually occur until more than a decade later.[25]

In March 2003 the government published a draft Corruption Bill that then went through pre-legislative scrutiny by the Joint Committee of Parliament, which criticized the Bill's retention of the agent/principal relationship as the basis for the offense of bribery.[26] The agent/principal concept, which was employed by the Prevention of Corruption Act 1906, created an exception to the offense of bribery where the bribe's recipient had acted with the informed consent of the principal.[27] The government subsequently undertook a consultation exercise in 2005, through which it decided to refer the matter back to the Law Commission for further review due to a lack of consensus on the reform of anti-bribery laws.[28] This resulted in the most prolonged delay in reform efforts, as the Law Commission did not publish its next report on consolidating and reforming the law on bribery until November 2008.[29] In March 2009 the government presented a draft Bribery Bill to Parliament, and after

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[23] Anti-terrorism, Crime and Security Act 2001, Part 12.

[24] *Ibid*., at ss. 108–109.

[25] Law Commission, *Reforming Bribery* (Report No. 313, HC 928, Law Com. No. 313, 19 November 2008) paras. 4.8–4.9.

[26] Home Office, *The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill* (Session 2002–2003 HL 157, Cm 6068, March 2003).

[27] *United Kingdom: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 17 March 2005, para. 182.

[28] Home Office, *Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Public Officials: A Consultation Paper*, December 2005.

[29] Law Commission, *Reforming Bribery* (Report No. 313, HC 928, Law Com. No. 313, 19 November 2008).

pre-legislative scrutiny and the government's response, Parliament finally passed the Bill in April 2010.[30]

The UK Bribery Act 2010 did not come into force until over a year later in July 2011, however, because the UK government took longer than it had anticipated to finalize the Guidance required under the Act, which will be discussed below. This delay may be attributed in part to the objections raised by pro-business lobbying organizations in the United Kingdom, including the Confederation of British Industry, about how the Act would impact the competitiveness of UK businesses.[31] The United Kingdom's plodding and at times halting efforts to reform its anti-bribery laws between 1998 and 2011 provoked increasing impatience from the OECD's Working Group on Bribery, a body tasked with monitoring the implementation of the OECD Anti-Bribery Convention. By 2010/2011, the Working Group on Bribery and its Chairman, Mark Peith, had adopted an overtly threatening stance towards the United Kingdom, which appears to have played at least some role in the finalization of the Guidance and the subsequent entry into force of the Bribery Act.[32]

C. The Contours of the UK Bribery Act 2010 and Accompanying Guidance

1. The Bribery Act 2010

The Bribery Act itself makes no mention of conflicts of interest or of corruption more generally. Instead, the Act focuses on the criminalization of active and passive bribery, the bribery of foreign public officials, and the failure of commercial organizations to prevent bribery. Section 1 of the Act criminalizes active bribery, which consists of offering, promising or giving a financial or other advantage to another person with the intention of inducing or rewarding the other person for improperly

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[30] Bribery Draft Legislation (Cm 7570, 25 March 2009); House of Lords and House of Commons, Joint Committee on the Draft Bribery Bill, First Report of Session 2008–09, HL115, HC430 – Vols I & II, 16 July 2009; Bribery: Government Response to the Conclusions and Recommendations of the Joint Committee Report on the Draft Bribery Bill (Cm 7748, November 2009).

[31] *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom*, March 2012, para. 10.

[32] For a more detailed examination of this progression *see* Cecily Rose, 'The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention', 61 ICLQ 485 (2012).

performing a relevant function or activity.[33] Active bribery also encompasses situations in which the briber knows or believes that the acceptance of such an advantage would in itself constitute an improper performance.[34] Section 2 of the Act criminalizes passive bribery, such as when a person requests, agrees to receive, or accepts an advantage in exchange for an improper performance of a relevant function or activity.[35] These two provisions on active and passive bribery replace the offenses at common law and those under the Prevention of Corruption Acts 1889 to 1916, which have now been repealed.[36] Sections 1 and 2 abandon the reliance on the agent/principal relationship, which formed the basis of these much earlier acts, and instead premise active and passive bribery on an intention to induce improper conduct.[37]

The Bribery Act also creates a discrete offense of bribing a foreign public official, thereby replacing the anti-bribery provisions of the Anti-terrorism, Crime and Security Act 2001, which the Bribery Act repeals.[38] In keeping with the language of the OECD Anti-Bribery Convention, section 6 of the Bribery Act criminalizes the bribery of a foreign public official if the briber intends to influence the foreign public official in his official capacity, and intends to obtain or retain a business or other advantage in the conduct of business.[39] Both natural and legal persons, in the form of commercial organizations, may be guilty of bribery, but the Act notably creates a defense for commercial organizations that have instituted adequate procedures designed to prevent persons associated with them from engaging in such conduct.[40] As will be discussed below, the Bribery Act obliged the Secretary of State to publish guidance concerning procedures that relevant commercial organizations may implement in order to prevent persons associated with them from engaging in bribery.[41]

The Bribery Act includes a number of other notable features, beyond these criminalization provisions and the defense of adequate procedures. First, the Act abandoned the previous requirement that the Attorney General consent to the prosecution of a bribery offense. Instead, the Act

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33 S. 1(2).
34 S. 1(3).
35 S. 2(2).
36 *Bribery Act 2010: Explanatory Notes*, para. 4.
37 *Ibid.*
38 *Ibid.* at para. 30.
39 Bribery Act, s. 6(1)–(2); OECD Anti-Bribery Convention, Art. 1(1).
40 S. 7(1)–(2).
41 S. 9(1).

requires the consent of the Director of Public Prosecutions, the Serious Fraud Office, or Revenue and Customs Prosecutions.[42] The exclusion of the Attorney General from this list appears to be tied to the controversial role that the Attorney General played in the decision to suspend the investigation of BAE Systems in 2006.[43] In this case, Lord Goldsmith, the then Attorney General, played a significant role in the decision to suspend the UK's investigation of BAE Systems plc for the bribery of foreign public officials in Saudi Arabia following threats by the Saudi Arabian government to end security cooperation with the United Kingdom should the investigation continue.[44] The Bribery Act's omission of a role for the Attorney General in consenting to prosecutions may represent an attempt to insulate decisions about foreign bribery prosecutions from these types of political pressures or considerations.

In another important development, the Bribery Act extends the jurisdiction of the United Kingdom to bribery committed abroad by UK residents, UK nationals, and UK corporations.[45] Yet, the Guidance notably indicates that a company's mere listing on the London Stock Exchange would, in itself, not be likely to bring a company within the jurisdiction of the Bribery Act.[46] Finally, the Act creates a defense for certain bribery offenses, such that a person charged with bribery may defend himself by proving that this conduct was necessary for the proper exercise of any function of an intelligence service or the armed forces when in active service.[47] This provision has come under criticism for weakening the Act by, for example, potentially permitting intelligence officers overseas to engage in unethical and otherwise illegal conduct in the context of the arms trade.[48]

2. The Guidance Accompanying the Bribery Act

While the Bribery Act 2010 represents a significant contribution to anti-corruption legislation in the United Kingdom, the Act itself makes no mention of conflicts of interest and does not address the relationship between corruption and conflicts of interest. The Guidance under s. 9 of

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[42] S. 10(1).

[43] *R (Corner House Research & Another) v. Dir. of the Serious Fraud Office*, [2008] UKHL 60, [2009] 1 AC 756.

[44] *Id*.

[45] S. 12.

[46] Guidance, pp. 15–16.

[47] S. 13(1).

[48] Jeremy Horder, 'On Her Majesty's Commercial Service: Bribery, Public Officials and the UK Intelligence Services', 74 Modern Law Review 911 (2011).

the Act, however, does briefly address conflicts of interest. Formally speaking, the Guidance is non-prescriptive.[49] Commercial organizations nevertheless have a great incentive to institute compliance programs that accord with this Guidance, as the implementation of adequate procedures to prevent bribery constitutes a defense under s. 7 of the Act. The Guidance primarily consists of six principles that should inform the procedures that companies put in place to prevent bribery, namely: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training), and monitoring and review. The Guidance elaborates upon each principle through commentary and relevant procedures.

The term conflicts of interest arises in the context of Principle 1, which concerns proportionate procedures and provides that '[a] commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced'.[50]

The Guidance goes on to list a number of procedures that organizations can implement in order to mitigate identified risks and to prevent deliberately unethical conduct by persons associated with them.[51] This list includes '[d]ecision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.'[52] The Guidance thereby implicitly recognizes that bribery and conflicts of interest are linked to one another because avoiding conflicts of interest represents one of many methods for preventing bribery on behalf of commercial organizations. The Guidance does not, however, elaborate upon this relationship or address how exactly commercial organizations could go about avoiding conflicts of interest.

Although the Guidance addresses conflicts of interest in a fleeting manner, this reference nevertheless arguably helps to bring the United Kingdom into compliance with its international legal obligations to implement anti-corruption laws. The OECD Anti-Bribery Convention omits any reference to conflicts of interest, but the more recent and comprehensive UN Convention against Corruption addresses conflicts of

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[49] Guidance, 20.
[50] *Ibid*. at 21.
[51] *Ibid*. at para. 1.7.
[52] *Ibid*.

interest in Chapter 1, which concerns preventive measures.[53] Article 7 of the UN Convention, which addresses the prevention of corruption in the public sector, provides that '[e]ach 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.'[54] With respect to the private sector, Article 12 provides that preventive measures may include '[p]romoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest …'.[55] Article 12 further provides that such measures may prevent conflicts of interest

> by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure.[56]

Principle 1 of the Guidance to the UK Bribery Act arguably helps to bring the United Kingdom into compliance with Article 12's provisions on the prevention of corruption in the private sector by creating a strong incentive for commercial organizations to regulate conflicts of interest. The Guidance, however, does the bare minimum by merely indicating that avoiding conflicts of interest is one of a number of methods for preventing bribery by persons associated with commercial organizations. Moreover, the Guidance applies only to the prevention of corruption by commercial organizations, and therefore has no relevance for corruption and conflicts of interest in the public sector. Consequently, the Bribery Act does nothing to bring the United Kingdom into compliance with Article 7 on the prevention of corruption in the public sector. It remains to be seen how other States Parties to the UN Convention will assess the UK's compliance with Chapter 1 of the UN Convention against Corruption, as a part of the peer review process currently underway. The United Kingdom's compliance with Chapters III and IV of the Convention has

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[53] The OECD does, however, address corruption and conflicts of interest in other instruments, such as the *Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service*, June 2003.

[54] Art. 7(4).

[55] Art. 12(2)(b).

[56] Art. 12(2)(e).

already been assessed by Israel and Greece as a part of this review process, but an assessment of the UK's compliance with the Convention's other chapters has not yet taken place.[57]

III. THE REGULATION OF CONFLICTS OF INTEREST WITHIN THE PUBLIC SECTOR MORE GENERALLY

The remainder of this chapter provides an introduction to the regulation of conflicts of interest in the UK public sector more generally, beyond the immediate context of anti-bribery legislation.[58] Since its establishment in 1994, the Committee on Standards in Public Life has continued to play a central role in the regulation of conflicts of interest in the United Kingdom. As a standing committee that is not linked to a specific inquiry or report, the CSPL has been a constant presence in the United Kingdom since its founding, although its membership has changed throughout this period.[59] The Committee's continual presence has allowed it to help keep conflicts of interest, and public ethics generally, on the political agenda, even if the UK government has not always accepted its recommendations.[60] Since its first report on standards in public life, issued in May 1995, the CSPL has produced a steady stream of reports covering a range of institutions and issues, including local public spending bodies, local governments, the funding of political parties, conduct in the House of Lords and in the House of Commons, the electoral commission, and expenses and allowances for Members of Parliament.[61] In keeping with its terms of reference, the CSPL has examined the standards of conduct of a wide range of public office

[57] United Nations Office on Drugs and Crime, Country Profile, United Kingdom of Great Britain and Northern Ireland http://www.unodc.org/unodc/treaties/CAC/country-profile/profiles/GBR.html.

[58] The regulation of conflicts of interest in the private sector remains beyond the scope of this chapter. For a detailed and comprehensive treatment of this subject, *see* Charles Hollander QC and Simon Salzedo, *Conflicts of Interest* (Sweet & Maxwell 2011, 4th ed.).

[59] Committee on Standards in Public Life, About Us, http://www.public-standards.gov.uk/about.html.

[60] Gillian Peele and Robert Kaye, 'Conflict of Interest in British Public Life' in Christine Trost and Alison Gash, eds, *Conflict of Interest in Public life: Cross-National Perspectives* (Cambridge University Press 2008) 159.

[61] Committee on Standards in Public Life, History of the Committee, http://www.public-standards.gov.uk/About/History_of_the_Committee.html.

holders, such as central and local government officials, Members of Parliament, officials of non-departmental public bodies, and the National Health Service.[62]

The CSPL has approached conflicts of interest as an aspect of ethical standards, and has relied on self-regulation, accompanied by independent scrutiny and monitoring.[63] Thus, codes of conduct, which often call for the disclosure of interests, have dominated the regulation of conflicts of interest in the public sector in the United Kingdom. The degree to which scrutiny has been truly independent, however, remains questionable, as will be discussed below. As a consequence of the CSPL's general approach to ethics, hard laws and penal sanctions have played a relatively minor role in regulating conflicts of interest in the UK public sector.[64] The following provides a sketch of how the CSPL has influenced the regulation of conflicts of interest at the national level since its inception.

The first report of the CSPL resulted in an overhaul of the system for regulating ethics and conflicts of interest of members of the House of Commons.[65] In this report, the Committee recommended that all public bodies draw up codes of conduct that incorporate the seven principles of public life, and it also determined that independent scrutiny should support internal systems for maintaining such standards.[66] The House of Commons accordingly drew up a code of conduct that requires the observance of these principles and provides, in part, that '[m]embers shall base their conduct on a consideration of the public interest, avoid conflict between personal interest and the public interest and resolve any conflict between the two, at once and in favour of the public interest.'[67] The Rules of Conduct also reaffirmed the long-standing ban on the acceptance of a bribe by a Member of Parliament, and introduced a ban

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[62] Hansard (HC) 25 October 1994, col 758.

[63] Manuel Villoria Mendieta, 'Conflict of Interest Policies and Practices in Nine EU Member States', in Alexander Seger et al., eds, *Corruption and Democracy: Political Finances, Conflicts of Interest, Lobbying, Justice* (Council of Europe 2008).

[64] Peele and Kaye, above note 60 at 166; David Hine, 'Conflict of Interest Regulation in its Institutional Context', in Christine Trost and Alison Gash, eds, *Conflict of Interest in Public life: Cross-National Perspectives* (Cambridge University Press 2008) 223.

[65] The CSPL's seventh report of November 2000 led to the creation of a separate Code of Conduct for members of the House of Lords.

[66] First Report of the Committee on Standards in Public Life, above note 19 at 3, Recs 6–7.

[67] *Ibid*. at para. 10.

on paid advocacy or lobbying.[68] During this process of reform, and in keeping with the recommendations of the CSPL, the House of Commons strengthened rules that require its members to register their interests with the publicly accessible Register of Members' Financial Interests, and to draw attention to any relevant interests during Parliamentary proceedings.[69] As a part of this new regime, the House established a Commissioner for Parliamentary Standards to oversee the Register and to monitor the Code's operations, as well as a Committee on Standards and Privileges, which oversees the Commissioner. While this system is more independent than the previous regime, it is nevertheless still within the control of Parliament rather than an external body, and partisan politics have at times affected its functioning.[70]

Members of Parliament who also serve as ministers fall under the scope of the Ministerial Code as well as the House of Commons' Code of Conduct.[71] Like the Parliamentary Code, the Ministerial Code incorporates the seven principles of public life, as articulated by the CSPL.[72] The Ministerial Code also includes a substantially less detailed set of rules and procedures with respect to ministers' private interests, and requires, among other things, that ministers provide their Permanent Secretary with a list of interests that could give rise to a conflict, including those of their spouse/partner and close family.[73] The website of the Cabinet Office provides the two most recent lists of ministers' interests.[74] Enforcement of the Ministerial Code has evolved away from enforcement by the Cabinet Secretary, which proved controversial in the past, in part due to the fact that the Cabinet Secretary was required to sit in judgment of a minister to whom he was subordinate as a senior civil servant.[75] Under the current system, which arose out of recommendations made by the CSPL in its ninth report of April 2003, allegations of breaches of the Code may give rise to a consultation between the Prime Minister and the Cabinet Secretary, and the former may then refer the matter to the

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[68] *Ibid*. at para. 12; Resolutions of 2 May 1695, 22 June 1858, and 15 July 1947 as amended on 6 November 1995 and 14 May 2002.

[69] House of Commons, The Register of Members' Financial Interests, http://www.publications.parliament.uk/pa/cm/cmregmem.htm.

[70] Peele and Kaye, above note 60 at 171–172.

[71] Cabinet Office, Ministerial Code, May 2010.

[72] *Ibid*. at Annex A.

[73] *Ibid*. at para. 7.3; *see generally* pp. 14–17.

[74] Cabinet Office, List of ministers' interests, http://www.cabinetoffice.gov.uk/resource-library/list-ministers-interests.

[75] Peele and Kaye, above note 60 at 175.

Independent Adviser on Minister's Interests.[76] The Independent Adviser, whom the Prime Minister appoints, then undertakes an investigation of the alleged breach.[77] The Independent Adviser also serves as 'an independent check and source of advice to government ministers on the handling of their private interests.'[78] Despite the creation of an Independent Adviser, the continued role of the Prime Minister in this enforcement process arguably diminishes the level of independent scrutiny that exists with respect to the Ministerial Code.

Yet another code of conduct governs the conduct of civil servants in the United Kingdom, although this one focuses not on the disclosure of interests, as do the Ministerial and Parliamentary Codes, but on issues such as standards of propriety, political activities, pay and allowances, expenses, and holidays and attendance.[79] The Civil Service Management Code does, however, provide that civil servants 'must not misuse their official position or information acquired in the course of their official duties to further their private interests or those of others,' and where a conflict of interest arises, they must declare the interest to senior management, who will then decide how best to proceed.[80] With respect to the issue of conflicts of interest, the most significant aspect of the Code is its inclusion of an Annex on Business Appointment Rules for Civil Servants.[81] According to these Rules, senior civil servants who wish to take up an outside appointment or employment within two years of leaving the Civil Service may have to seek the approval of the Independent Advisory Committee on Business Appointments. As of May 2010, former ministers must comply with a similar set of rules, whereas previously they were subject only to non-mandatory rules concerning their post-employment activities.[82]

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[76] Ministerial Code, para. 1.3.

[77] Independent Adviser on Ministers' Interests, Annual Report 2010–2011, December 2011, para. 1.1.

[78] *Id*.

[79] Civil Service Management Code, June 2011.

[80] *Ibid*. at para. 4.1.3(c).

[81] *Ibid*. at para. 4.3, Annex A.

[82] Business Appointment Rules for Former Ministers; Ministerial Code, para. 7.25.

IV. CONCLUSION

The UK government largely approaches conflicts of interest not as a criminal matter, but as an ethical issue that calls for self-regulation and enforcement that is truly only quasi-independent. At the national level, for example, codes of conduct regulate the issue of conflicts of interest with respect to Parliamentarians, ministers, and civil servants, among others. While the standing Committee on Standards in Public Life has perhaps aspired towards independent scrutiny, the institutional structures that have developed since the mid-1990s are not necessarily designed to ensure that the enforcement of these ethical standards will be free from political as well as other influences. Meanwhile, the Bribery Act 2010 missed an opportunity to deal with conflicts of interest in a robust manner that would have treated conflicts of interest and corruption as related to one another. The Guidance to the Bribery Act mentions conflicts of interest, but in a fleeting manner that provides no detail about how commercial organizations could go about preventing bribery by regulating conflicts of interest. Thus, for the time being, the treatment of corruption and conflicts of interest remains separate in the United Kingdom, despite the inherent connection between the two.

12. The legal regulations for the prevention of corruption of civil servants in Turkey and the Council of Ethics for Public Service

Çagla Tansug

INTRODUCTION

Along with the international conventions concerning the fight against corruption among civil servants that Turkey signed,[1] it is possible to argue that the legal regulations in Turkish national law are mostly directed toward the objective of 'punishing' corrupt practices in the public administration. In this context, the acts of embezzlement, malversation, failure to perform control duty, bribery,[2] engaging in influence peddling, malfeasance, trading during public service, illegal disposition of properties of persons, illegal undertaking of the public service and

[1] The international documents related to the fight against corruption that apply in Turkey are: the United Nations Convention Against Transnational Crime, United Nations Convention Against Corruption, The Council of Europe's Civil Law Convention on Corruption, The Council of Europe's Criminal Law Convention on Corruption, The Council of Europe's Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, and the OECD Convention on Combating bribery of foreign public officials in international business transactions, http://www.mfa.gov.tr/turkey_s-efforts-in-combating-corruption.en.mfa (accessed 10 July 2012). Turkey ratified the Agreement for the Establishment of the International Anti-Corruption Academy as an International Organization by Law no. 6347 JO 12 July 2012-28351.

[2] See Erdal Baytemir, 'The crime of bribery within the scope of Turkish Criminal Law no. 5237' ('5237 sayili Turk Ceza Kanunu Kapsamında Rusvet Sucu') (2010) TBB Journal no. 88 333, 388; Gune Okuyucu-Ergun, 'Anti-Corruption Legislation in Turkish Law' (2007) German Law Journal vol. 8, no. 9 903, 914.

illegal use of special signs and dress are penalized[3] under the title of 'The Crimes against the Credibility and the Operation of the Public Administration' of the fourth section entitled 'Crimes against the Nation and the State and the Final Provisions' of the Turkish criminal law which entered into force in 2005.[4] Law number 5607 of the Fight against Smuggling,[5] wherein the crimes and misconduct concerning smuggling are regulated in detail, is another text providing criminal sanctions concerning the matter. The subject will be principally discussed with regard to administrative law in the framework of prevention of corruption. For this purpose, legal regulations regarding the prevention of civil servants from committing crimes related to their mission will be primarily discussed (section I).

When the administrative entities that fight against corruption are examined, it is possible to argue that they are not operating only with the purpose of preventing corruption but also with fighting against it by ascertaining which acts are corrupt. Although public officials come under the scope of authority of these entities, these entities are also in charge of persons who are not public officials.[6] The Council of Ethics for Public Service, which is one of the administrative entities fighting against corruption, is distinguished as an administrative unit operating exclusively with regard to public officials and undertaking actions to regulate the administrative operation. This Council will be mentioned in this study because it is operating especially to 'prevent' crimes of mission by preparing ethical rules for public officials. The aforementioned Council

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[3] In accordance with Turkish Criminal Law, the expression 'public official' signifies 'any person selected or appointed to carry out public duty for a temporary or permanent period' (art. 6/1/(c)). This definition is more comprehensive and larger relative to the definition of 'State employee' in administrative law. According to Turkish Administrative Law, a 'State employee' is the person who permanently works in the administration in exchange for a wage or salary and who is part of the permanent, constant and ordinary staff. 'Other public officials' is a category composed of the personnel conducting fundamental and permanent public services in accordance with the principles of general administration whose personnel rights are regulated by law. (Tayfun Akguner, *Management of Civil Servants* (*Kamu Personel Yönetimi*) (5th edn, DER 2009) 286–292).

[4] Turkish Criminal Law no. 5237, OJ 12 October 2004-25611.

[5] See the Law of the Fight Against Smuggling OJ 31 March 2007-26479.

[6] Financial Crimes Investigation Board (*MASAK*), which is operating in accordance with Law no. 5549 on Prevention of Laundering Proceeds of Crime, can be cited as an example of the entities that fight against the crime committed. See http://www.masak.gov.tr/en/default.aspx accessed 11 July 2012.

will be considered in this chapter for its function is chiefly to prevent the crimes of civil servants by establishing ethical rules for them (section II).

I. THE LEGAL REGULATIONS

Turkish law regulations concerning the prevention of corruption of civil servants, after they begin their public mission, will be mentioned in order.

1. Law no. 3628 of Declaration of Assets, Fight against Bribery and Corruption

In Law no. 3628[7] 'The fight against bribery and corruption' (art. 1), the declaration of property belonging to persons who are members of the organizations specified,[8] renewals of their declarations, inspection of their acquisition of property, provisions to be implemented in the case of unjustified benefit or of misrepresentation of the declaration of property are provided, including the employees and other civil servants.[9]

In accordance with Law no. 3628, elected public officials, ministers appointed from outside the national assembly, notaries and all public officials and employees except those who have the status of 'worker', must declare their assets. Those obliged to declare assets in accordance with special laws are also subject to the provisions of this Law (art. 2).

The declaration of assets is a prerequisite to inauguration; is obligatory at the end of February for years ending with (0) and (5) as long as the position is kept; within one month in case of an important change in

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[7] Law no. 3628 of Declaration of Property, Fight against Bribery and Corruption, OJ 04 May 1990-20508.

[8] Leaders of political parties, persons in charge of administrative organs of foundations; chairpersons, members of boards of directors and general managers of cooperatives and unions; certified public accountants, managers and supervisors of organizations under consideration for public welfare; owners of newspapers, members of boards of directors and boards of supervisors, directors in chief of companies owning newspapers; and editorial writers and columnists are also ranked among those who are obliged to declare properties in accordance with Law no. 3628.

[9] In Law no. 3628 there are also regulations related to pursuance, and civil procedures about the public officials and their abettors related to some determined crimes as well as the provisions in this subject. But these regulations will be studied in the following sections because they are related to Law no. 4483.

property, and also within one month following the termination of the position (arts. 6 and 7).

Since declarations of property are confidential, the person nominated for investigation and prosecution is obliged, when requested by the Ministry of Finance or its representative, to disclose completely to the legal department, in a reasonable time and without delay, the information demanded. In addition, the Council of Ethics for Public Service has authority to examine the declarations of property, if required (arts. 9 and 20).

Persons who misrepresent their declarations of property may be sentenced to prison (from six months to three years) and banished from public service during this penalty period, unless a more severe punishment is required according to the law (art. 12). The persons who acquire or hide unjustified benefits may be sentenced to prison (from three to five years), ordered to pay a fine and banished from public service indefinitely, unless a more severe punishment is required according to the law (arts. 13 and 15). The procedure of investigation for the above-mentioned crimes and other crimes related to corruption ranked in Law no. 3628 will be studied hereinafter.

2. Law of State Employees no. 657

The Law of State Employees no. 657 involves both provisions related to the punishment of corrupt acts, and preventive regulations.

For persons who will be engaged in state employment, a precondition of 'not having been condemned because of crimes of embezzlement, malversation, bribery, robbery, fraud, forgery, abuse of confidence, fraudulent bankrupt corruption tenders, involvement in a fraudulent act during fulfilment of obligations, laundering property values generating from crimes or smuggling' is imposed, among other crimes (art. 48/(A)/(5)).

State employees are prohibited from exercising commercial or profit-making activities except for activities mentioned by this law. In addition, state employees whose spouses, underage children or children with a disability are involved in prohibited activities have the duty to notify this situation within 15 days to the institution on which they depend (arts. 28/1 and 3).

Also, state employees cannot receive gifts, nor can they benefit from anything connected with their professions. In this context, state employees are forbidden to demand gifts directly or through mediators, and to receive gifts or to demand and contract debts from owners of companies with the purpose of benefiting even if it is not during the completion of

the task. The Council of Ethics for Public Service is authorized to determine the scope of received gifts and to demand from 'General Managers' or their equivalent at the end of each calendar year (art. 29) the list of gifts received by high-level public officials. The directive prepared by the Council of Ethics for Public Service referring to this authority was published in the official gazette[10] on 13 April 2004. The last circular letter was published on 16 December 2011.[11]

> It is forbidden for the state employee to get any benefit directly or in any name directly or through mediators from an entity under his/her control or related to his/her task or to the institution he/she is a member of. (art. 30)

A supervisor is also banned from making any demand to receive any private benefit, accept gifts and contract debt from an employee under him or her (art. 10/3).

Another provision of Law no. 657, which is often included in regulations related to public officials, is: 'It is forbidden for state employees to declare secret information concerning public service, even when they quit their jobs, unless there is a written permission of the related minister' (art. 31).

In the context of these provisions, regulations to prevent corruption by using a public position, during the performance of a contract and even after the contract is terminated, are covered by Law no. 657.

3. Law no. 4483 concerning the Trial of Employees and Other Public Officials

In accordance with the Constitution of 1982, still in force in Turkey: 'prosecution of public servants and other public employees for alleged offences shall be subject, except in cases prescribed by law, to the permission of the administrative authority designated by law' (art. 126/6).[12] In Law no. 4483,[13] which entered into force in accordance with

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[10] Article 15 of Regulation on the Principles of Ethical Behaviour of the Public Officials and Application Procedures and Essentials, http://www.etik.gov.tr/Mevzuat.aspx?id=1 accessed 11 July 2012.

[11] Commission of Ethics for Public Services, Circular Letter Concerning the Prohibition of Reception of Gifts, 16 December 2011, http://www.etik.gov.tr/Mevzuat.aspx?id=1 accessed 11 July 2012.

[12] Constitution of the Republic of Turkey, www.anayasa.gov.tr accessed 11 July 2012.

[13] Law no. 4483 Concerning Trial of Employees and Other Public Officials, OJ 04 December 1999-23896.

this provision of the Constitution, the procedures to be followed in a criminal prosecution concerning public servants and other public employees, as well as the administrative authorities competent to give permission to prosecute are established.

Law no. 4483 'is implemented in the crimes that the public servants and the other public employees performing fundamental and permanent duties required by the public services provided by the State and other public legal persons according to the general administrative principles, commit because of their tasks' (art. 2/1).

In accordance with this law, and concerning the crimes that have been committed by public servants and other public employees within the accomplishment of their tasks, save if the offense detected in the criminal act requires imposition of heavier punishment, the procedure to be implemented is as follows: the chief public prosecutor demands permission from the relevant authority to investigate, by sending a copy of the document before proceeding to any operation other than recording evidence, which must be collected as a matter of emergency to avoid the risk of the public servant or other public employee who is the subject of the denunciation or complaint (art. 4/1) disappearing without their testimony being taken. The authorities competent to give permission to investigate initiate a 'preliminary examination' (art. 5/1). After preparation of a report, they decide whether to permit the investigation (art. 6/2). It is obligatory that this decision be taken within thirty days from the time of the discovery of the matter (art. 7). It is possible to contest this decision within ten days of its notification. The objection is submitted to the authority of the administrative jurisdiction and the court decides in a definitive manner within three months (art. 9). If permission to investigate is obtained, 'the related Office of chief prosecutor conducts and concludes the preliminary investigation by using its authorities in the Law of criminal procedure and other laws' (art. 11). Preliminary investigations concerning the General Secretary of the President, the General Secretary of the Grand National Assembly of Turkey, undersecretaries and governors are made by the chief prosecutor of the 'court of cassation' or by the vice chief prosecutor, and preliminary investigations concerning the county governors are carried out by the public chief prosecutors of the province or by the vice chief prosecutors (art. 12/1).

According to the annex of Law no. 4483,[14] crimes of torture and those exceeding the limits of authorization for the use of force[15] were excluded from the scope of this law. The implementation of its general provisions is set forth without permission to investigate in these cases (art. 2/5).

In accordance with an amendment made in 2003,[16] the provisions of Law no. 4483 are not applicable to defendants in a proceeding relating to crimes or participation in crimes covered by Law no. 3628 (explained above), banking law crimes and crimes such as defalcation, bribery, simple and aggravated embezzlement, smuggling during or because of the duty, conspiring to rig bids on official tenders and buying and sales, revealing state secrets or causing state secrets to be revealed (Law no. 3628, art. 17/1).

As a result of this amendment, to prevent corruption in the cases of the crimes cited above, the Public Prosecutor directly initiates an investigation without requiring permission to investigate and notifies his/her supervisor or the authorities that received the defendants' declarations of assets (Law no. 3628, art. 19/1) about the situation.

In addition, when the Chief Prosecutor initiates the investigation, he/she can demand from the tribunal or regional civil court where the money or property exists, that cautionary judgement is taken concerning the money or property about which evidence and indications of unjustified acquisition exist, before opening the public suit (Law no. 3628, art. 19/2 and 3).

However, the provisions permitting prosecution of the related crimes without need for 'permission to investigate' and which can assure an effective fight against corruption and 'the provisions of law related to the defendants subjected to the special procedure of investigation and of prosecution because of their tasks and attributes' 'are not implemented on undersecretaries, governors, county governors' (Law no. 3628, arts. 17/2 and 3).

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[14] Law no. 4778 related to the introduction of amendments in various Laws (Turkish Criminal Law, Criminal Procedures Law, Foundation Law and various Laws), OJ 11 January 2003-24990.

[15] Turkish Criminal Code, art. 256/1. The provisions relating to felonious injury are applied in case of use of force or power by a public officer against a person(s), exceeding the limits of authority. http://www.justice.gov.tr/basiclaws/Criminal_Code.pdf.

[16] Law no. 5020 related to the introduction of amendments in banking law and a number of other laws, OJ 26 December 2003-25328.

4. Law no. 5018 on Public Financial Management and Control

The objectives of Law no. 5018[17] are to regulate the structure and function of public financial management, the preparation and implementation of public budgets, and the accounting and reporting of all financial transactions, and to perform financial control in line with the politics and objectives covered in the development plans and programs to ensure accountability and transparency and the effective, economic and efficient collection and utilization of public resources (art. 1).

In this framework, Law no. 5018 contains provisions related to the precautions to be taken in case of an appearance of corruption as well as provisions related to the prevention of corruption.

In the context of this law, an 'internal audit system'[18] is created with the following objective: 'the prevention of illegality and corruption in any kind of financial decisions and operations' (art. 56/(c)). In cases where there is a complete breakdown of the financial management and control system or there are indications of major corruption or public loss, upon the request of the concerned minister/governor for the special provincial administrations/mayor of a municipality, or upon the direct approval of the Prime Minister; the Minister of Finance or of the Interior may authorize audit staff to inspect the entire financial management and control systems, financial decisions and transactions of the public administrations as to their compliance with the legislation. A copy of the reports is to be issued at the end of such inspections, which shall be sent to the Internal Audit Coordination Board. Another copy is sent to the relevant Minister, governor or mayor (art. 75 and art. 77/2).

5. Law no. 4734 on Public Procurement

The objective of this law is to ensure competition and transparency by preventing both public officials and authorities from the private sector

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[17] Law no. 5018 on Public Financial Management and Control, OJ 24 December 2003-25326 (for the English version see: ived.dpt.gov.tr/DocObjects/Download/9579/PFMCL-5018.pdf, accessed 12 July 2012).

[18] Law no. 5018, art. 55 – internal control is the whole of the financial and other controls comprising organization, methodology, procedure and internal audit established by the administration in order to provide that the activities are performed in an effective, economic and efficient way in accordance with the aims, defined policies of the administration and with legislation, the assets and resources are protected, the accounting records are held correctly and completely, the financial information and management information are produced in time and securely.

from using public funds for their personal interests in public procurement. It is part of the related European Union regulations. To reach harmonization with these regulations, some amendments[19] have been made to Public Procurement Law[20] no. 4734.

In accordance with Law no. 4734, it is forbidden 'to conspire to rig bids or to intend to do so for operations related to tender by cheating, promise, threat, exerting influence, capitalizing, agreement, defalcation, bribery or by other means' (art. 17/(a)).

In accordance with article 60 of the same law, if it is established that the contracting officer, the chairperson and the members of the tender commissions and other related persons assigned at any stage of the procurement proceedings from the beginning until the signing of contract, have committed these acts or conduct, have failed to fulfil their duties in accordance with the legal requirements or failed to act impartially, or have been involved in misconduct or negligent acts which inflict loss upon one of the parties, these persons shall be given a disciplinary punishment in accordance with the related legislation. Criminal prosecution shall also apply to these persons depending on the nature of their acts or conduct, and in addition to the punishment rendered by the court, these persons shall pay a penalty for all loss and damage inflicted upon the parties in accordance with the general provisions. The persons who have been convicted for the acts and conduct contrary to this law shall not be assigned to duties within the scope of this law. The personnel who have incurred punishment by judicial bodies due to acts and conduct included within the scope of this law shall not be appointed and assigned by any public institutions and authorities covered in this law, or to any duties or authorized positions related to the implementation of this law or other related regulations (arts. 60/1 and 2).

Those who implement this law cannot disclose any confidential information or documents relating to the proceedings about the procurement process, jobs and transactions of the tenderers, technical and financial structures of the tenders as well as the estimated costs of the procurements, or use this information for their own benefit or for the benefit of third persons (art. 61). The sanctions mentioned above will be also applied to the public servants who violate this rule.

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[19] Gul Ustun, 'The Effects of the Harmonization Process with the Law of European Union on the Administrative Law', MUHF-HAD vol. 15, nos. 1–2 153, 158.

[20] Law no. 4734 OJ 22 January 2002-24648 (for the English version see: http://www.ihale.gov.tr/public_procurement_law-50-1.html, accessed 12 July 2012).

The legislator made regulations to prevent public servants from obtaining unfair advantages or providing unfair advantages utilizing tenders, and set forth administrative and criminal sanctions for violation of these regulations. In addition to these regulations, the digital recording of all procurement operations will increase compliance with the principles of transparency and accountability.[21]

6. Right to Information Act Law no. 4982

Under the amendment[22] to the Constitution of 1982 adopted in 2010, the right to information acquired constitutional guarantee by being added to the Constitution. This right had already been recognized in Turkish law in 2003 by the Right to Information Act Law no. 4982[23] which entered into force in 2003. Through the recognition of this right, one can see 'the ideas to eliminate the concept of obscurity which is considered as negative and to assure the inspection of the operations of the administrators by the ruled people'[24] in order to provide openness and transparency in state institutions. This law allows anybody to demand by application information and documents that are held or should be held by all state institutions and organizations including professional organizations that are under the status of public institution.

In accordance with Law no. 4982, the right to information may be limited when the information demanded concerns: state secrets (art. 16), economic interests of the country (art. 17), intelligence (art. 18), administrative investigation (art. 19), judicial investigation and prosecution (art.

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[21] Arif Koktas, Fatih Karaosmanoglu & Veysel Bilgic, *Academic Research Report in the Project of Ethics for the Prevention of Corruption in Turkey: Public adjudications and ethics* (Council of Ethics for the Public Service–Council of Europe, 2009) http://www.etik.gov.tr/BilgiBankasi.aspx?id=2, accessed 11 July 2012 47, 73.

[22] Law no. 5982 related to the introduction of Amendments in Some Articles of Constitution of the republic of Turkey OJ 13 May 2010-27580.

[23] Law no. 4982 on the Right to Information, OJ 24 October 2003-25269 (for the English version see http://www.bilgiedinmehakki.org/en/index.php?option=com_content&task=view&id=7&Itemid=8, accessed 12 July 2012).

[24] Draft law of right to information and Reports of Commission of Harmonization and Commission of Justice of European Union, General Preamble http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss248m.htm (accessed 12 July 2012).

20). However, public officials will be subject to the principle of publicity.[25] These outcomes might have positive effects on the fight against corruption.

II. COUNCIL OF ETHICS FOR PUBLIC SERVICE (CEPS)

The aim of Law no. 5176[26] is 'to determine the establishment, duty and working procedures and fundamentals of the Council of Ethics for Public Service as to adopt and observe the implementation of ethical attitude principles such as transparency, impartiality, honesty, and accountability, that should be abided by the public officials' (art. 1/1).

This law covers all staff employed in the public sector except 'the President of the Republic, members of the Grand National Assembly of Turkey, members of the Board of Ministers, the Turkish Armed Forces, adjudication members and universities' (art. 1/3).

CEPS was founded under the framework of the regulations called 'Reform of Public Administration' in Turkey,[27] which occurs under the authority of the Prime Minister. The Council of Ministers assigns all of the eleven members of CEPS. These members are selected among persons who have held high-level management positions or similar high-level positions in the ministry, the central administration or other public entities in the categories set forth by Law no. 5176.

Council members are appointed for four renewable years and cannot be dismissed before the end of the task period (art. 2/4). These regulations, which were established to assure neutral decision-making of Council members, associate the sectoral regulatory authorities. To provide administrative autonomy to these institutions similar to '*autorité administrative indépendante*' in French law, it would be necessary to grant them public legal personality. However, CEPS is deprived of public legal personality.

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[25] Cemil Kaya, *Right to Information in Administrative Law (İdare Hukukunda Bilgi Edinme Hakkı*) (1st edn., Seckin 2005) 51–52.

[26] Law no. 5176 Related to the Establishment Council of Ethics for Public Service and Making Modifications on Some Laws (for the English version see http://www.etik.gov.tr/mevzuat/5176ing.htm, accessed 22 April 2012).

[27] Ibrahim Arap & Levent Yilmaz, 'The "New" Institution of the New Approach of Public Administration: Council of Ethics for Public Service' ('Yeni Kamu Yönetimi Anlayışının "Yeni" Kurumu: Kamu Görevlileri Etik Kurulu') (2006) TODAIE vol. 39, no. 2, 51–69.

The CEPS is commissioned and authorized to determine, with the regulations it shall prepare, the ethical attitude principles to be abided by public officials while performing their duties. It is also commissioned and authorized to perform necessary investigation and research with personal claims if ethical attitude principles are violated or likewise based on the applications yet to be received. It also informs the relevant authorities of the result of such investigations and research, performs or commissions studies to establish the ethical culture within the public and supports studies to be performed in this regard (art. 3). These principles are regulated in a directive that the Council prepared.[28] It is the first time that the concept of conflict of interest (art. 13) has been incorporated into Turkish legislation.[29]

Even though Law no. 5176 is applicable to all public officials except those who are ranked, it is possible to apply CEPS exclusively to combat implementations that violate the ethical attitude principles of public officials who are in the level of general manager or equivalent, or in higher levels in state institutions.

> The application to be made with the claim that implementations are made by other public officials violating the ethical attitude principles, are evaluated by the authorized disciplinary committees of the related institutions as to whether there is a violation of the ethical attitude principles defined by the regulations issued by the Council. (art. 4)

If such applications are made, the 'Council executes the examination and investigations concerning the applications in the framework of whether the ethical attitude principles are violated. The Council is obliged to finalize the examination and investigations it shall perform within at most three months for the applications received via complaint or denunciation' (art. 5/1).

In light of all of these regulations, it is obvious that the decisions of CEPS have an administrative character. 'The examination and investigations performed as per this Law do not constitute a hindrance for criminal prosecution or disciplinary prosecution based on the personnel laws they are subject to' (art. 5/4). Additionally, CEPS shall inform the

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[28] Regulation on the Principles of Ethical Behavior of the Public Officials and Application Procedures and Essentials, OJ 13 April 2005-25785, http://www.etik.gov.tr/Mevzuat.aspx?id=1, accessed 12 July 2012.

[29] Omer Faruk Genckaya, *Academic Research Report in the Project of Ethics for the Prevention of Corruption in Turkey: Conflict of Interest* (Council of Ethics for the Public Service–Council of Europe, 2009) 34.

relevant entities and the Prime Minister in written form of the results of the examination and investigation (art. 5/2).

It is possible to state that these powers give CEPS an aspect of 'Qualified Disciplinary Committee' that acts under the authority of the Prime Minister and is empowered to prepare general regulations. On the other hand, the fact that the ethical principles that public officials have to conform to are cited as exemplification in the law, and that the determination of these principles is left to a directive[30] to enter into force with the approbation of the Prime Minister, is a source of criticism.

CONCLUSION

It is a fact that regulations in the field of the fight against corruption in Turkey are criticized. The requirement to introduce a single 'Law of the Fight against Corruption' to unify all of the laws aimed at fighting corruption is one of the ideas raised.[31] However, it must be acknowledged that Turkish law includes detailed regulations directed to prevent corruption and to establish ethical principles, and it contains effective mechanisms such as an 'internal audit system' that Law no. 5018 sets forth. Whereas all of these regulations are related to public administration, they occur in different legal texts because they contain different details related to different fields in conformity with the characteristics of these fields. Currently, the principles prepared by the Council of Ethics for Public Service related to the matter are unified in the above-mentioned directive. The crucial point should be the efficient implementation of these principles.[32]

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[30] Regulation on the Principles of Ethical Behavior of the Public Officials and Application Procedures and Essentials, OJ 13 April 2005-25785, http://www.etik.gov.tr/Mevzuat.aspx?id=1, accessed 12 July 2012.

[31] Burcu Gediz Oral, 'The fight against corruption in the international field and institutional structure of anti-corruption efforts in Turkey' (Yolsuzlukla Uluslararası Alanda Mucadele ve Turkiye'de Yolsuzlukla Mucadelenin Kurumsal Yapisi) (2011) Marmara University IIBF Journal vol. 30, no. 1, 163, 186.

[32] Yuksel, C., *From Ethics in State to Ethical State: Ethics in Public Administration* vol. 2 (2005, TUSİAD T/2005 11-411) 301.

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PART III

International organizations and the fight against corruption and conflicts of interest

13. Corruption, conflicts of interests and the WTO

Susan Ariel Aaronson and M. Rodwan Abouharb

DOES THE WTO HELP MEMBER STATES CLEAN UP?

The GATT and the WTO comprise the international system of rules governing trade. Neither the GATT nor the WTO includes rules to address or reduce corruption per se.[1] However, member states have long used both the WTO and its predecessor agreement, the GATT, to improve governance in other countries.[2] They hold these states accountable with three mechanisms: the accession process, trade policy reviews, and ultimately, trade disputes.

Under WTO rules, policymakers are obligated to act in an evenhanded and predictable manner – so that all market actors are treated in an equivalent manner under trade rules. They also must provide market actors with access to information and to allow individuals to comment on and challenge trade-related regulations before they are adopted (a form of due process). These obligations can be redefined as anti-corruption counterweights[3] in that they bolster the ability of citizens to monitor their

[1] Kenneth W. Abbott, 'Rule Making in the WTO: Lessons from the Case of Bribery and Corruption,' *Journal of International Economic Law* 4:2 (2001) 275–296.

[2] Members of the GATT agreed to create the WTO; it came into existence in 1995.

[3] See Transparency International, 'National Integrity Systems: Country Studies,' www.transparency.org/activities/nat_integ_systems/country_studies. html; and Marianne Camerer, 'Measuring Public Integrity,' *Journal of Democracy* 17:1 (2006); International Council on Human Rights Policy and Transparency International, 'Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities, Opportunities,' 2010, pp. 7–8; and Daniel Kaufmann, 'Back to Basics: Ten Myths about Governance and Corruption,' *Finance and Development* 42:3

government and hold it accountable.[4] In attempting to improve governance for foreign market actors (the direct intent of WTO rules), membership in the WTO improves governance for domestic actors too.[5] In so doing, the WTO helps member states counter corruption (a spillover effect).

Corruption (the abuse of entrusted authority for illicit gain)[6] is pervasive, hard to measure and damaging to economic growth.[7] Activists, scholars and policymakers now recognize that corruption is an outcome of inadequate governance. Thus, development practitioners increasingly focus their efforts on improving governance.[8] Herein we define good governance as 'mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights … and mediate their differences.'[9] Anti-corruption counterweights such as due process, evenhandedness and transparency are important elements of good governance. They are also norms of the GATT/WTO.[10]

(September 2005) http://www.imf.org/external/Pubs/FT/fandd/2005/09/basics.htm.

[4] Daniel Kaufmann, 'Myths and Realities of Governance and Corruption' (2005) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=829244 (Accessed October 6, 2011); Martin Skladany, 'Buying Our Way out of Corruption: Performance-Based Incentive Bonuses for Developing Country Politicians and Bureaucrats,' *Yale Human Rights & Development Law* 12 (2009) 160–204.

[5] Susan A. Aaronson and M. Rodwan Abouharb, 'Unexpected Bedfellows: The GATT, the WTO and Some Democratic Rights,' *International Studies Quarterly* 55 (2011) 379–408.

[6] Norad, 'Anti-Corruption Approaches: A Literature Review', Study 2, 2008, 12, 40, http://www.norad.no/en/Tools+and+publications/Publications/Publication+Page?key=119213. Scholars and policymakers list civil society organizations, freedom of the press/media, access to information laws, budgetary disclosure and open meetings.

[7] Daniel Lederman et al, 'Accountability and corruption: Political Institutions Matter,' *World Bank Working Paper 2708* November (2001); and Paulo Mauro, 'Corruption and Growth,' *Quarterly Journal of Economics* 110:3 (August 1994) 681–712.

[8] World Bank, World Development Report 'Building Institutions for Markets' http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:22295291~pagePK:478093~piPK:477627~theSitePK:477624,00.html (2002) 19; Kaufmann 2005 (n4).

[9] United Nations Development Programme, 'Governance for sustainable human development,' a UNDP policy document. http://mirror.undp.org/magnet/policy/chapter1.htm (1997).

[10] Krista Nadakavukaren Schefer, 'Corruption and the WTO Legal System,' *Journal of World Trade* 43:4 (2009) 737–770; Padideh Ala'I, 'The WTO and the Anti-Corruption Movement,' *Loyola University Chicago International Law*

Some scholars have asserted that developing countries use membership in the WTO to improve their governance (policy anchoring). The accession process allows member states to signal investors and traders that they are adopting good governance practices and signal their citizens that the government is accountable.[11] Acceding states cannot join unless they can convince existing WTO members that they have improved their governance strategies.[12] Scholars such as Francois 1996; Bacchetta and Drabek 2002; and Basu 2008 have stressed that anchoring occurs during the year(s) of accession.[13] These scholars have relied on metrics of governance developed by widely respected sources such as the World Bank and Freedom House. These broad metrics are based on expert surveys of policymakers, human rights and governance activists and business leaders. Analysts ask these experts a wide range of questions and then aggregate the answers into one numerical assessment of governance, which they then describe as broadly reflective of good governance. Thus, some scholars call these indices mash-ups.[14]

However, we believe these governance metrics may be too broad to examine how the WTO may influence governance. We argue that the WTO obliges members to adhere to three norms of good governance: evenhandedness (non-discrimination); access to information (transparency); and administrative due process (the ability to review, comment upon and challenge trade-related policies).

Review 6:1 (2008–2009) 259–278; Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows,' *World Trade Review* 9 (2010) 551–581.

[11] Edward D. Mansfield, Helen V. Milner, and B. Peter Rosendorff, 'Why Democracies Cooperate More: Electoral Control and International Trade Agreements,' *International Organization* 56:3 (2002) 477–513.

[12] Marc Bacchetta and Zdenek Drabek, 'Effects of WTO Accession on Policy-Making in Sovereign States: Preliminary Lessons from the Recent Experience of Transition Countries,' *Staff Working Paper ERSD-2002-02*. Geneva: WTO (2002); Tang Man-Keung and Wei Shang-Jin (2006) 'Is Bitter Medicine Good for You? The Economic Consequences of WTO/GATT Accessions,' IMF Conference on Trade Research Department, April 13. http://www.imf.org/external/np/res/seminars/2006/trade04/tanwei.pdf (accessed 2 February 2010).

[13] Peter Mandelson, 'Russia, Its Future and the WTO,' at the Joint Event Association of European Business (AEB) and the Russian Confederation of Business Industries (RSPP) http://trade.ec.europa.eu/doclib/docs/2007/march/tradoc_133867.pdf.

[14] Martin Revaillion, 'Mashup Indices of Development,' World Bank Policy Research Paper 5432, Sept. 2010, 10; and see Duncan Green, on the Oxfam GB website, http://www.oxfamblogs.org/fp2p/?p=3092.

We used metrics from Global Integrity (on due process and access to information), as well as statistics from the World Bank Doing Business Report (on evenhandedness – the degree to which individual states fairly and evenly enforce contracts within their borders). With these metrics, we can better explain *how* membership affects governance as well as *when* policy anchoring occurs.

We found that nations change their laws and policies to join the WTO, but they achieve measurable, albeit uneven governance improvements only *after* years of membership. Members reinforce both the norms and policies of good governance in the day-to-day workings of the WTO, although these mechanisms are not designed to monitor governance improvements per se. Moreover, because our data is not limited to governance in the trade regime but covers the polity as a whole, our empirical evidence provides partial support for our hypothesis that the norms of good governance promoted by the WTO transcend the trade sphere and affect the country's approach to governance in general.

We hypothesized that if policy anchoring is occurring when nations attempt to join the WTO, these acceding states should show dramatic improvements in good governance during the years of accession. However, if policy anchoring occurs during membership, we would see greater evidence of improvements in our metrics of governance for both new and longstanding members of the WTO.

Our analysis proceeds as follows. We begin by delineating the specific GATT/WTO norms of due process, evenhandedness and transparency. We next examine qualitative evidence of accession and trade policy reviews to see if member states alter their approaches to governance to foster due process, evenhandedness, and transparency. We then briefly summarize our quantitative findings, and conclude with a discussion of the implications of this research. This chapter is a shortened version of an upcoming article on the WTO and improved governance.

HOW DOES THE WTO IMPROVE GOVERNANCE?

The WTO Secretariat has long embraced the idea that good governance is a spillover of its efforts to promote open trade. WTO rules 'reduce opportunities for corruption,' by regulating how and when governments can protect and by requiring transparency in trade regulation.[15] The section below delineates the specific WTO obligations that influence both

[15] WTO, 'Ten Benefits of the WTO,' 2008, http://www.wto.org/english/res_e/doload_e/10b_e.pdf.

the behavior of member states and market actors. We see these obligations as good governance norms. Specifically, the WTO requires that governments promote:

- *Evenhandedness (also known as non-discrimination)*: Governments must not discriminate between foreign and domestic market actors (GATT's MFN and national treatment obligations). Article III requires non-discrimination both in the letter of the law and in the manner in which laws are applied.[16] The WTO describes this as 'treating other people equally.'[17]
- *Transparency and access to information*: The WTO says that transparency is essential to the functioning of the global trading system, and a means of enhancing legitimacy.[18] The WTO defines transparency as the 'degree to which trade policies and practices, and the process by which they are established, are open and predictable.' Transparency and access to information help make the WTO's rules and processes accountable both to member states and their citizens. Governments must make trade-related policies in a transparent manner and ensure market actors can be made aware of such provisions.[19] Transparency checks arbitrary or discriminatory policies or practices and provides market actors with the information they need to challenge trade-related policies and decisions.
- *Due Process*: Governments must accord due process rights to market actors. GATT Article X: 3(b) requires each party to maintain 'judicial, arbitral or administrative tribunals or procedures for the purpose … of the prompt review and correction of administrative action relating to customs matters. These tribunals must be independent … and allow importers to lodge appeals.' Moreover, individuals with interests in investigations have a right to receive notice, to present written evidence … to challenge decisions and to

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[16] OECD, 'Potential Anticorruption Effects of WTO Disciplines,' TD/TC (2000)3 Final, 2000, p. 6. r.

[17] http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.

[18] Trade Policy Reviews, Ensuring Transparency, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm; and 'Lamy calls on global cooperation for the smooth flow of Trade,' http://www.wto.org/english/news_e/sppl_e/sppl182_e.htm.

[19] Article X.

seek judicial review.[20] These provisions set limits on what bureaucrats can do and how they do.[21]

If WTO members do not adhere to these three norms, other members are likely to name and shame them at their trade policy reviews. But public exposure may not change a member state's practices. Members of the WTO can challenge the behavior of another member state in a trade dispute if they can show that country is distorting trade. Trade disputes are costly, and thus they are rare. However, because they are binding, they are effective means to hold countries to account.

Our Contribution

We argue that the diffusion of good governance norms through the WTO is both direct and indirect. When countries accede, they are directly prodded by other member states to make changes to ensure that their policies accord with WTO norms. We believe that as trade-related good governance practices such as providing access to information or allowing challenges to trade regulation become 'learned,' officials may then act in a similar manner in other aspects of policymaking.[22] But the diffusion of good governance also empowers citizens. With rights to information and due process rights related to trade policymaking a growing number of people are learning how to influence and challenge their country's trade-related policies. Here too diffusion is direct. Moreover, because trade today encompasses so many areas of governance, from tax to food safety, these same citizens may gradually learn to transfer the skills learned from influencing trade-related policies to other public issues.[23] In this indirect manner, good governance spills into the polity as a whole. Table 13.1 below summarizes this process.

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[20] Steve Charnovitz, 'The WTO and the Rights of the Individual,' *Intereconomics Review of European Economic Policy* 36:2 (2001) 98–108.

[21] Sylvia Ostry, 'China and the WTO: Transparency Issue,' *UCLA Journal of International Law and Foreign Affairs* 3:1 (1998) 1–22.

[22] Beth A. Simmons, 'International Law and State Behavior: Commitment and Compliance in International Monetary Affairs,' *American Political Science Review* 94:4 (2000) 819–835; Emily Hafner-Burton, 'Trading Human Rights: How Preferential Trade Agreements Influence Government Repression,' *International Organization* 59:3 (2005) 593–629.

[23] Aaronson and Abouharb 2011 (n 5).

Table 13.1 The direct and spillover effects of GATT/WTO norms at the national level

GATT WTO provision *and its purpose*	Policymaker obligation	Spillover effects on policymakers	Examples of policies that must be established or improved	Spillover effects on market actors and citizens
MFN and national treatment Articles I, III. *Designed to prevent discrimination among market actors – domestic and foreign actors.*	Act in an evenhanded manner.	Policymakers learn to act in an evenhanded manner related to trade. Policymakers should avoid bribes or favoritism.	Taxation Customs Agriculture Industrial policies Health, environment and safety regulations Investment regime State ownership and pricing policies Authority of sub-governments Legal system	Market actors learn to expect non-discrimination and evenhandedness. May lead to better market allocation. Citizens may perceive government as fairer, and more responsive.
Transparency and access to information Article X *Provide clarity and certainty to trade.*	Act in a transparent manner. Be responsive to public questions.	Policymakers learn to act in the sunshine. May create feedback loop and lead to better public policies.	Same as above	Citizens gain information to assess and influence government decisions and ensure greater responsiveness to public concerns. Citizens learn who to ask about decisions and how to seek redress. May lead to public questioning of policy directions.

Table 13.1 (cont.)

GATT WTO provision *and its purpose*	Policymaker obligation	Spillover effects on policymakers	Examples of policies that must be established or improved	Spillover effects on market actors and citizens
Due process Article X. *Allows foreign and domestic market actors to comment on and trade-related regulatory changes.*	Act in an accountable manner. Accept public challenge and questioning.	Policymakers learn to interact with and listen to constituents. Government learns to read markets.	Same as above and administrative/ judicial review	Citizens gradually learn how to challenge government. Market actors may be more willing to take risk if they can challenge policy decisions.

Member states directly monitor performance regarding WTO rules and principles during trade policy reviews.[24] They use this process to hold other governments to account – lauding them for good behavior, criticizing them for bad behavior. During these reviews, the diffusion of norms is circuitous and gradual. Members may reject criticism, but if they do, they may be challenged in a trade dispute.

Qualitative Evidence

Diffusion of good governance: Accessions

Members of the WTO use the accession process to influence the behavior of possible new members.[25] The current members must agree on the terms of membership for a new member; these terms differ for each country.[26] If two-thirds of the members approve, the acceding country can ratify the agreement and then join the WTO.

[24] Tang and Wei 2006 (n 12).

[25] WTO, 'Membership, Alliances and Bureaucracy,' www.wto.org/english/thewto_e/whatis_e/tif_e/org3_ehtm; and Anna Lanoszka, 'WTO Accession Process: Negotiating Participation in a Globalizing Economy,' *Journal of World Trade* 35:4 (2001) 575–602.

[26] 'How to Join the WTO: The Accession Process,' http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.

Current members use the accession process to prod the potential members to take steps that increase transparency, and advance the rule of law. Potential members must also ensure that their legal system is evenhanded and effective; they govern in a transparent manner, and allow traders to influence and challenge trade policies.[27]

We reviewed working party reports and accession protocols for more than 25 accessions that took place from 1995 to 2011; we found that countries promise and make significant changes to their governance systems before accession is approved.[28] For example, China, Vietnam, and Russia, made, amended or adopted innumerable laws, decrees, orders, regulations, decisions, and other measures to weave the WTO rules and its specific commitments into its domestic legal regime.[29] Both countries developed procedures for judicial review, uniform administration of rules, and policies to nullify laws that are inconsistent with WTO norms. They also were obligated to update their legal system and develop procedures to make this system more evenhanded, transparent, and accountable in order to meet the needs of foreign as well as domestic investors.[30] Georgia also promised to change its legal system to conform to WTO rules, including the right to appeal administrative rulings on matters subject to WTO provisions.[31] Saudi Arabia and Nepal agreed to increase provisions for transparency and public comment.[32] Cambodia agreed to remake its judicial and administrative law systems, adding an appeals process. Working party member governments also reminded Cambodia that it was obliged to develop 'mechanisms for publication and dissemination of draft legislation and standards for public comment; [and] the establishment of a TBT (technical barriers to trade) Inquiry point, where foreign and domestic producers could learn how to meet

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[27] Bacchetta and Drabek 2002: 11 (n 12).

[28] http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#sau.

[29] On Russia, http://www.ustr.gov/webfm_send/3482. On China, see http://www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_China_final.pdf; on Vietnam, http://www.ustr.gov/archive/assets/Document_Library/Fact_Sheets/2006/asset_upload_file521_9445.pdf.

[30] Julia Qa-Qin, 'WTO Plus Obligations and Their Implications for the World Trade Organization Legal System,' *Journal of World Trade* 37:3 (2003) 483–522; and William P. Lane, 'Trade in China's Shadow? Intellectual Property Protection in Post-WTO Accession Russia,' 36 *Boston College International and Comparative Legal Review* 183 (2013), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1694&context=iclr.

[31] WTO/ACC/GEO31, p. 8 (on due process) and 34 on transparency.

[32] Working Party on the Accession of Nepal, WT/ACC/NPL16.doc, and Working Party on the Accession of Saudi Arabia, WT/ACC/SA-U/61.

Cambodian standards.'[33] The representative of Jordan said that from the date of accession all laws, regulations, decrees, judicial decisions and administrative rulings of general application related to trade would be published in a manner that fulfills the WTO requirements.[34]

WTO member states were perhaps hardest on China, demanding that China improve the rule of law as a condition of accession.[35] China's Protocol calls on China to 'apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures pertaining to or affecting trade.'[36] The agreement calls on China to ensure that 'those laws, regulations and other measures pertaining to and affecting trade shall be enforced.'[37]

Other member states and business leaders monitor China's adherence to its WTO obligations.[38] While the US government generally lauded China for meeting its obligations, it also concluded that parts of the Chinese government 'had not yet fully embraced the key WTO principles of market access, non-discrimination and transparency, or the carefully negotiated conditions for China's WTO accession designed to lead to significantly reduced levels of trade-distorting government policies.'[39] In 2011, the US China Business Council (USCBC) examined China's adherence to its transparency commitments. It concluded China had 'complied reasonably well, but inconsistently.'[40]

Taken in sum, the accession process is forcing major changes not only in the laws of new member states, but also in how nations govern. These

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[33] Working Party on the Accession of Cambodia, WT/ACC/KHM/21, 15 August 2003, p. 25, #124.

[34] WT/ACC/JOR/33WT/MIN (99)/9, 3 December 1999, on transparency; pp. 238–240 and 10, 41 #40–41.

[35] Susan A. Aaronson 'Seeping in Slowly: How Human Rights Concerns Are Penetrating the WTO,' *World Trade Review* 6:3 (2007) 413–449.

[36] WTO, 'Accession of the People's Republic of China, Decision of 10 November 2001,' WT/L/432, (A), 1, 2.

[37] Wt/L/432, Sections (B), (C), 3.

[38] For the EU see http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/china/; for the US see http://www.ustr.gov/countries-regions/china; http://www.ustr.gov/webfm_send/2596.

[39] USTR, 2010 Report to Congress on China's Compliance with Its WTO Commitments, December 2010, pp. 1–5, http://www.ustr.gov/webfm_send/2596.

[40] The US China Business Council, 'PRC Transparency Tracking' April 2011, pp. 1–3, at https://www.uschina.org/public/documents/2011/04/transparency_tracking.pdf.

changes include measures that enhance access to information, improve evenhandedness, and provide due process regarding trade-related policymaking.[41] Over time, these reforms may give citizens in weak democracies or authoritarian regimes more opportunities to influence trade-related policymaking.[42] In so doing, the WTO is helping countries create a feedback loop between the government and the governed on trade and trade-related policies. Feedback loops can also promote greater accountability, a key anticorruption counterweight. The WTO actually argues this is a spillover effect of membership in the WTO.[43]

Indirect Diffusion: The Trade Policy Review Mechanism: TPRM

Since 1989 (under GATT), member states have formally and publicly reviewed each other's trade policies in trade policy reviews. The US, EU, China, and Japan are reviewed every two years, the next sixteen largest trade nations are reviewed every four years; and the remaining countries are reviewed every six years.[44]

Member states can use the review to name and shame countries that fail to meet their obligations for transparency, participatory governance and due process. The review meetings are not open to the public but they are made public on the WTO's website some six weeks after they occur. Therefore, citizens of WTO member states can use the review to gain broader insights into a country's policies and circumstances, and they provide feedback to the reviewed country on its performance in the system.[45] Zahrnt argues that the TPR teaches the habits of good governance, because it 'accustoms governments to tolerate reviews, stakeholders to contribute to the review process and the media to use the results.'[46]

We examined trade policy review documents for 24 countries. Our sample included a range of countries both developing and middle-income countries that were relatively new members.[47] Costa Rica was the only

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[41] WTO Case Studies 30, 43, 44, at http://www.wto.org/english/res_e/booksp_e/casestudies_e/casestudies_e.htm.

[42] Aaronson and Abouharb 2011; Aaronson 2007.

[43] WTO Case Studies 30, 43, 44, at http://www.wto.org/english/res_e/booksp_e/casestudies_e/casestudies_e.htm.

[44] http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm.

[45] http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm.

[46] Valentin Zahrnt, 'The WTO's Trade Policy Review Mechanism: How to Create Political Will for Liberalization?' *ECIPE Working Paper No. 11* Brussels, Belgium (2009) 6.

[47] The sample of countries were the US, which joined in 1948 and is reviewed every two years (most recently 2010); Malaysia, which joined in 1947

country in our sample where these issues never came up. For these other countries, corruption and good governance issues came up frequently. The questioning did not only come from the behemoths of global trade – the US, the EU and China. Countries such as Colombia, Turkey and Chile also challenged how member states behaved under WTO rules.

In general, countries were asked how they made regulations transparent, how they encouraged foreign understanding of relevant policies, and how they responded to public comment.[48] Some countries such as Kyrgyzstan and Georgia were chided for unpredictable enforcement and unclear public policies.[49] Members often asked about policy transparency and evenhandedness, they less frequently mentioned the rule of law and judicial independence. Members sometimes disagreed on performance. Turkey was lauded by some countries for its openness and improved governance, although China and Japan said that Turkey was not transparent enough.[50] Not surprisingly, China received the most criticism and questioning. In its 2008 and 2010 TPR, members acknowledged that China had become more accountable, but most countries made it clear that they thought China remained complex, opaque and inadequately governed.[51]

Member states directly mentioned problems of corruption and strengthening the rule of law during the trade policy reviews of Ghana,

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and was reviewed in 2010; Jamaica, 1963, reviewed 2005; Turkey joined 1951, reviewed 2007; Slovenia, joined 1994, reviewed 2002; Costa Rica, joined 1990, reviewed 2007, Tanzania (1961), Kenya (1964), and Uganda (1962) reviewed in 2006; Brazil, joined 1948, reviewed 2007; China joined 2001, reviewed 2010; Bangladesh, joined 1972, reviewed 2006; Sri Lanka, joined 1948, reviewed 2010; Pakistan, joined 1948, reviewed 2008; Philippines, joined 1979, reviewed 2005; Argentina, joined 1967, reviewed 2007; Ghana joined 1957, reviewed 2008; Egypt joined 1970, reviewed 2005; Colombia joined 1981, reviewed 2006; Thailand, joined 1982, reviewed 2008; Mali, joined 1993, reviewed 2004; and Kyrgyz Republic, joined 1998, reviewed 2006.

[48] See Trade Policy Review Malaysia, WT/TPR/M/225/Add.1, pp. 13, 108, 137; Trade Policy Review, Jamaica, WT/TPR/M/139, Minutes of Meeting, p. 12, #47, Trade Policy Review, Turkey, Minutes of Meeting, WT/TPR/M/192, #31, #47, 48; Trade Policy Review, Brazil, WT/TPR/M/212, #113, p. 19; #125 and #128, p. 21; and Trade Policy Review, Bangladesh, WT/TPR/M/168.

[49] Kyrgyz Republic, WT/TPR/M/170, #28, 29, p. 9; and Georgia, WT/TPR/M/206, 19 December 2008.

[50] WT/TPR/M/192, 32, 41, Japan, #47, China, #51; and Colombia, #285, p. 47.

[51] Trade Policy Review, China, Record of the Meeting, WT/TPR/M/230, quoting Secretariats' report #124, p. 21, #66, p. 12 remarks of Brazil; #92, 16, Remarks of Norway; 187, p. 33, remarks of U.S.; Japan, #213, p. 37.

Bangladesh, Philippines, Pakistan, Thailand, Kyrgyz Republic, Sri Lanka, Georgia, and the joint review of Tanzania, Kenya, and Uganda.[52] Jordan was also asked to discuss how it tackles corruption. The Jordanian representative responded that the Anti-Corruption Commission operates with neutrality, objectivity and independence.[53]

Taken in sum, members use the trade policy reviews to praise countries that have made governance progress and to name and shame countries that continue to have problems. They often discussed issues of transparency and evenhandedness and less frequently discussed due process. They chided some nations for corruption and inadequate governance and some countries even prodded other new members to encourage public participation. But trade policy reviews cannot force nations to live up to their accession or WTO agreement commitments. Hence while the trade policy review process is useful as a means of 'outing' bad or inadequate behavior, it cannot stop such behavior. Moreover, members may talk about de jure policy changes, but such change may not yet result in facts on the ground – where citizens can consistently obtain information, challenge trade-related policies, and monitor their government commitments. Nonetheless, our review of WTO documents showed some member states are pushing new member states to transmit WTO norms in areas of non-WTO competence – including advancing human rights or reducing corruption. As outlined in Table I, WTO norms are slowly diffusing into the polity as a whole in some countries some of the time. We see this slow and uneven diffusion in our qualitative results.

Brief Summary of our Quantitive Results

We do not have the space to fully delineate our research strategy and results, but readers can find our data at http://www.ucl.ac.uk/spp/people/rodwan-abouharb.

First we examined if the completed negotiating group of countries improved their performance on our narrow metrics of evenhandedness,

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[52] For example, Bangladesh WT/TPR/M/168, #44, p. 11; Sri Lanka, Trade Policy Review, WT/TPR/M/237, #79, p. 17; and #187 and 188, p. 36; and Pakistan, WT/TPR/M/193, #68, 17; Georgia, WT/TPR/M/206, 19 December 2008, and Philippines, WT/TPR/M/149/Add.1, comments of Korea, Canada, #5, 6, p. 6; and Ghana, Wt/TPR/M/194/Add.1., #19 p. 30.

[53] WT/TPR/M/206, 10 and 12 November 2008, Add 1 p. 7, paragraph 17, and p. 7, paragraph 22.

non-discrimination, and access to information in comparison to non-members. We utilized feasible generalized least squares approach (StataCorp 2009: 154). In our second and third set of analyses we examine if new members as well as longstanding members in the GATT/WTO are associated with improved governance outcomes. In particular we examined if new members (those joining from 1996 to 2011)[54] showed improved performance on these metrics in comparison to all other states (including non-members and longstanding members). We then also examined if longstanding members of the GATT/WTO (those that joined before 1995) improved performance on these metrics in comparison to all other states (including non-members and new members). We utilized instrumental variables analysis to account for the possibility of an endogenous relationship between those countries that are members of the GATT/WTO and better governance outcomes.

With our first two models, we found new WTO members perform significantly worse than non-members or longstanding members on our narrow metrics of due process and access to information. However, the third model shows that new members perform better on our narrow metric of evenhandedness. We believe this qualitative evidence is strongly supportive of our thesis that the WTO gradually helps nations improve their governance.

CONCLUSION

The WTO governs trade, and doesn't directly address corruption. Yet we found considerable qualitative evidence that it is helping member states clean up. Before they accede, countries make major changes to their laws, regulations and behavior related to a wide range of trade and trade-related policies from tax and competition policies to health and safety standards. New member states are required to adopt trade-related policies, laws and institutions based on transparency, due process, and evenhandedness. Member states monitor these changes at trade policy reviews. During these reviews, trade officials ask questions about compliance with WTO norms in trade policymaking. But they also ask new

[54] These included Albania, Armenia, Bulgaria, Cambodia, Cape Verde, China, Croatia, Ecuador, Estonia, FYR Macedonia, Georgia, Jordan, Kyrgyz Republic, Lithuania, Latvia, Moldova, Mongolia, Nepal, Oman, Panama, Saudi Arabia, Chinese Taipei, Tonga, Ukraine, and Viet Nam. Please note this sample is not the same as the sample we used in our qualitative review. We focused on these countries because they had sufficient data.

members about strategies to reduce corruption, involve the public, and ensure evenhandedness. The trade policy reviews provide evidence that, as outlined in Table 13.1, norms of good governance are slowly diffusing into the polity in some countries some of the time.

As noted above, our quantitative evidence did not fully prove our hypothesis. New member states did not dramatically improve governance. Moreover, we found little quantitative evidence for policy anchoring during the accession process. In fact, we found little difference in performance on our metrics among nations between new members and non-members. We found members improve governance gradually and unevenly over time.

Readers understandably will ask how we explain the dissonance between our strong qualitative and mixed quantitative results. Our data may have measurement errors. Alternatively, it may be a learning problem. Nations take time to anchor to the WTO and occasionally nations may drift. Policymakers may lack capacity, funds, or the will to effectively implement reforms. Business and governmental elites may resist change. We also emphasize that the WTO cannot directly compel improved governance in the trade or domestic spheres.

Our findings suggest some new areas of research. Although our metrics closely track WTO norms, we could not find statistics that covered all WTO members for our period of review. We hope other scholars will work on more exact metrics of governance. In addition, we found that membership in the WTO did not yield consistent improvements for all three norms. We hope other scholars will tackle the question of when and how does the WTO improve governance.

14. 'Global integrity': National administrations versus global regimes

Elisa D'Alterio

1. INTRODUCTION

The OECD defines 'integrity of the public sector' as 'the application of values, principles and norms in the daily operations of public sector organisations'.[1] Many states adopt integrity measures especially by implementing ad hoc global standards under control of global regimes.[2] At the same time, integrity rules may also be applied to global institutions in relation to specific functions, and in certain sectors with an economic relevance. In particular, some global regimes provide for integrity measures in their staff regulations or in specific acts.

The present chapter aims to analyse integrity of the public sector, in order to answer the following questions: do global regimes practice 'what they preach' (in other terms, what they recommend states to do)? Furthermore, do they practice with the same diligence with which they preach?

Such objectives suggest how this chapter is organized. After an analysis of the integrity definition at the global level (section 2), section 3 examines 'what and how global regimes preach', by illustrating global integrity measures applied to states on the basis of three parameters: (a) normative framework; (b) compliance with global integrity rules; (c)

[1] OECD, Government at Glance 2009, 105.

[2] Some international studies – as the WB Policy Research Working Paper 'Anti-Corruption Policies and Programs. A Framework for Evaluation', written by J. Huther and A. Shah (December 2000) – even identify the 'better integrity measure' for each national system on the basis of country's quality of governance.

control mechanisms.[3] The same parameters are then considered in section 4, in order to analyse the global regimes' approach to integrity – in other words, 'what and how they practice'. It allows us to verify whether global regimes practice what they preach, and in which manner they do it, by identifying peculiarities of both national and global approaches (section 5). It leads, in turn, to conclusions concerning some open problems (section 6).

2. THE INTEGRITY OF THE PUBLIC SECTOR

The origins of integrity notion are strictly connected with ethics and refer to 'the quality of being honest and morally upright'.[4] Only in contemporary times has the term been employed – with new meanings – in the legal sector, in relation to the activities of public administrations: it appears to be like an 'open term', hardly referable to a precise legal definition. Nevertheless, a common denominator characterizes all different integrity measures: they are the means to prevent illegal phenomena in the public sector. Nowadays, integrity is identified as part of the founding principles of public administration, shared by a large number of national systems; at the same time, it could be defined a 'global public interest'.

Due to the global dimension of such an interest, as well as the incapacity of the single states to manage the illegality in the public sector adequately, the role of global organizations in promoting and regulating integrity measures has been crucial. In the last fifteen years, in fact, integrity has become the main focus of several strategies adopted at the global level. For instance, the OECD requires 'a substantive commitment to integrate public service ethics into the operations of agencies';[5] the World Bank associates integrity with the programs of corruption repression in the financial sector (WB *Annual Integrity Report*); the UN Convention against Corruption – UNCAC refers to integrity in relation to preventive policies (articles 1 and 5).

Transparency International (TI), Global Integrity (GI), and Open Government Partnership (OGP), strictly link integrity with transparency:

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[3] Note that the analysis does not wonder whether and how states practice what global regimes preach. It is limited to illustrating what and how global regimes preach (in relation to states), and practice (in relation to themselves).

[4] *Compact Oxford English Dictionary*, Oxford University Press, 2003.

[5] OECD, Public Sector Integrity. A Framework for Assessment, 2005, 246.

TI promotes 'building transparency and integrity at FIFA';[6] GI indicators measure transparency of the public procurement process, and asset disclosure requirements (*Global Integrity Reports*); in the 'Action Plan' of each country participating in the OGP, transparency is the first objective included in the list of integrity strategies.

Lastly, several international documents consider integrity as a 'measurable concept'.[7] Every year, TI compiles the *Corruption Perception Index*. In addition, there exist *World Bank Doing Business* indicators, the *Rule of Law Index* within the *World Justice Project*, and the *Financial Action Task Force* indicators.

In brief, the most relevant features of 'global integrity' are: (*i*) it is a 'global general principle', related both to the public and private sectors, and not limited to a set of rules, or to a moral obligation; (*ii*) it is strictly connected with other legal notions, such as transparency, ethics, anti-corruption; nevertheless, it does not correspond to them; (*iii*) integrity measures pertain to the prevention of an improper use of power and, more generally, of illegality, and not to their repression.

3. GLOBAL INTEGRITY AND NATIONAL SYSTEMS

A. The Normative Framework

Global rules on integrity compose a multifaceted framework also including provisions on transparency, rule of law, and accountability in the public sector. The following box itemizes the main integrity acts adopted by different global regimes and addressed to national systems.[8]

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[6] Transparency International, Safe Hands. Building Integrity and Transparency at FIFA, 2011.

[7] On the measurement of integrity, see C. Sampford, A. Shacklock, C. Connors, and F. Galtung (eds.), *Measuring Corruption*, Law, Ethics and Governance Series, Ashgate, 2007.

[8] The lists in para. 3 and in para. 4 cannot be exhaustive. Nevertheless, they may be useful, due to the lack of a general collection of integrity documents at the global level. In certain cases, boxes report categories of act – and not specific acts (data updated in July 2012).

BOX 14.1 INTERGOVERNMENTAL ORGANIZATIONS – IOs

UN

Resolutions: *Action against corruption – International Code of Conduct for Public Officials; United Nations Declaration against Corruption and Bribery in International Commercial Transactions; United Nations Convention against Transnational Organized Crime; United Nations Convention against Corruption*;

United Nations Development Programme documents: *Corruption and Good Governance; Corruption and Integrity Improvement Initiatives in Developing Countries; Anti-corruption Practitioners Network*;

UN Global Compact;

UN Committee of Experts on Public Administration Reports.

OECD

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; Revised Recommendation of the Council of the OECD on Combating Bribery in International Business Transactions;

Recommendations: *on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service; Guidelines for Managing Conflict of Interest in the Public Service; on Enhancing Integrity in Public Procurement; on Principles for Transparency and Integrity in Lobbying*;

Studies: *Trust in Government: Ethics Measures in OECD Countries; Public Sector Integrity. A Framework for Assessment; OECD, Specialised Anti-corruption Institutions. Review of Models; OECD Integrity in Public Procurement: Good Practice from A to Z; OECD Principles for Integrity in Public Procurement; Government at a Glance.*

WB

WB Annual Integrity Report;

WB Aid Policies;

Strategies: *Helping Countries Combat Corruption; Helping Countries Combat Corruption. Progress at the World Bank since 1997; Anti-corruption Policies and Programs. A Framework for Evaluation; Strengthening World Bank Group Engagement on*

Governance and Anticorruption; Strengthening Governance, Tackling Corruption: the World Bank's Updated Strategy and Implementation Plan; Legal and Judicial Sector Assessment Manual. Issues on Legal and Judicial Reform;
International Development Association documents.

IMF
'Good Governance: The IMF's Role';
'Anti-Money Laundering and Combating the Financing of Terrorism – Report on the Review of the Effectiveness of the Program'.

WTO
Transparency and due process of law rules: article X GATT; article III GATS; article 63 TRIPS; article 12 Anti-dumping Agreement; article 2 Agreement on Safeguards; article 22 SCM Agreement; Part A of the Trade Policy Review Mechanism.
International Association of Anti-corruption Authorities Acts.
FATF recommendations.
Aarhus Convention, articles 6–7.

Regional Organizations

Council of Europe
Conventions: *Criminal Law Convention on Corruption and Civil Law Convention on Corruption; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;*
Resolutions: *on the Twenty Guiding Principles for the Fight against Corruption; Agreement Establishing the Group of States against Corruption; Model Code of Conduct for Public Officials;*
GRECO Recommendations and Annual Reports;
Multidisciplinary Group of Corruption Studies.

EU
Conventions: *on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union; on the Protection of the European Communities' Financial Interests;*

EU Council Directive 'on Prevention of the Use of the Financial System for the Purpose of Money Laundering and terrorist financing';
EU Parliament Resolution 'on the EU's Efforts to Combat Corruption';
EU Commission communications: 'on a Comprehensive EU Policy against Corruption'; 'Fighting Corruption in the EU';
Group actions: European Partners against Corruption.

African Union Convention on Preventing and Combating Corruption.
Organization of American States Inter-American Convention against Corruption.
North American Agreement for Labour Cooperation, article 5, para. 1.

NGOs, private organisms and international networks

TI (Annual Corruption Perception Index; Anti-Corruption Handbooks); **GI** Annual Reports; **International Chamber of Commerce (**advisory documents: 'Views on the UN Convention against Corruption'); **OGP** acts**; International Anti-corruption Conference** strategies**; Global Organization for Parliamentarians against Corruption** acts; **Ethics Resource Centre** studies**; Partnership for Transparency Fund; Global Integrity Alliance** projects; **Partnership against Corruption Initiative; International Organization of Securities Commission** ('Objectives and Principles of Securities Regulation', art. 6.5.); **International Institute for Public Ethics** studies; **The Extractive Industries Transparency Initiative.**

Source: Author.

On the basis of a hierarchical classification, the above-mentioned documents can be distinguished as hard law acts (international treaties and resolutions), soft law measures (recommendations, codes of conduct, declarations, guidelines, and actions), and promoting tools (reports, programs, strategies, studies, handbooks, indicators, and projects).

All these measures are addressed to national systems, but they have a different degree of effectiveness. Some acts are self-executing (i.e., UN resolutions); international conventions must be ratified by states instead.

Others documents can be defined 'conditioning rules', insofar as their application affects the exercise of certain rights (i.e., integrity obligations related to World Bank (WB) aid). However, most of the integrity measures correspond both to soft law acts, and to promoting tools. This trend reflects a recurring element of many global institutions: the lack of prescriptive and coercive powers. Despite this evidence, the amount of hard law acts on integrity – about twenty measures – is relatively significant; furthermore, all these documents are referable to IOs.

B. The Compliance with Integrity Rules

National systems' compliance with global integrity rules may assume different configurations: at least four types of approach by states are recognizable: 'implicit spontaneous'; 'explicit voluntary'; 'conditioned'; 'obliged'.[9]

In most cases, states adopt integrity measures implicitly, by following the suggestions listed in soft law documents of certain global organisms. For example, Canada promulgated The Public Servants Disclosure Protection Act, which establishes a *Public Sector Integrity Commissioner* and an ad hoc tribunal, in accordance with the global recommendations providing for more transparency and accountability in the public action. In Australia and in Italy, specialized anti-corruption institutions have been established.[10] Germany applies a Federal Government Directive Concerning the Prevention of Corruption, including the *Anticorruption Code of Conduct* and a *Handbook*, by following the model proposed by the UN, OECD, and EU, respectively.

In other cases, governments explicitly comply with global soft law mechanisms: about 55 national systems participate in the OGP, by submitting specific action plans. Forty-nine Member States of the Council of Europe are voluntarily part of GRECO membership, and they are subjected to its recommendations and assessments.[11]

In particular circumstances, states have to comply with global integrity rules in order to exercise certain rights: for instance, China had to

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[9] Of course, it is possible to add the 'indifferent approach' of several states, which do not apply 'integrity measures'. Conversely, note that some national systems have a long tradition on integrity management of the public sector (see US Ethics in Government Act).

[10] See OECD, Specialised Anti-corruption Institutions. Review of Models, 2008. Moreover, UNCAC provides for the establishment of 'preventive anti-corruption body or bodies' with the 'necessary independence' (article 6).

[11] Data updated in July 2012.

provide for transparency obligations in its accession protocol for participation in WTO membership.

Lastly, states comply with global integrity rules under specific international obligations. The 'UNCAC Self-Assessment' of many Member States includes a long list of national integrity measures adopted in accordance with UN obligations.

C. Control Mechanisms

Global organisms monitor the compliance of national systems with global integrity rules in at least seven ways.

The most common control mechanism is based on reporting activity: GRECO monitoring reports, OECD progress reports, GI annual reports are some significant examples.

A second model is represented by the activity of ad hoc bodies. For instance, an 'Integrity Vice Presidency' and a 'Department of Institutional Integrity' (INT) operate within the WB. In particular, the latter investigates allegations of corruption in WB financed projects, when states or firms are not consistent with WB integrity standards. The Department publicly sanctions corrupted national firms, and promotes follow-up actions by national governments. The system is based on the collaboration between the Bank's investigative team and the country's own anticorruption institutions. It also provides for 'anticorruption action plans', 'anticorruption teams', and 'governance advisers'. Furthermore, relevant control functions are carried out within the WB Group by the International Finance Corporation, and by the Multilateral Investment Guarantee Agency.

Thirdly, the IMF control system is remarkable. It monitors countries' compliance with internationally recognized standards and codes through the joint IMF–WB ROSC initiative. This system includes implementing policy transparency codes on fiscal, monetary and financial policies.

Indicator systems are a further control mechanism (i.e., the TI 'Global Corruption Barometer'). The use of indicators, in fact, is intended not only to measure the current situation, but also to encourage enhanced compliance and adoption of global standards. Precisely, they allow for both the information collected and outcomes to be public. Hence, states' compliance with integrity measures can be monitored by public opinion.

Another significant control system is based on assessment and review mechanisms carried out both by global organisms, and by states. For instance, there exists a mechanism for the review of the implementation of the UNCAC within the UN Office on Drugs and Crime, which conducts assessments of specific countries in collaboration with the UN

International Criminal Justice Research Institute. In addition, states' self-assessments are published.[12]

Sixthly, some IOs provide for judicial or quasi-judicial review. For example, in the WTO, panels can be established in order to review states' compliance with WTO obligations (in particular, with article X of GATT, relating to transparency and due process of law).[13]

Lastly, there are control systems based on civil society involvement. WB projects must be appropriately designed with a focus on upstream consultation and participation, enhanced oversight mechanisms, timely disclosure of project information and handling of complaints, and strengthened supervision.

The above-mentioned models are characterized by at least three common factors: (*i.*) very seldom, these mechanisms are enhanced by global enforcement systems; (*ii.*) joint control mechanisms are widespread; (*iii.*) some systems appear more as promoting initiatives rather than effective reviews.

4. GLOBAL INTEGRITY AND ULTRA-STATE REGIMES

A. The Normative Framework

Several integrity measures are applied within the global regimes, by affecting different dimensions relating to transparency, participation, ethics, etc. In accordance with the list of global organisms in section 3, the following box illustrates a significant sample of integrity acts.

BOX 14.2 INTERGOVERNMENTAL ORGANIZATIONS – IOs

UN
UN Charter (articles 8, 97, 100, 101, 105);
UN Staff Rules and Staff Regulations;
Code of Ethics for United Nations Personnel;
Convention on the Privileges and Immunities of the United Nations;

[12] Note that article 66 of the UNCAC provides that disputes concerning the application of the Convention shall be settled firstly through negotiation.

[13] In the WTO, since the creation of this organization in 1995, there has been a minimum of twenty cases addressing article X of GATT. Nevertheless, note that WTO DSB recommendations are not followed by effective sanctions, and they may be swapped with negotiation.

UN Roadmap. A Staff Member's Guide to Finding the Right Place;
Financial Regulations and Rules;
UN Procurement Manual;
UN Standards of Conduct;
UN Core Values;
International Civil Service Commission Reports.

OECD
Code of Conduct for OECD Officials.

WB
Code of Professional Ethics;
Staff Manual (para. 3).

IMF
Staff Ethics, Financial Disclosure, and Resolution of Staff Disputes;
Updates Standards for Staff Conduct;
General Administrative Order No. 33 – Conduct of Staff Members;
Code of Conduct for Members of the IMF Executive Board.

WTO
Conditions of Service Applicable to the Staff of the WTO Secretariat (WT/L/282);
Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Regional Organizations

Council of Europe
Staff Regulations of Council of Europe;
Staff Regulations of Council of Europe Development Bank.

EU
Staff Regulations of Officials of the European Communities;
Code of Good Administrative Behaviour. Relations with the Public (European Commission).

NGOs, private organisms, and international networks

TI Corruption Perception Index; **International Accounting Standards Committee Foundation** Agreement (art. 31); **ICANN** Bylaws (art. IV), Expected Standards of Behaviour; Accountability and Transparency Frameworks and Principles.

Source: Author.

Most of the integrity acts applied to global regimes correspond both to 'homemade' standards of conduct, and to staff regulations and rules. Only in some cases these measures are adopted in accordance with obligations provided by the statutory agreements (UN). All these measures – usually addressed both to internal bodies, and to staff of the global organisms – are binding and self-executing.

Very seldom, global organisms provide for integrity measures applicable to other global organizations. To take one example, TI guidelines may be used by different global organisms, in order to promote and guarantee integrity within their internal bodies (as in the case of FIFA). However, this practice does not represent a trend and it depends on a voluntary disposition.

B. The Compliance with Integrity Rules

Global organisms are exposed to a high risk of illegality and they adopt integrity measures in order to prevent events that could affect the organization's ability to achieve its objectives.

After the well-known *Oil for Food* scandal, the UN Secretary General launched a reform process, by enhancing the adoption of several integrity measures: integrity standards for UN staff members; the establishment of a Senior Review Group and central review bodies; disciplinary measures; the establishment of the Ethics Office and the Ethics Committee; a 'Financial Disclosure Programme'; the involvement of citizens, etc. The compliance with such measures has significantly reduced the risk exposure, and it is subjected to a periodic review.

Due to the high-risk exposure in aid and financial sectors, the WB has established a Vice-Presidency for Integrity, set up to deal with corruption. Several investigations are conducted periodically and specific procedures and sanctions are provided, including referral to national authorities and disbarment from the organization. Some measures have been adopted in order to curb corruption, consisting of hunter networks, training, etc.

In the 1990s, some EU Commission members were accused of fraud, mismanagement and nepotism. Following from ad hoc investigations, the Commission was forced to resign. The incoming commissioners adopted – for the first time – staff regulations and the 'Code of Good Administrative Behaviour', as well as systems that ensure control over the compliance of the EU civil service with integrity rules.

In all these cases, the compliance of global regimes with integrity measures – differently from states – does not depend on specific obligations or commitments imposed by different external bodies, but it depends on voluntary and internal decisions of global organisms. In this sense, a 'spontaneous approach' is recognizable.

C. Control Mechanisms

At least four means of control over the compliance of global regimes with integrity measures can be identified.

Firstly, some international conventions provide for a national control over the compliance of global regimes with certain standards. The 'Procedures for the Elaboration of Codex Alimentarius Standards and Related Texts', for instance, impose participatory and transparency standards on the Commission, in order to guarantee Member States' participation and control. The 'Operational Guidelines for the Implementation of the World Heritage Convention' provide for the participation of states in the procedure for the inclusion in the list of World Heritage properties.

Secondly, internal audit mechanisms and quasi-judicial bodies operate within some global regimes. WB control systems are a significant example: they appear as the Chinese boxes game, within which different offices (Ombudsman Office, Professional Ethics Office, Appeals Committee) and several audit mechanisms are interrelated (portfolio reviews, INT investigations, fiscal accountability, hierarchical accountability, peer reviews). WB INT has the mandate to investigate allegations of misconduct of WB staff. It is, in turn, reviewed by an independent panel of experts, with the goal of strengthening INT's operations and effectiveness. Also the Bank's Board has an important role in ensuring that WB's strategies are consistent across countries, as well as ensuring that WB staff comply with due diligence and risk tolerance, both for the Bank's own resources and for Bank-administered trust funds. Moreover, legal accountability is ensured by the WB Inspection Panel, a quasi-judicial body with the task of scrutinizing whether the Bank's Board

adheres to its operational policies and procedures – including integrity standards – in the design, preparation and implementation of projects.[14]

Thirdly, some global regimes are also subjected to an external and independent audit. The WB, UNDP, and IMF are reviewed by the 'Network on Development Evaluation' established within the OECD. Further external audit systems are: the 'Multilateral Organization Performance Assessment Network', formed by seven donor countries, that carries out regular assessments of multilateral organizations at national level; and the 'British Department for International Development' and its 'Multilateral Effectiveness Framework', which assess performance of multilateral aid organizations. Even global private regimes are subjected to external and independent review: the 'Address Supporting Organization' – for instance, is an independent entity – provided by the ICANN Bylaws and established between ICANN and the 'Number Resource Organization', which carries out an independent organizational review of ICANN activities. Even in the OGP an 'Independent Reporting Mechanism' operates and it is, in turn, overseen by an 'Independent Expert Panel'.

Lastly, there are control mechanisms based on the involvement of the civil society. A good example is the EU Commission 'Code of Good Administrative Behaviour'. It provides that citizens may lodge complaints concerning a possible breach of the Code principles directly with the Secretariat-General of the European Commission.

Concisely, at least three main features are recognizable: (*i*) similarly to the control mechanisms applied to national systems, the aforesaid mechanisms are not enhanced by effective enforcement; (*ii*) in addition to the internal audit mechanisms, there exist ad hoc global networks ensuring an external review; (*iii*) national governments do not play a significant role in reviewing the compliance of global regimes with integrity measures.

5. TO PREACH AND TO PRACTICE

'The UN is the guardian of several new international standards addressing accountability and transparency, such as the UN Convention Against Corruption and the UN Global Compact. As such, we should practise

[14] Nevertheless, the WB Inspection Panel merely adopts recommendations addressed to WB governing bodies, its sanctions against the Bank are mild, and they do not include compensation for illegally damaged parties.

what we preach.' In this way, the UN Ethics Office website describes the main objective of the Office. In light of the above considerations, does this purpose reflect the reality of global regimes? Do they practice with the same care with which they preach?

At least four aspects can be drawn from the analysis.

Firstly, states are subjected to multifarious integrity rules imposed by external institutions. Conversely, global regimes adopt 'homemade' codes and standards, and they are not subjected to external obligations.

Secondly, the implementation of integrity measures in the national systems aims to enhance general public interests: rule of law, democracy, innovation of the public sector, etc. Global regimes, instead, apply integrity measures in order to pursue internal objectives: the preservation of the organization's credibility and reputation; the proper achievement of the organization's objectives.[15]

Thirdly, the compliance of states with integrity rules is directly monitored by global regimes; conversely, the former do not systematically monitor the latter; nevertheless, internal audit mechanisms applied to some global regimes are more sophisticated than those applied to states.[16]

Lastly, control mechanisms are not usually enhanced by effective enforcement systems at both national and global levels; furthermore, the infringement of global integrity rules is not usually followed by formal sanctions.[17]

On the whole, the comparison between national systems and global regimes appears quite balanced: on the one hand, the set of global integrity acts applicable to states is broader than that related to global regimes; on the other hand, global regimes voluntarily adopt integrity measures without any external pressure, showing a particular attention to the issue. Furthermore, control mechanisms of states' compliance with integrity rules are numerous and ensured by ad hoc global systems; at the same time, internal audit systems provided by global regimes are more

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[15] 'Reducing corruption in Bank-supervised projects is essential […] to its credibility in advising and supporting countries' governance and anticorruption efforts' (Strengthening World Bank Group Engagement on Governance and Anticorruption, March 21, 2007, 24).

[16] Very seldom, in the national public administrations *ad hoc* bodies or committees systematically monitor the compliance of the administration with global integrity measures.

[17] Only in extraordinary circumstances, the infringement of international treaties rules may determine the criminal liability of states, with the application of reparation or countermeasures.

complete than those operating within national systems. Lastly, enforcement mechanisms are lacking or insufficient at both levels.

Therefore, global regimes practice what they preach. In addition, the global regimes' approach is, overall, quite effective, as shown in the annual reports of some organizations.[18] All the most important IOs apply codes of conduct; global private regimes may impose transparency standards on other global regimes; ethics offices operate within both IOs and NGOs; independent control systems are applied to global regimes, also embracing the involvement of the civil society. From this perspective, 'the contrast between the infancy of international organization and the maturity of the modern State',[19] underlined by a large literature, appears more mitigated. Although remarkable limits remain,[20] the development of integrity measures within global regimes partly seems to challenge the assumption whereby global regimes 'operate in an essentially closed and opaque manner'.[21]

6. CONCLUDING REMARKS

This chapter has sought to provide an original interpretation of integrity, by analysing global integrity measures applied to national administrations and to global regimes. The analysis has led us to at least four conclusions: (*i*) the integrity of the public sector is a global public interest; (*ii*) global regimes 'preach' widely in relation to integrity issues; (*iii*) they practice what they preach; (*iv*) in the integrity domain, there is no significant 'disparity' between national administrations and global regimes.

Nevertheless, some problems persist. Firstly, in relation to the application of integrity systems within global regimes, which are the best practices?

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[18] According to the 'Overview of Internal Investigation Outcomes', carried out by the WB INT and described in its Annual Report 2011, from 2007 to 2011 the internal investigation cases decreased from 152 to 35.

[19] C.W. Jenks, *The Proper Law of International Organizations*, London, Oceana, 1962, xi.

[20] For a general description of the main features and limits of global regimes, see S. Cassese, *The Global Polity. Global Dimensions of Democracy and the Rule of Law*, Seville, Global Law Press, 2012.

[21] In relation to WTO, see R.B. Stewart and M. Ratton Sanchez, 'The World Trade Organization: Multiple Dimensions of Global Administrative Law', 9 *International Journal of Constitutional Law* 3–4, 556–586 (2011).

The WB and ICANN, for instance, provide for multifarious integrity measures, comply with transparency and accountability standards, and are subjected to developed audit mechanisms. However, these models are hardly transferable to different contexts. WB integrity systems are linked with the core activity of the organization, and they are shaped on the basis of the WB administrative procedures related to aid projects. The ICANN integrity system, instead, corresponds to the typical integrity management scheme adopted by private subjects, and it is hardly applicable within intergovernmental organizations. Therefore, it is very difficult to recognize a best practice at the global level, which can be followed by all global regimes. It is the further evidence of the global regimes' impermeability.[22]

Secondly, global regimes monitor the compliance of national systems with global integrity rules; conversely, the latter do not directly monitor the former. In this sense, it appears as a 'one-way system'. Is it desirable to move towards a 'two-way system'?[23]

According to some scholars, 'GAL procedures for decision making without review could be applied with sufficient flexibility to accommodate non-bureaucratic forms of administration, including global committees or networks.'[24] In other words, the compliance of global regimes may be ensured with mechanisms not necessarily corresponding to those applied to states. Nevertheless, a deeper control by national systems over global regimes is desirable. To this end, the participation of national governments in the governing bodies of these organizations appears insufficient; moreover, it is not applicable to those global regimes without an intergovernmental membership.

Lastly, integrity audit systems are not enhanced by effective enforcement mechanisms at both national and global levels.[25] Audit committees

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[22] On this point, see A. Lindroos and M. Mehling, 'Dispelling the Chimera of Self-Contained Regimes. International Law and the WTO', 16 *European Journal of International Law* 858 (2006).

[23] It would be a system where states monitor global regimes exactly as the latter monitor the former.

[24] R.B. Stewart and M. Ratton Sanchez, 'The World Trade Organization', above note 21. On GAL definition, see B. Kingsbury, N. Krisch, and R. Stewart, 'The Emergence of Global Administrative Law', in 68 *Law & Contemporary Problems* 3/4 (2005), 15–61.

[25] On enforcement mechanisms in the global administrative space, see S. Cassese, E. D'Alterio, and M. De Bellis, 'The Enforcement of Transnational Private Regulation: A Fictitious Oxymoron', in *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*, edited by F. Cafaggi, Cheltenham, UK and Northampton, MA, USA, Edward Elgar, 2012, 331ff.

usually do not perform coercive functions, and their acts are not prescriptive; there exist no external bodies with the power to apply financial penalties, reparations, countermeasures, etc., for the breach of global integrity standards at both national and global levels; there are no 'global integrity courts' with a universal jurisdiction. The infringement of integrity standards mainly determines reputational effects, but they may be thwarted in a context within which, for instance, all legal systems do not apply these parameters.

Control systems are usually strengthened by providing for the establishment of new committees, the definition of additional indicators, and the creation of ad hoc networks. But the introduction of these additional measures without any effective enforcement mechanisms may be risky, in so far as it may enhance the enforcement deficit by 'throwing dust in the eyes'. This trend recalls the Easter Island's allegory: a myopic behaviour in pursuing a certain objective thwarts the achievement of such an objective.[26]

[26] See D. de la Croix and D. Dottori, Easter Island's Collapse: A Tale of a Population Race, 2007, available at www.papers.ssrn.com.

15. How Multilateral Development Banks invest corruption in their funded projects

Mariangela Benedetti

1. INTRODUCTION

According to the aim of helping the poorest countries, the International Financial Institutions (IFIs)[1] provide loans, both to the public and private sectors, in order to support economic and social development projects (i.e. dams, hydroelectric power, bridges, etc.).

Such internationally funded projects present a significant corruption risk. In fact, borrower governments are usually plagued with weak procurement systems, insufficient supervisory personnel, inadequate resources for investigating and prosecuting corruption and poor legal rules and procedures to prevent, detect and address corruption.[2] In addition to this, international loans mainly involve developing countries that are particularly subject to corruption.[3] Moreover, at the national level, the projects are often implemented through public–private joint ventures, company consortia or by engaging private multinational corporations that operate simultaneously in different countries. In this way,

[1] Wikipedia encyclopaedia defines International Financial Institutions (IFIs) as the 'financial institutions that have been established (or chartered) by more than one country, and hence are subjects of international law […] Many of these are multilateral development banks (MDB)' (http://en.wikipedia.org/wiki/International_financial_institutions).

[2] US Gen. Accounting Office, World Bank: Management Controls Stronger, but Challenges in Fighting Corruption Remain, GAO Doc. No. NSIAD-00-73, 2000, p. 16 (available at www.gao.gov/new.items/ns00073.pdf).

[3] Transparency international corruption index 2011 shows Somalia, Korea (North), Myanmar, and Afghanistan amongst the most corrupt countries in the world (http://cpi.transparency.org/cpi2011/).

corruption risk goes beyond the national boundaries and involves a variety of public–private actors within and outside borrower countries.[4]

This chapter illustrates the importance of investigating and punishing corporate corruption in Multilateral Development Banks (MDBs), which refer to the World Bank (WB) and four other regional development banks, including the African Development Bank (AFDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD) and the Inter-American Development Bank (IDB). These MDBs represent a small group of the IFIs.

This choice is justified by three main reasons: (i) the considerable growth of the volume of MDBs lending in developing and transition economies over the last decade;[5] (ii) the number of MDBs-funded projects that have been subject to allegations of corruption; (iii) the existence of uniform standards for corruption investigations.

The MDBs primarily fund large infrastructures and other development projects, and they increasingly provide loans tied to policy reforms by the government.[6] From the moment the loan is declared effective, the implementation of the project is managed by the borrowing country through the government executing agencies. In accordance with the Bank's legal provision,[7] the borrower ensures the material implementation of the project through different activities, such as 'recruiting consultants; preparing tender documents and detailed designs; procuring

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[4] On these issues, see D. Hall, 'Privatisation, multinationals, and corruption', in *Development in Practice,* vol. 9, November 1999 (http://www.epoc.uni-bremen.de/publications/pup2001/files2001/Hall_Multinationals.PDF). S. Rose-Ackerman, The Political Economy of Corruption: Causes and Consequences, World Bank Public Policy for the Private Sector Note No. 74, Washington DC: The World Bank (http://rru.worldbank.org/documents/publicpolicyjournal/074ackerm.pdf).

[5] In 2010, Freshfields Briefing notes that 'MDBs spent $70 billion each year on loans and grants to the developing world' (Freshfields Bruckhaus Deringer US LLP, *Sanctions investigations by the World Bank and other multilateral development banks*, July 2010, available at http://finance.practicallaw.com).

[6] R.N. Nelson, *Multilateral Development Banks: Overview and Issues for Congress*, Congressional Research Service, Report for the Congress, April 2012, available at http://www.fas.org/sgp/crs/row/R41170.pdf.

[7] The main legal provision governing the project-loan is the Loan Agreement signed between MDBs and the borrower or between the MDBs and the state-owned enterprise.

equipment; selecting contractors for construction'.[8] Among these implementation activities, the procurement procedure represents 'one hotspot for the corruption risk, due to inevitable public–private interactions'.[9]

Considering this risk, the MDBs demand that all the proceeds in their funded projects are used only for the purposes for which they were granted.[10] To this end, the MDBs require that the procurement procedures are observed and carried out with fairness and impartiality, so as to ensure that borrowing countries '(1) use loans only to buy goods and services needed to complete the project, (2) purchase items in the most efficient and economical manner, and (3) give qualified bidders from MDBs member countries an equal opportunity to compete for bank-financed contracts'.[11]

In the following pages, several cases of corruption concerning MDBs-financed projects will be described (section 2). The following cases are actually only described on a factual basis; they do not have strong legal arguments because of the limited legal information available on the web. Next the MBDs' answers to corruption will be considered (section 3) and the common aspects of the MDBs' sanction procedures will be highlighted (section 4). An assessment and some short conclusions will be presented, respectively, in sections 5, 6 and 7.

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[8] See Implementation page in AfDB website (http://www.afdb.org/en/projects-and-operations/project-cycle/implementation/).

[9] See Anti-Corruption Resource Centre, *Grand designs: Corruption risks in major water infrastructure*, November 2009, n. 27, p. 2 available at http://www.u4.no/; J. Pope and F. Vogl, 'Making Anticorruption Agencies More Effective', *Finance and Development*, June 2000, Volume 37, Number 2, available at http://www.imf.org/external/pubs/ft/fandd/2000/06/pope.htm.

[10] As Leroy and Fariello note, this fundamental requirement is often referred to as the 'fiduciary duty'. See A.M. Leroy and F. Fariello, *The World Bank Group Sanctions Process and Its Recent Reforms*, World Bank Study, 2012, p. 6, available at http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/SanctionsProcess.pdf. See WB's Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants, January 2011, § 1.2; AfDB's Rules of Procedure for Procurement of Goods and Works, 2008 (revised July 2012), § 1.2; ADB's Procurement Guidelines, 2010, § 1.14; IDB's Basic Procurement Policies and Procurement of the IDB, 1995, § 1.4.

[11] United States General Accounting Office (GAO), *Multilateral Development Banks. U.S. Firms' Market Share and Federal Efforts to Help U.S. Firms*, September 28, 1995, p. 28 available at http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GGD-95-222/pdf/GAOREPORTS-GGD-95-222.pdf.

2. CASE STUDIES

Let us begin by briefly examining three famous cases of corruption in MDBs-funded projects.

Yacyretá Hydroelectric Project

The Yacyretá Hydroelectric Project is a joint venture established in a 1973 Treaty between Argentina and Paraguay. It consists of different construction projects, such as hydroelectric dams along 67 kilometres of the Paraná River, which forms the border between the signatory countries. It also includes a navigation lock, a fish-passage and other support facilities, as well as a large program of infrastructure relocation, population resettlement and mitigation of environmental impacts.[12] The initial estimated project cost was $1.35 billion,[13] subsequently expanded to $5.3 billion and thereafter to $11.5 billion.[14]

The Project was financed by a series of loans both from the WB and the Inter-American Development Bank (IDB). In 1976 a semi-autonomous bi-national entity, Entidad Binacional Yacyretá (EBY), was established to implement the project. Since its very beginning, the implementation of the project has encountered several technical, financial, social and environmental issues. In 1998, for example, 'three turbines had to be taken out of service at a cost of $5 million in lost production when cracks appeared. In May 1999, four turbines failed and the EBY sought damages from the manufacturers of $200,000 for each day the turbines were inactive'.[15]

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[12] See The World Bank Inspection Panel, *Report and Recommendation on Request for Inspection*, Paraguay – Reform Project for the Water and Telecommunications Sectors (Loan No. 3842 – PA), Argentina – SEGBA v Power Distribution Project (Loan No. 2854 – AR), para. 2.

[13] See K. Treakle and E. Kiaz Pena, 'Accountability at the World Bank: What Does It Take? Lessons from the Yacycretá Hydroelectric Project, Argentina/Paraguay', in D. Clark, J. Fox, and K. Treakle (eds), *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*, Lanham, Md.: Rowman & Littlefield, 2003, p. 70.

[14] See C. Hail, *Global Water Crisis*, in United Nations Environmental Programme, *Financing Dams and Sustainable Development*, 2004, p. 35 available at http://www.unep.org/dams/files/Issue-basedWorkshops/Financing_procgs.pdf.

[15] UK Parliament, Committee on International Development, *Yacyretá Hydroelectric Project, Argentina. Itaipu Hydroelectric Project, Brazil* available at http://www.parliament.the-stationery-office.co.uk/pa/.

The Yacyretá project was only in 1990 famously described by Argentinian president Carlos Menem as a 'monument to corruption'.[16] According to some observers, 'evidence suggested that contracting firms won lucrative contracts through corruptive practices'.[17] Gustavo Lins Ribeiro notes that bidding procedures – which involved different European dam builders – 'were linked with political lobby groups in Paraguay and Argentina and each accused the other of corruption'.[18]

Despite allegations that companies and politicians siphoned off public funds during Yacyretá's construction, no one has ever been brought to justice either at supranational or at national level.

Lesotho Highlands Water Project

The Lesotho Highlands Water Project (LHWP) involves the building of five dams, 200 kilometres of tunnels blasted through the Maluti Mountains, and a 72-megawatt hydropower plant that will supply power to Lesotho and water for South Africa.

This project came into being by a treaty signed between the governments of the Kingdom of Lesotho and the Republic of South Africa in October 1986. According to the Treaty, the LHWP was split into different phases which were to be carried out sequentially. A consortium of international lenders were to have financed the different phases of the project, the entire cost of which was estimated to be $8 billion. The World Bank granted $110 million for the construction of Kates Dam on the Malibamat'so River in Lesotho.[19] Other lenders included the Development Bank of South Africa, the African Development Bank, the European Development Fund, various export credit agencies and European commercial banks.

For the implementation of the project, three new institutions were created: the Lesotho Highlands Development Authority (LHDA); the

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[16] UK Parliament, Committee on International Development, *Yacyretá*, ibid.

[17] See Transparency International Organization, Global Corruption Report 2005 and International River Organization http://www.internationalrivers.org/campaigns/yacyret%C3%A1-dam.

[18] See G. Lins Ribeiro, *Transnational Capitalism and Hydropolitics in Argentina: The Yacretá High Dam*, University of Florida Press, 1994, pp. 34–35.

[19] Phase 1A consists of building the Katse dam, 45km Transfer Tunnel, Muela Hydropower Station and Tail Pond, 15km Delivery Tunnel – south and 22km Delivery Tunnel – north. For detailed information about Lesotho Highlands Water Project see http://www.lhda.org.ls/overview/default.htm.

Trans-Caledon Tunnel Authority (TCTA) and the Joint Permanent Technical Commission (JPTC), subsequently known as the Lesotho Highlands Water Commission.[20] On November 1, 1986, Mr. Masupha Sole – a qualified civil engineer – was appointed as the Chief Executive of the LHDA's Board of Directors. In 1993, the government required an audit of the project's two oversight bodies, the LHDA and the TCTA. As Fiona Darroch has noted, 'the audit revealed substantial administrative irregularities within the LHDA and gave rise to an inquiry into the conduct of its chief executive officer. By 1996 Sole had been dismissed from the LHDA'.[21] Subsequently the LHDA brought an action against Mr. Sole in the Lesotho High Court, claiming damages arising from his alleged wrongful conduct while he was the chief executive. Judgment was given in favour of the LHDA in October 1999 and an appeal by the appellant to this court was dismissed in April 2001.[22] The High Court of Lesotho found the chief executive of the LHDA guilty of accepting bribes from multinationals in order to secure tenders in the LHWP. In 2003, the Court also found the German company Lahmeyer International GmbH (Lahmeyer) guilty of corruption for bribing its way into a massive dams project.

In 2005, following the national judicial decisions on the Lesotho Project, the WB opened debarment proceedings against Lahmeyer. In 2006, it was announced that 'Lahmeyer has been declared ineligible to be awarded Bank-financed contracts for a period of seven years, because of corrupt activities in connection with the Lesotho Highlands Water Project (LHWP)'.[23]

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[20] The JPTC was responsible for the overall supervision of the project. In particular the JPTC gave authority to the LHDA and the TCTA for operational plans, project works design, tender procedures, appointment of consultants or contractors and issuing of variation orders. See A. Earle and A. Turton, *Corruption on the Lesotho Highlands Water Project – a Case Study*, in African Water Issue Research Unit, University of Pretoria, 2005 available at http://www.swedishwaterhouse.se/swh/resources/20051010171048Earle_Turton_Presentation_Corr_case_study.pdf.

[21] F. Darroch, 'Case study: Lesotho puts international business in the dock', in *Transparency International, Global Corruption Report* 2005. London, Pluto Press, p. 32.

[22] See the Appeal Court of Lesotho, *Ephraim Masupha Sole v. The Crown*, 2, 3 and 14 April, 2003, pp. 3–4 available at http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/afr/les/eng/les-2003-d-002?fn=document-frame.htm$f=templates$3.0.

[23] See World Bank Sanctions Lahmeyer International for Corrupt Activities in Bank-Financed Projects available at Press Release No:129/2007/INT available

Padma Multipurpose Bridge Project

The Padma Multipurpose Bridge project is an infrastructural project co-financed by the Government of Bangladesh, the World Bank, the Asian Development Bank, the Japan International Cooperation Agency and the Islamic Development Bank, with the aim of supporting economic growth and poverty reduction in the Bangladesh region.

The project involves the building of a bridge over the Padma River that separates the southwest zone of Bangladesh from the other parts of the country. The aim is to enhance 'freight and passenger transportation between Dhaka and major points in the southwest zone and contribute substantially to the development of the southwest zone as well as to national economic growth'.[24] In order to implement the project, an ad hoc national authority was set up: the Bangladesh Bridge Authority (BBA), which should have set up various initiatives, including the selection of consulting services to supervise the construction work.[25]

In 2010, SNC-Lavalin, which is one of the world's biggest engineering companies, submitted a bid to act as the owner's engineer on behalf of the Bangladeshi government, for the supervision of contractors responsible for constructing a 6 kilometre bridge over the Padma River.

In September 2011, at the request of the WB, the Royal Canadian Mounted Police (RCMP) launched an investigation into the engineering company with an allegation of bribery. As a result of its investigative activities, in close cooperation with the Bangladesh Anti-Corruption Commission (ACC), the RCMP concluded that SNC-Lavalin offered large bribes to at least six influential Bangladeshi officials, including two former government ministers, in order to secure the Padma contract.

On June 29, 2012 the WB cancelled its $1.2 billion loan for the Padma Bridge, claiming credible proof of corruption in selection of pre-qualified contractors for the project. Moreover, the WB, accusing the Bangladeshi

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at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21116129~pagePK:64257043~piPK:437376~theSitePK:4607,00.html.

[24] See the Padma Project in ADB website http://pid.adb.org/pid/LoanView.htm?projNo=35049&seqNo=02&typeCd=3).

[25] See Speech by Ellen Goldstein, Country Director, The World Bank Dhaka at the Joint Press Conference on Padma Multipurpose Bridge available at http://www.worldbank.org.bd/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/BANGLADESHEXTN/0,,contentMDK:22551795~menuPK:295782~pagePK:2865066~piPK:2865079~theSitePK:295760,00.html.

government of failing to investigate claims of high-level fraud in connection with the project, temporarily barred SNC-Lavalin from bidding on its contracts in the country.

3. THE MBDS' ANSWER TO CORRUPTION: A HOLISTIC APPROACH

For a long time, MDBs have turned a blind eye to the corruption problem: they had never intended to take any measures against corruption, neither to interfere nor to influence the internal affairs of a borrower country.[26] A change occurred in the early 1990s however. As a result of some well-known speeches by James Wolfensohn, entitled 'The Cancer of Corruption', the WB was the first MDB to adopt a number of 'effective tools to mitigate the risk of corruption in designing projects, as well as mechanisms to address instances when it finds that corrupt practices have occurred in the course of project implementation'.[27]

In particular, in 1995 the WB introduced a new paragraph dealing with fraud and corruption in its procurement policy governing the purchase of goods, civil works and consulting services.[28] In 1997, the WB's Executive Advisory Board approved its first anti-corruption strategy,[29] following the instruction of Paul Wolfowitz, the WB's president, concerning the need to improve governance and fight corruption as crucial elements

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[26] See Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, art. IV § 10. See J.D. Wolfensohn, 'Corruption Impedes Development – and Hurts the Poor', *Int'l J. Gov't Auditing*, Oct., 1998, p. 1.

[27] U.S. Senate, Committee on Foreign Relations, *Combating Corruption in the Multilateral Development Banks*, May 13, 2004, available at http://www.gpo.gov/fdsys/pkg/CHRG-108shrg97554/pdf/CHRG-108shrg97554.pdf.

[28] This new paragraph requires that 'borrowers (including beneficiaries of Bank loans), as well as bidders, suppliers, and contractors and their subcontractors under Bank-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts … the inclusion of corruption criteria in the analysis for granting loans'. See WB's *Procurement Guidelines*, §1.15.

[29] This strategy involves four areas: 1. Preventing fraud and corruption in WB projects of the institution; 2. Helping countries that ask for assistance in combating corruption; 3. Making corruption a central focus of the WB's concern in the work of the WB; 4. Giving support to international forces combating corruption. See J. Hunter and A. Shah, *Anti-corruption Policies and Programs: a framework for evaluation*, 2000, available at http://www.worldbank.org.

toward successful development and poverty reduction.[30] In 1998, with the aim of enforcing the WB's administrative sanctions policy, a Sanctions Committee was established to review allegations and recommend sanctions to the President. Then, in 2001, the power to investigate allegations of fraud and corruption in Bank operations and allegations of staff misconduct was delegated to the new Department of Institutional Integrity (INT).

As a result of these innovations, the WB adopted a 'sanction policy'. Under this policy, the bank may issue two administrative measures: (i) the *debarment* of firms and individuals from participating in any further bank or bank-financed projects if they are determined to have engaged in corrupt, fraudulent, collusive, or coercive practices in competing for or in executing a bank contract; (ii) the *suspension* of loans to the borrower country in case procurement guidelines have not been followed.

Following the WB's initiative, other MDBs have developed a systematic approach to fighting corruption. They have used different tools, from the elaboration of codes of behavior for the institution's staff (i.e. Codes of Ethics) to the revision of their procurement policies to include specific paragraphs addressing fraud and corruption, and to the establishment of an independent internal office entrusted with investigative tasks.

The MDBs have adopted an *holistic approach* to combating corruption in activities and operations. This approach has both a vertical and a horizontal dimension. The *vertical dimension* refers to the decision of each Bank to address the risks of corruption simultaneously at the human resources level and at the project level, and as part of the Bank's assistance to its borrowing member countries. That decision has been necessary because the boundaries between these internal areas are ill-defined and porous.[31] The *horizontal dimension* refers to the decision taken by all the different MDBs to adopt a common strategy for fighting corruption. The need for coordination is primarily due to the overlap between the regulatory regimes of different Banks. As is shown by the cases discussed above, big infrastructural projects (such as a dam or a

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[30] See World Bank, *Strengthening Bank Group Engagement on Governance and Anticorruption*, Washington DC, The World Bank, 2006. See also R.C. Blake, 'The World's Bank Draft Comprehensive Development Framework and the Microparadigm of Law and Development', 3 *Yale H.R. & Dev. L. J*, vol. 159, 2000, available at www.law.yale.edu/documents/pdf/LawJournals/Richard_Blake_YHRDLJ.pdf.

[31] IDB, *Strengthening a Systemic Framework against Corruption for the Inter-American Development Bank*, February 28, 2001, para. 1.11 available at http://www.iadb.org/leg/documents/pdf/corruption-en.pdf.

hydropower project) are often sponsored by two or more MBDs, due to the magnitude of their cost. In so doing, one fraudulent behavior could breach several supranational anti-corruption policies in different ways.

To reduce the risk of fragmentation, the MDBs' leaders established in February 2006 the International Financial Institutions Anti-Corruption Task Force (IFI Task Force).[32] The IFI Task Force adopted a set of standardized definitions of fraudulent and corrupt practices[33] to facilitate the investigation of activities financed by member institutions; common principles and guidelines for investigations; a general clause concerning the exchange of information in connection with investigations; and due diligence principles to enhance integrity in private sector lending and investments.

Lastly, the MDBs have adopted an Agreement on the enforcement aspects;[34] under this agreement, 'if one of the banks debars a corporation for more than one year for having engaged in corrupt practices, the other four banks will debar the company as well'.[35]

4. THE MDBS' SANCTIONS PROCEDURES

Each MDB has established specific institutions responsible for carrying out the relevant sanction procedures.[36] In detail:

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[32] Seiler and Madir note that 'In 2006, the five MDBs, together with the International Monetary Fund and the European Investment Bank (EIB) established the International Financial Institutions Anti-Corruption Task Force, in order to consider a catalogue of measures aimed at harmonizing the efforts of the participating institutions against fraud and corruption'. See N. Seiler and J. Madir, 'Fight against Corruption: Sanctions Regimes of Multilateral Development Banks', in 15 *Journal of International Law*, 2012 pp. 8–9.

[33] See AfDB, ADB, EBRD, EIB, IMF, IDB, WB, *International Financial Institutions. Anti-Corruption Task Force*, September 2006, p. 2, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/30716700-EN-UNIFORM-FRAMEWORK-FOR-COMBATTING-FRAUD-V6.PDF.

[34] On April 9, 2010, the leaders of MDBs signed the 'Agreement for Mutual Enforcement of Debarment Decisions'.

[35] Freshfields Bruckhaus Deringer US LLP, *Sanctions investigations by the World Bank and other*, above, note 5, p. 2.

[36] See WB, Sanctions Procedure, January 1, 2011 available at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctionsProceduresJan2011.pdf; AfDB, Investigative Process, available at http://www.afdb.org/en/about-us/structure/integrity-and-anti-corruption/investigative-process/; IDB, Sanctions Procedures, April 1, 2011 available at http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36233155; EBRD, Enforcement Policy and Procedures,

a. the WB's sanction procedure is managed by three main bodies: the Integrity Vice Presidency (INT), the Evaluation Officer (EO) and the Sanctions Board (SB). The INT determines if there is sufficient evidence of sanctionable misconduct by a firm or individual; if so, it submits a 'statement of accusation and evidence' to the EO; it conducts the sanction proceeding, giving notice to the respondent. On the basis of its investigation, the EO may issue a sanction recommendation. If the firm or individual contests the evidence presented by INT and/or the sanction recommended by the EO, the case is appealed to the Sanctions Board (SB). The SB considers the case *de novo* and takes a final decision which cannot be further appealed. The SB is comprised of four external members (appointed by the Executive Directors of the World Bank Group from a list of candidates drawn up by the President), and three internal members, appointed by the President among senior World Bank Group staff.
b. The EBRD's procedure involves two main subjects: the Office of the Chief Compliance Officer (OCCO), headed by the Chief Compliance Officer (CCO) and the Enforcement Committee (EC). If the OCCO determines that there is sufficient evidence to support a finding of sanctionable misconduct, the CCO prepares a report including a proposed enforcement action for the Enforcement Committee (EC). According to all relevant materials gathered by the OCCO, the EC issues a final report which includes its own recommendations to the President. The President adopts sanctions decisions in agreement with the members of the Executive Committee, an internal Bank committee composed of the First Vice President, three Vice Presidents and the Secretary General.
c. The AfDB has entrusted its sanction procedure mainly to the Integrity and Anti-Corruption Division (IACD).[37] The IACD first receives the complaint and then evaluates whether there is a

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September 2010; ADB, *Integrity Principle and Guidelines*, October 2010, available at http://www.adb.org/site/integrity/investigation-process. For a detailed analysis of the sanction procedures of the Multilateral Banks see N. Seiler and J. Madir, 'Fight against Corruption', above n. 32, pp. 5–28.

[37] There is a proposal to change the AfDB's sanction procedures. In the new version the procedure should involve three bodies: the IACD, the Sanctions Office (SO) and the Sanctions Appeals Board (SAB). See AfDB, *Proposal for the Implementation for a Sanctions Process within the African Development Bank*, May 2012 available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Proposal%20for%20the%20Implementation%20

legitimate basis to warrant an investigation. If so, the IACD starts the investigative phase and gives the respondent the opportunity to reply to the allegations. At the end of its investigation, the IACD's findings are reported to the AfDB's President, who decides on the appropriate sanction. In adopting the final decision, the President may be supported by the Advisory Committee on Corruption and Fraud (ACCF), composed of five individuals: three senior staff members chosen by the President, the General Counsel and the Auditor General.

d. The IDB has established the Office of Institutional Integrity (OII), the Case Officer (CO) and the Sanction Committee (SC). The OII presents a 'preliminary notice of administrative action' (PNAA) to the Case Officer.[38] Based on the PNAA review, the CO decides if there is sufficient evidence to support a finding; if so, he (or she) issues a notice of administrative action (NAA) in consultation with the Chairman of the Sanctions Committee, including a recommended sanction to be imposed on the respondent. The NAA also explains that the respondent has an opportunity to review the NAA before the Sanctions Committee (SC) made up of seven members (four external and three internal among IDB staff) appointed by the President.[39] The SC considers 'whether a preponderance of evidence supports a finding that the respondent engaged in a Prohibited Practice'.[40] Its decision is final.

e. The ADB's procedure is supported by the Office of Anticorruption and Integrity (OAI), the Integrity Oversight Committee (IOC) and the Sanction Appeals Committee (SAC). If the OAI's investigation shows commitment of an integrity violation, it presents its findings, recommends a sanction to the respondent and provides it with an opportunity to reply to the findings. The OAI provides the IOC with a report of its investigation, together with the party's response to

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of%20a%20Sanctions%20Process%20within%20the%20ADB%20-%20Rev%201.pdf.

[38] See IDB's *Sanctions Procedures* § 3.2 'The President shall appoint a Case Officer (the "Case Officer"), who shall not be a member of the Sanctions Committee (the "Committee"), to serve as provided in these Procedures'.

[39] Cases will generally be decided by a panel comprised of three members, one internal and two external. The President designates a member of the Sanctions Committee as Chairperson and appoints a Secretary, who shall not be a member of the Sanctions Committee and who reports directly to the Sanctions Committee.

[40] See IDB's *Sanctions Procedures* § 9.1.

the findings, if any.[41] The IOC is comprised of one external member and two staff members,[42] and determines if it is possible to impose remedial action based on the OAI's report and any other information gathered by itself. The IOC's decisions may be appealed by the sanctioned party to another body called the Sanction Appeals Committee (SAC).

5. COMMON ASPECTS

Despite the structural differences noted above, it is nevertheless possible to briefly outline some common aspects. All five MDBs' sanction procedures are articulated in four separate phases.

The first is represented by the '*eligibility analysis*'. Such an analysis is based upon allegations notified by any person[43] having any knowledge of fraud or corruption to the Bank's internal integrity office, that is, the WB's INT; the ADB's OIA; the AfDB's IACD; the EBRD's Chief CCO and the IDB's OII. The internal office has to verify its jurisdiction over the matter.[44]

If the allegation is eligible, the internal office verifies – prima facie – whether the respondent engaged in a prohibited practice breaching the Bank's integrity policies. This second-level analysis is usually managed by the same internal office which had provided the eligibility criteria: in these cases it is not easy to distinguish the boundaries between the two levels. On the contrary, some MDBs' sanction procedures directly entrust the investigative analysis to another office, such as the World Bank's Evaluation Office (EO); other Multilateral Banks also recognize the

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[41] ADB *Integrity Principle and Guidelines* § 64.

[42] The internal members are all ADB's staff at Director Level and are appointed by the President annually. The IOC decisions are made by majority vote, and shall include the vote of the external member. In case the external member's vote is not part of the majority decision, a new meeting will be called involving, in so far as possible, the three members that initially discussed the case, plus an additional internal and additional external member.

[43] D. Thornburgh, R.L. Gainer, and C.H. Walker, *Report Concerning the Debarment Processes of the World Bank*, August 2002, p. 16 available at http://siteresources.worldbank.org/PROCUREMENT/Resources/thornburghreport.pdf.

[44] See ADB, *Integrity Principle and Guidelines*, (§ 30) available at http://www.adb.org/site/integrity/investigation-process.

possibility of entrusting this *investigation phase* to an advisory body, such as the Inter-American Development Bank's Case Officer.[45]

If the investigative office does not find sufficient information and evidence to substantiate the complaint, it closes the procedure and notifies the relevant parties. If, on the other hand, the office finds sufficient evidence to support a finding, it issues a 'preliminary notice' to the respondent and provides them with an opportunity to respond.[46] During this screening, the investigative office of the WB, EBRD and IDB may also temporarily suspend entities and individuals from eligibility to be awarded additional contracts for projects pending.[47]

The third phase of the procedure is the *adjudication* of the case. This function is carried out by a specific committee: the WB's Sanction Board (SB), the ADB's Integrity Oversight Committee (IOC), the EBRD's Enforcement Committee (EEC) and the IDB's Sanction Committee (ISC). These bodies have to identify an appropriate sanction that has to be taken, on the basis of the information gathered by the investigative office and on considering the party's response to the findings, if any. These sanction committees should be composed only of internal staff members,[48] or of a mix of internal and external members.[49] To recommend imposition of a sanction, the Committee must find that the evidence is 'reasonably sufficient to support a finding that the respondent

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[45] See IDB's *Sanctions Procedures*, § 3.3.

[46] In the World Bank's sanction procedures the office which can issue a notice of sanctions proceeding to the respondent is the Evaluation Office. This office determines whether the information gathered by the WB's INT constitutes sufficient evidence to support a finding that the respondent engaged in a prohibited practice. If so, the EO will issue a notice. See World Bank's *Sanction Procedures*, § 3.02 and § 4.

[47] See WB's *Sanction Procedures*, § 2; IDB's *Sanction Procedure* § 3.11; EBRD's *Enforcement Policy and Procedures* § 5.2.

[48] The EBRD's Enforcement Committee consists of at least five senior EBRD staff members, appointed by EBRD's President (see EBRD's *Enforcement Policy and Procedures*, § 4.1).

[49] The ADB's Integrity Oversight Committee consists of three voting members, one of which is selected from a list of external members (see ADB's *Integrity Principles and Guidelines*, § 66). The Inter-American Development Bank's Sanctions Committee is composed of three IDB staff members and four non-IDB staff members. The external members must not hold any appointment as an employee of the IDB group (see IDB's Sanction Procedure Annex A, *Committee Charter*, § 2).

had engaged in the fraudulent or corrupt practice charged'.[50] If the Committee finds that the evidence is not reasonably sufficient, the case is dismissed. If it finds that reasonably sufficient evidence does exist, the Committee shall impose an appropriate sanction (or sanctions) on the Respondent.[51]

Which kind of sanction can be issued? Sanctions may involve both project and contractors. Referring to the project, the Bank 'may suspend or cancel project or request the borrower to return funds spent on a particular contract or project affected by fraud, corruption or other prohibited practices'.[52] As shown by the Padma case, the WB decided to suspend the $1.2 billion loan to Bangladesh to finance the bridge over the Padma River. On the other hand, sanctions may involve a contractor. As shown by the Lesotho cases, the contractor – both firms and individuals – that had engaged in the corrupt, fraudulent, collusive, or coercive practices, is subject to the debarment measure that – according to the WB's policy – consists in the 'disqualification from future Bank-funded contracts either indefinitely or for a defined period'.[53] This is the heaviest remedy that could be taken by the MDBs' Sanction Committee against the contractors; the other remedies are: public letter of reprimand, conditional non-debarment, debarment with conditional release and restitutions.[54] In addition, according to the 'Debarment Agreement', each

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[50] This is the WB's standard of proof (13.b. 2). The IDB and the ADB refer to the 'preponderance of the evidence' (see IDB's *Sanction Procedures*, §9.2; ADB's *Integrity Principle and Guidelines*, § 12.A).

[51] See IDB's *Sanction Procedures*, § 10.3; ADB's *Integrity Principle and Guidelines*, § 65; WB's *Sanction Procedures*, § 8.01 (b). On the contrary EBRD's Enforcement Committee and AfDB's Oversight Committee prepare a report of its determination to the President which includes their recommendation as to the Enforcement Actions to be taken vis-à-vis the Respondent. See EBRD's *Enforcement Policy and Procedures*, § 6.7; ADB's *Integrity Principle and Guidelines* (investigative finding).

[52] See AfDB, Result of IAC investigation, in http://www.afdb.org/en/about-us/structure/integrity-and-anti-corruption/investigations/.

[53] WB's *Procurement Guidelines*, § 1.14 (d).

[54] The other sanctions are: 'public letter of reprimand' which is issued to the sanctioned party; 'conditional non-debarment' which means that the sanctioned party is told that they will be debarred unless they comply with certain conditions; 'debarment with conditional release' which means that the sanctioned party is debarred until the specified conditions have been complied with; 'restitutions' which means paying back the ill-gotten gains to the government or to the victim of the fraud and corruption. See ADB's *Integrity Principle and Guidelines*, § 69–70; EDBR's *Enforcement Policy and Procedures*, § 7.2; WB's *Sanction Procedures*, § 9; IDB's *Sanction Procedures*, § 10.2.

MDBs' Sanction Committee has to notify[55] to the 'other participating institutions each debarment decision and any modification thereto. Upon receipt of the notice, the other participating institutions enforce such decision as soon as practicable'.[56]

The fourth and last phase of the procedure is represented by the *appeal*. When a sanction has been issued, the respondent has the possibility of contesting it.[57] Actually, this 'right to an appeal' is recognized only by the ADB which established the Sanction Appeal Committee to review the IOC's decisions.[58] The ADB's Sanction Committee, composed of two or three vice presidents depending on the nature of the case and the length of the sanction, is called to review an IOC's decision only if the request includes new relevant information not available or known at the time of the allegation.[59]

6. PROCEDURAL AND STRUCTURAL POINTS OF STRENGTH AND SHORTCOMINGS

The MDBs' sanctions procedure presents at least four main points of strength against corruption behavior in the Bank-funded project.

1. The first deals with the separation between investigative and enforcement functions. Four MDBs have adopted a separate sanctions process that is independent from their investigative office. This separation is also ensured by the composition of the bodies. While the investigative office is composed of internal staff only, the

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[55] The World Bank Group, *Mutual Enforcement of Debarment Decisions Among Multilateral Development Banks* (Debarment Agreement), March 3, 2010, § 3: 'The notice shall include (a) the name of the entities or individuals sanctioned, (b) the sanctionable practice(s) found to have been committed and (c) the terms of the debarment or modification.'

[56] Ibid § 4.

[57] It's important to note that right to the appeal is also recognized during the investigative procedure. In particular, the Respondent may appeal the Temporary Suspension to the Sanction Committee, if any.

[58] ADB's *Integrity Principle and Guidelines*, § 82–84.

[59] 'The SAC will render its decision only on the basis of a consensus of all members. Should the Chair of SAC determine that the Committee is unable to reach a consensus, the Chair will request the President's involvement. The President will help to resolve the differences and allow the SAC to reach a unanimous decision or, if that is still not possible, the President takes a final decision' (see AfDB, *Proposal for the implementation*, cit. p. 6).

Sanction Committee is usually composed of a mix of internal and external members. This separation guarantees a check-and-balance system where the final decision is taken by a body that has not conducted the investigation.

2. The second point of strength is the recognition of procedural protections for the respondent, who is given the opportunity to contest the investigative office's finding or recommendation. In fact, all MDBs' sanction procedures give a 'reasonable period' – not less than 30 days[60] – to submit written material and any evidence in response to the investigation activity. The respondent may submit additional written material also during the adjudication phase[61] or against the temporary suspension.[62]
3. Thirdly, MDBs mutually recognize 'blacklisting' in order to reduce the risk of fragmentation linked to the existence of separate MDBs' sanction procedures. In fact, whether the sanction(s) imposed by one MDB would be recognized by any other MDB or not, one sanctioned party could nevertheless continue to do business with other MDBs and potentially engage in further misconduct in relation to contracts financed by fellow MDBs. This risk is a serious one. As shown by a study on dam building companies,[63] the companies which contribute to the execution of the infrastructural projects are often the same; for example, the Switzerland ABB, the Italian Impreglio, the British Knight Piesold and the German Lahmeyer were all engaged in the Lesotho and Yaycretá projects.
4. The last point of strength is the transparency of the debarment decisions. The names of the firms and individuals debarred are published on the MDBs' website with the indication of the relative sanction violation. This transparency requirement represents an

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[60] ERBD's *Enforcement Policy and Procedures*, § 5.4 (vi) (not less than 30 days); WB's *Sanction Procedures*, § 2.02 (within 30 days); IDB's *Sanction Procedures*, § 5.2 (recognizes 60 days).

[61] ADB's *Integrity Principle and Guidelines*, § 59; ERBD's *Enforcement Policy and Procedures*, § 6.5.

[62] P.H. Dubois and A.E. Nowlan, 'Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law', in *The Yale Journal of International Law Online*, p. 19.

[63] C. Lang, N. Hildyard, K. Geary, and M. Grainger, *Dams Incorporated. The Record of Twelve European Dam Building Companies*, February 2000 available at http://www.naturskyddsforeningen.se/upload/Foreningsdokument/Rapporter/rapport_internationellt_damsincorporated.pdf.

important 'blame and shame mechanism' that consents to all civil society knowing which companies have adopted corruptive behavior.

Despite these points of strength, the MDBs' sanction procedures do not yet provide a fully effective response to the problem of corruption. In fact, as the Yaycretá case shows, it is possible that corruptive behavior goes unpunished. This is due to the following shortcomings of the sanction procedures:

1. MDBs' anti-corruption investigations are not criminal investigations. They provide an administrative remedy against corruptive behavior in funded projects.[64] This means that MDBs' investigative offices have limited ability to gather sufficient evidence of actual corruption. In other words, in order to fight efficiently against bribery allegations, the MDBs have to benefit from the work done by the criminal prosecutions in borrowing countries. For example, in both the Lesotho and Padma Bridge cases, the WB SC benefits from the national guilty decision reached in respect of the Lahmeyer and Lavalin companies.
2. The MDBs' Sanction Committee may be vulnerable to a real or perceived 'conflict of interests'.[65] This problem may have both an internal and external dimension. The internal dimension is linked to the composition of the Sanction Committee. In fact, although they have some external members,[66] several other of them are still current Banks staffers with managerial and professional positions. The external dimension refers to the close ties that MDBs may have established with the multinational corporations that bid for procurement selection. On this aspect, for example, the 'Corner House Report' notes that a Lahmeyer staff member participated in the World Bank's staff exchange program, which 'allows them an

[64] See A.M. Leroy and F. Fariello, *The World Bank Group Sanctions Process*, above, n 10, p. 8.

[65] D. Thornburgh, R.L. Gainer, and C.H. Walker, *Report Concerning the Debarment*, above, n 43, p. 23; C. Hostetler, 'Going from Bad to Good: Combating Corporate Corruption on World Bank-Funded Infrastructure Projects', in 14 *Yale Hum. Rig. & Dev. L. J*., 2011, p. 252; M.A. Aguilar, J.B.S. Gill, and L. Pino, *World Bank, Preventing Fraud and Corruption*, World Bank Projcts, A Staff Guide, p. 40.

[66] See note 49.

insider's view of how the bank works, as well as allowing them to get to know bank staff personally'.[67]

3. Differences still exist between each MDB's sanction procedures; for example, 'the types of activities from which the sanctioned party may be excluded as a result of debarment; the effect on existing contractual relationships with the relevant MDBs and reinstatement of the affected party after the expiry of the specified period of debarment'.[68] Considering these differences, foresight on mutual enforcement of debarment decisions is not binding. In fact, the same agreement recognizes 'the opportunity for each participant to pursue independent debarment proceedings for separate sanctionable practices by the same entity or individual already debarred by the other sanctioning committee'.[69]

7. CONCLUSIONS

As the sanction regimes of the five MDBs have only recently become operational, it is not yet possible to identify with sufficient clarity the effects of their anti-corruption strategy.

It is however possible to register the fact that some positive results have already been achieved. This is the case, for example, in the harmonization of certain *minimum* standards in MDBs' policies. According to the Uniform Framework for Preventing and Combating Fraud and Corruption, all participating institutions have to guarantee, among other things, certain minimum due process principles. To do so, each MDB has tailored its disciplines to the Uniform Framework requirements; on May 2012 AfDB, which had not yet done so, also issued the 'Proposal for the Implementation of a Sanction Process'. In addition, the transparency of the debarment information gave consent to all civil society to monitor the MDBs' anti-corruption enforcement, improving, at the same time, the MDBs' accountability.

Other positive results could be obtained in the near future. They include, for example, the strengthening of the Bank's good governance. As US Senator Richard C. Lugar notes, 'Corruption impedes development efforts in many ways. Bribes can influence important Banks'

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[67] The Corner House, *Dam Inc. 2: Lahmeyer International*, 2003, p. 3 available at http://www.scribd.com/doc/47709952/LahmeyerCornerhouse-02-28-03.

[68] N. Seiler and J. Madir, *Fight Against Corruption*, above, n. 33, pp. 22–25.

[69] Debarment Agreement, para. 6.

decisions on projects and on contractors. Misuse of funds can inflate project costs, deny needed assistance to the poor, and cause projects to fail. Stolen money may prop up dictatorships and finance human rights abuses'.[70] In other words, there is an evident link between the project-related corruption and the breach of MDBs' good governance policy. In fact, as shown by the Yaycretá and Lesotho cases, where there are corruptive behaviors there are also breaches of other Banks' operational policies, such as environmental and resettlement policies.[71] Thus, by ensuring an efficient instrument against corruption, MDBs might reduce the risk of infringement of other internal good governance of (by?) the Banks.

One further result could relate to the national administrations themselves. As shown by the cases above, to obtain results efficiently in the fight against corruption, the Multilateral Banks need good cooperation from the national institutions in borrower countries. Thus, it is fundamental that internal civil, administrative and criminal proceedings exist and are efficient. To ensure this result, the Banks have an interest in supporting the individual borrowing country's administration and closely supervising the implementation project.

A third result could be the 'domino effect'. Following the example of the MDBs, other IFIs could adhere to the 'Uniform Framework' and to the 'Debarment Agreement'. After all, these Agreements have been designed with the participation of two additional IFIs: the European Investment Bank and the International Monetary Fund. Thus, more financial institutions might sign them. For example, in 2010, in order to meet the requirements to become a participating institution in the Cross-Debarment Agreement, the Islamic Development Bank Group adopted its Integrity Policy and established a Group Integrity Office.[72] In addition, the IDB modified its integrity standards to harmonize them with

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[70] U.S. Senator Richard C. Lugar Holds Hearing on Combatting Multilateral Development Bank Corruption, September 2004, available at http://www.accessmylibrary.com/article-1G1-122672308/u-s-senator-richard.html.

[71] The Yaycretá and Lesotho projects were brought to the attention of the World Bank's inspection panel. About the Yaycretá project in detail, see the Inspection Panel Register, Request No. RQ96l2, September 30, 1996; the Inspection Panel Register, Request No. RQ 02/1, May 17, 2002. About the Lesotho project see the Inspection Panel Register, Request No. RQ99/2, April 26, 1999. The Panel had recommended inspection for the Yaycretá project only.

[72] See Islamic Development Bank, Integrity Enhancements to meet the Standards of the MDB's Cross-Debarment Agreement, available at http://www.isdb.org/irj/servlet/prt/portal/prtroot/pcd!3aportal_content!2fidb.en.IDBEnglish!2fIDBInternet!2fIDB_Roles!2fIDBEnglishInternetUsers!2fAboutIDB!2fIntegrity

those adopted by other Financial Institutions. Lastly, a further positive effect could arise from the 'blame and shame' mechanism. In fact, the firms listed in the blacklist ought really to be excluded from the international procurement market.

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16. Introduction to the World Bank's policies in the fight against corruption and conflicts of interests in public contracts

Laurence Folliot-Lalliot

A topic such as the fight against fraud and corruption (F&C) and conflict of interests (COI) offers a perfect opportunity for exploring the World Bank's (WB or the Bank[1]) role today and how it contributes to the ongoing movement of globalization in the legal fields. Recalling that Professor Delmas-Marty, in her book, *Ordering Pluralism*,[2] underscores the fact that globalization of law is essentially promoted in the areas of trade and criminal laws, then COI and anti-corruption indeed lie at the intersection of these two fields. As an example of administrative law for international organizations, the WB has developed corporate sanctions for F&C and COI which apply to the Bank's staff or govern the Bank's own contracts. Moreover, and as we are going to focus on this illustration of *Global Administrative Law*,[3] the WB has developed sanctions reaching

[1] The World Bank Group is composed of five branches: the International Bank for Reconstruction and Development (IBRD) lends to governments of middle-income and low-income countries; the International Development Association (IDA) provides interest-free loans and grants to governments of the poorest countries; the International Finance Corporation (IFC) provides loans, equity and technical assistance to the private sector; the Multilateral Investment Guarantee Agency (MIGA) provides guarantees against losses to investors; and the International Centre for Settlement of Investment Disputes (ICSID) works on arbitration issues.

[2] Mireille Delmas-Marty, *Ordering Pluralism, A Conceptual Framework for Understanding the Transnational Legal World*, translated by Naomi Norberg, Hart Publishing, 2009.

[3] Pascale Hélène Dubois and Aileen Elizabeth Nowlan, 'Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law', 36 *Yale Journal of International Law Online* (2010).

out to companies in the context of government contracts entered into by its Client countries.

Under WB's loans or grants, over $40 billion each year are spent by Client countries in public contracts to build infrastructure and operate major services,[4] whereas the WB's anti-corruption policy is intended to prevent or tackle any misuse of the proceeds of Bank financing. As it is presented in the *Guidelines on Preventing and Combating Fraud and Corruption in Projects financed by IBRD Loans and IDA Credits and Grants*, and in the *Anti-Corruption Guidelines for IFC, MIGA, and World Bank Guarantee Transactions* (2006), known as 'the Fraud and Corruption Guidelines', the current WB's anti-corruption policy is constructively grounded in its fiduciary duty as required by its founding status. Under its Articles of Agreement, the WB is required to ensure that funds are paid from a Bank loan only as expenditure is incurred.[5] The Borrower (the country) is legally responsible for the procurement proceedings and the contracts awarded. It invites, receives, and evaluates bids, awards the contract and takes care of the potential complaints from unsuccessful bidders. However, since the loan agreement refers to the Anti-Corruption Guidelines and the Procurement Guidelines, the Borrower, the bidders and all the actors concerned in the award of the public contract financed by the Bank loan must obey the WB anti-corruption policy.

With due consideration to the creation of the WB after World War II, this dedicated policy is rather recent, reflecting a process of maturation influenced by the US policy addressing the same issues and by international concerns about the cost of corruption over development initiatives. Initially the WB's sanctions policy was limited to debarment decisions (i.e. exclusion from any future call for tenders for corporations found to have engaged in F&C during the bidding process or the execution of contracts) introduced in 1995 in the WB Procurement

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[4] Bank lending to developing countries by IBRD/IDA in FY 2011 totaled US $43 billion, source WB external website, Projects and lending.

[5] 'It is the duty of the World Bank, under its Articles of Agreement, to make arrangements to ensure that funds provided by the Bank are used only for their intended purposes. In furtherance of this duty, the World Bank has established a regime for the sanctioning of firms and individuals that are found to have engaged in specified forms of fraud and corruption in connection with Bank financed or executed projects (as hereinafter defined, "Sanctionable Practices"). This regime protects Bank funds and serves as a deterrent upon those who might otherwise engage in the misuse of the proceeds of Bank financing', WB Anti-Corruption Guidelines, 2011, Section 1.01. Legal Basis and Purpose of these Procedures.

Guidelines.[6] In 1998, the President of the WB established a Sanctions Committee to review allegations of F&C and to recommend that sanctions be imposed on firms or individuals. In August 2001, written procedures were issued for Sanctions Committee cases. These procedures were finalized with the assistance of Richard Thornburgh, former Under-Secretary General of the United Nations and former Attorney General of the United States. They reflect the creation of the Institutional Integrity department (INT), responsible for conducting F&C investigations for the Bank. Since then, a quasi-judicial model was progressively introduced, with the Sanctions Committee renamed the 'Sanctions Board', to include both Bank staff and non-Bank staff sitting in panels; the creation of the 'Evaluation and Suspension Officer' to issue temporary suspensions pending final resolution of cases on appeal to the Sanctions Board;[7] and introduction of more flexible sanctions, with recognition of cooperation as a mitigating factor. In 2006, the Bank introduced specific Anti-Corruption Guidelines and a mandatory right to inspection for its Auditors, known as the 'audit clause'. Finally in 2011, new Anti-Corruption Guidelines were prepared by the Legal Department of the WB, rapidly inspiring other Multilateral Development Banks (MDBs) such as the Asian Development Bank or the African Development Bank in a joint effort to adapt their sanctions system to the funds distributed to their borrowing countries. In parallel, the WB Procurement Guidelines were also modified to introduce such new requirements and detailed provisions preventing COI.

One main feature of the WB sanctions policy remains the wide publicity it gives to the Sanctions Procedures, as well as publicly disclosing on its external website the list of debarred firms and their addresses.[8] As of 20 October 2012, based on the information extracted from glancing at the website, over 280 firms had been debarred for periods of either 3, 5, 10 or 12 years, and more than 90 were permanently debarred. To increase transparency, since 1 January 2011, the identity of the sanctioned party, the sanctions, the determinations of the Evaluation

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[6] These guidelines set the methods of procurement and different requirements during the call of tenders that ought to be followed by the Borrowing countries when awarding public contracts using the Bank's funds.

[7] Source: OECD Fighting Corruption and Promoting Integrity in Public Procurement, 2005.

[8] Accessible online under 'World Bank sanctions system' or www.worldbank.org/debarr.

Officer and a Law Digest of the Sanctions Board decisions are published on the same website.[9]

But the WB policy against corruption and COI goes further, amplifying the WB's contribution to the global administrative law's construction. Beyond the sanctionable practices targeted by the WB through its loans, grants and contracts that it finances directly or indirectly (section I), the WB is also actively promoting its anti-corruption policies when advising on procurement and governance reforms in countries (section II), two roles we are going to visit briefly while presenting the WB anti-corruption policy.

I. FRAUD, CORRUPTION AND COI IN WORLD BANK-FINANCED CONTRACTS

This section will explore the list of offences and definitions proposed by the WB Guidelines (A) and the procedures to be applied during the investigation (B).

A. Offences Listed by the WB Guidelines

Under the paragraphs on 'Fraud and Corruption', the Procurement Guidelines (§1.16) and the Consultants Guidelines (§1.19), for Projects financed by IBRD Loans and IDA Credits and Grants, set the list of offences with precise definitions: (i) corrupt practice;[10] (ii) fraudulent practice;[11] (iii) collusive practice;[12] (iv) coercive practice;[13] and (v) obstructive practice. To illustrate such cases: (i) should cover bribes or kickbacks to the official(s); (ii) covers misrepresentation of the capacities or qualifications of the company with false certification; (iii) covers bid

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[9] World Bank Group Sanctions Board Law Digest, December 2011.

[10] '"Corrupt practice" is the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.'

[11] '"Fraudulent practice"' is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.'

[12] '"Collusive practice" is an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party.'

[13] '"Coercive practice" is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.'

rigging among competitors; (iv) covers cases of intimidation of competing bidders. Indeed, the ten full decisions published since May 2012 are mainly cases of fraudulent practices or bribery.

Interestingly, the Asian Development Bank displays more detailed provisions, pursuant to its Integrity Principles and Guidelines revised in 2010, covering 'abuse', ('which is theft, waste or improper use of assets related to ADB-related activity, either committed intentionally or through reckless disregard'[14]) and other violations such as 'failure to adhere to the highest ethical standards' and 'retaliation against whistleblowers or witnesses'.

In the WB Procurement Guidelines, COI are targeted by separate provisions, apart from the F&C paragraphs. Actually, until the revision of 2010, COI provisions used to be mentioned only in the Consultant Guidelines, addressing individual COI. As a default principle, paragraph 1.9 of the Consultant Guidelines requires that consultants provide 'professional, objective, and impartial advice and at all times hold the client's interests paramount, without any consideration for future work, and that in providing advice they avoid conflicts with other assignments and their own corporate interests'. In order to guarantee the best service rendered, the assignment should not place the Consultant in conflict with past, future or parallel professional or personal obligations.

To illustrate COI situations, further provisions cover: (a) conflict between consulting activities and procurement of goods, works or services; (b) conflict among consulting assignments; (c) individual relationships with Borrower's staff. Hence, a non-exhaustive list of situations that are not compatible when awarding the contract is proposed by paragraph 1.9 of the Consultant Guidelines and paragraph 1.7 of the Procurement Guidelines. The first two address organizational COI while the last one is about individual COI (close business or family relationship with Borrower's staff, 'unless the conflict stemming from this relationship has been resolved in a manner acceptable to the Bank throughout the selection process and the execution of the contract'). Organizational COI, which targets conflicting links among parent companies and affiliates that may be implicated in the same projects, are defined as such:

> A firm that has been engaged by the Borrower to provide goods, works, or non-consulting services for a project, or any affiliate that directly or indirectly controls, is controlled by, or is under common control with that firm, shall be disqualified from providing consulting services resulting from or directly related to those goods, works, or non-consulting services. Conversely, a firm

[14] http://www.adb.org/documents/integrity-principles-and-guidelines.

> hired to provide consulting services for the preparation (before Loan effectiveness) or implementation of a project, or any affiliate that directly or indirectly controls, is controlled by, or is under common control with that firm, shall be disqualified from subsequently providing goods, works, or services (other than consulting services covered by these Guidelines) resulting from or directly related to the consulting services for such preparation or implementation. This provision does not apply to the various firms (consultants, contractors, or suppliers) which together are performing the Contractor's obligations under a turnkey or design and build contract.

Conflict among consulting assignments, or too close proximity between two assignments, shall disqualify the company or its personnel. To illustrate something that may be rather subjective to assess, the provision gives the example of consultants assisting a client in the privatization of public assets who shall neither purchase, nor advise purchasers of, such assets. Similarly, consultants hired to prepare Terms of Reference for an assignment shall not be hired for the assignment in question. COI is also identified when the candidate participates in more than one bid, including as a joint venture partner. And COI may also surface between the WB Group's stakeholders.

In contrast, while the WB has adopted a detailed approach of COI, tentatively listing all potential cases, the Asian Development Bank prefers a broad definition that may cover a wide range of situations:[15] '*Conflict of interest, which is any situation in which a party has interests that could improperly influence that party's performance of official duties or responsibilities, contractual obligations, or compliance with applicable laws and regulations*'.

B. Investigation Procedures

When conducting the bids evaluation, the Borrower shall check the eligibility of bidders from the lists of firms and individuals debarred and suspended by the Bank that are posted on the WB's external website. Meanwhile, the sequences of the proceedings of the bidding process facilitate the reviewing task performed by the Bank staff, since several 'no-objection' decisions, or approvals, need to be requested by the Borrower for major contracts. During the whole project preparation, Bank staff analyze warning signs and risks of F&C that may require

[15] http://www.adb.org/documents/integrity-principles-and-guidelines.

further review and follow-up. A dedicated Governance and Anti-Corruption Action Plan (GAAP) may be prepared for the project. In parallel, the Bank has set up a Voluntary Disclosure Program[16] which provides the private sector with '*incentives to disclose their knowledge of fraudulent and corrupt practices and comply with the WB rules and guidelines*'.

The WB shall also entertain complaints involving allegations of F&C, with due care and discretion. In an effort to introduce quasi-judicial proceedings, the latest reforms of the WB sanction procedures have emphasized the requirement for due diligence in detecting potential cases of infringement during the award process and also during the contract execution. Bank staff shall refer to INT all suspicions and allegations of F&C from any source involving, directly or indirectly, any participant in a procurement process, or staff from the implementing agency or other agencies of the country. Under paragraph 1.16(e), which mandates the inclusion of the 'Audit clause', a sizeable right to investigate is granted to Bank staff and Auditors:

> [the Bank] will require that a clause be included in bidding documents and in contracts financed by a Bank loan, requiring bidders, suppliers and contractors, and their sub-contractors, agents, personnel, consultants, service providers, or suppliers, to permit the Bank to inspect all accounts, records, and other documents relating to the submission of bids and contract performance, and to have them audited by auditors appointed by the Bank.

To protect the work of Auditors, and avoid dissimulation of information, a provision addressing 'obstructive practice' was added to the list of offences itemized in the Procurement Guidelines. The same provision is also applied by the Asian Development Bank and Inter-American Development Bank.

II. WORLD BANK SANCTIONS

Even though the Bank is not a party to the contract per se, it considers that the misuses of its funds can justify direct sanctions against the

[16] VDP Guidelines for Participants, available at worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

concerned companies.[17] Some actions are related to debarment investigation, such as temporary suspension[18] decided by the Evaluation and Suspension Officer, in connection with an ongoing sanction proceeding. As debarment prevents eligibility to participate in WB-financed contracts, everything is actually done to prevent the signature of an ill-awarded contract (A). Otherwise, misprocurement or cancellation of the loan may be declared (B).

A. Debarment and Related SanctionsTargeting the Companies

If in respect to companies, debarment is the ultimate sanction, other actions are also available, some of them only preventive like the rejection of a specific bid proposal. In case of major contracts, several steps of the bidding process are reviewed by the Bank, hence allowing for preventive actions. Therefore the WB can reject a proposal for award if it '*determines that the bidder recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for the contract in question*'. Under the grounds for 'ineligibility' (paragraph 1.9), it may as well sanction a situation of COI, preventing the company or the individual from being awarded a Bank-financed contract.

Debarment, or exclusion from the current or future bidding process, is the general interdiction governed by paragraph 1.16(d) in the Procurement Guidelines:

> [the Bank] will sanction a firm or individual, at any time, in accordance with the prevailing Bank's sanctions procedures, including by publicly declaring such firm or individual ineligible, either indefinitely or for a stated period of time: (i) to be awarded a Bank-financed contract; and (ii) to be a nominated sub-contractor, consultant, supplier, or service provider of an otherwise eligible firm being awarded a Bank-financed contract.

In the case of a firm debarred by the World Bank in the first instance, ineligibility extends to any firm or individual which the debarred firm directly or indirectly controls; and in the case of a debarred individual, ineligibility extends to any firm which the debarred individual directly or indirectly controls. In practice, this may pose tremendous problems in

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[17] As adopted on 15 April 2012, available at http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WBGSanctions_Procedures_April2012_Final.pdf, last visited 30 September 2012.

[18] WB Sanctions Procedures adopted on 15 April 2012, Article II.

identifying the links between different companies and affiliates. Regarding the chronology of the bidding process, debarments sanctions can be imposed prior to or after the award of the contract. When debarment is pronounced after the entry into force of the contract, the Borrower may terminate the contract or continue its execution, providing that additional due diligence is applied by closely supervising and monitoring any ongoing contract. The Borrower shall neither sign any new contracts nor sign an amendment, including any extension of time for completion or a change or variation order, to an ongoing contract with a suspended or debarred firm or individual after the effective date of the suspension or debarment without the WB prior review and with no objection. Otherwise, this may lead to a declaration of misprocurement (see below).

Other sanctions are conditional: (i) a letter of reprimand can be published on the Bank's website, meanwhile the firm will continue to be eligible to participate in Bank-financed activities. The letter will be removed after completion of mitigation measures, such as a corporate compliance program acceptable to the Bank; (ii) under Conditional Non-debarment, the company will continue to be eligible if, during a period no longer than two years, certain conditions are met, including the implementation of a compliance program, such as self-cleaning procedures. Compliance will be assessed by the Integrity Compliance Officer[19] and failure to comply will result in debarment. Restitution of the funds can also be ordered as part of a conditional non-debarment.

Overall, negotiations are still possible at any stage of the sanctions process up to the issuance of the final decision. A stay of proceedings can be requested and will remain for 60 days, renewable. If agreed upon, settlement agreements are cleared by the WB General Counsel. This procedure was actually used in 2009 with Siemens AG after a WB investigation of corruption in a WB-financed transport project in Russia.[20] Siemens agreed to have its Russian subsidiary debarred for four years and that the whole company and its subsidiaries and affiliates would voluntarily refrain from bidding on WB's projects for two years. Siemens also agreed to pay $100 million over 15 years to finance an anti-corruption and compliance program.

As a recent move toward harmonization of procedures among Multilateral Development Banks (MDBs), automatic debarment has been made

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[19] WB Sanctions Procedures 2012, Section 9.03 and A.-M. Leroy and F. Fariello, The World Bank Group Sanctions Process and Its Recent Reforms, A World Bank Study 2012

[20] See the settlement: worldbank.org/PROCUREMENT/Resources/Siemens FactSheetNov11.pdf, visited March 2013.

possible under certain conditions. Cross-debarment among five MDBs is now operational, in accordance with the Agreement for Mutual Enforcement of Debarment Decisions dated 9 April 2010,[21] which, as of 1 July 2011, encompasses the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development (EBRD), Inter-American Development Bank, and the World Bank. Until that Agreement,[22] only EBRD took notice of debarment decisions pronounced by other international institutions.[23] This amplifies considerably the impact of debarment decisions that are made public and exceed one year, even though, despite harmonization,[24] each MDB will maintain its own sanctions regime,[25] which could potentially result in '*concurrent, consecutive or subsequent periods of debarment*'.[26] Indeed, the procedural and institutional settings of each MDB are still rather specific even though they are presented in order to establish due process with dedicated safeguards. These differences are grounded in the particularism of their founding status, and as a matter of fact, subject to notification to the other MDBs, one can decide to waive the debarment decision of another MDB '*where such enforcement would be inconsistent with its legal or other institutional considerations*'.[27] The external website of the WB provided data on cross-debarment, indicating as of March 2013, that

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[21] Available at http://www.ebrd.com/downloads/integrity/Debar.pdf, visited 10 August 2012.

[22] Preceded by the 'Uniform Framework for Preventing and Combating Fraud and Corruption' (the Uniform Framework), adopted in 2006 by the International Financial Institutions Anti-Corruption Task Force grouping the five MDBs, the International Monetary Fund and the European Investment Bank, available at http://siteresources.worldbank.org/INTDOII/Resources/FinalIFI TaskForceFramework&Gdlines.pdf, visited 10 August 2012.

[23] According to Norbert Seiler and Jelena Madir, 'Fight against Corruption: Sanctions Regimes of Multilateral Development Banks', *Journal of International Economic Law* 15(1), 5–28, 2012, 'The first instance of cross-debarment occurred in February 2007, when the EBRD debarred Lahmeyer International following debarment by WB as a result of its involvement in the Lesotho Highland Waters Project'.

[24] Stephen S. Zimmerman and Frank A. Fariello, Jr., 'Coordinating the Fight against Fraud and Corruption, Agreement on Cross-Debarment among Multilateral Development Banks', 3 *World Bank Legal Review* (2011).

[25] Actually the European Investment Bank did not sign the Agreement, because EIB's debarment decisions are subject to review by courts and institutional bodies within the European Union.

[26] Agreement for Mutual Enforcement of Debarment Decisions, 9 April 2010, Principle 6.

[27] Agreement, Principle 7.

71 companies had been initially debarred by IDB, 28 companies by ADB, and 4 by EBRD.[28]

Applicability of cross-debarment between the WB and countries debarment decisions for F&C is also considered by the Procurement Guidelines on a case-by-case basis after review of the due process provided by the national judicial process, and only when the contracts are awarded according to national laws ('National Competitive Bidding' or NCB).[29]

B. Misprocurement Targeting the Borrower

'Misprocurement' covers the cancellation of the loan, or portion of it, allocated to the goods, works, or non-consulting services that have been misprocured. Misprocurement can be declared by the WB during the award process, or after if the contract has been substantially modified without the Bank's approval or if the fraud is discovered later on. It is thus a very efficient tool against the Borrower, designed to respond to the specific situation where the Bank is directly financing the project without being directly involved in the contract itself. Even though misprocurement is not only designed for cases of F&C, when applied under such circumstances, it has the effect of a financial disadvantage if not an actual sanction for the Borrower.

Many times, offences linked to corruption are committed by both sides: the corruptive company and the corrupted public entity, i.e. agents and representatives of the country. To cover such circumstances particularly, paragraph 1.14(c) of the Procurement Guidelines states that 'the Bank does not finance expenditures under a contract for goods, works, or non-consulting services if the Bank concludes that such contract (…): involves the engagement of a representative of the Borrower, or a recipient of any part of the Loan proceeds, in fraud and corruption as per paragraph 1.16(c)'.

Considering that the Bank has no direct power over the country representatives and civil servants, ordering or threatening to order the

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[28] Accessible at http://www.worldbank.org/debarr.

[29] WB Procurement Guidelines, 2011, Footnote 62: 'The Bank may agree, if requested by the Borrower, that bidding documents under NCB procedures include a clause rendering ineligible for Bank financing a firm, or an individual, of the Borrower country that is under a sanction of debarment from being awarded a contract by the appropriate judicial authority of the Borrower country and pursuant to its relevant laws, provided that the Bank has determined that the firm, or the individual, has engaged in F&C and the judicial proceeding afforded the firm or the individual adequate due process.'

reimbursement of the loan or grant can be used as a trigger to engage the country in taking appropriate actions against the individuals involved in fraudulent activities or COI. Actually, misprocurement will be declared if the Borrower fails to take 'timely and appropriate action satisfactory to the Bank to address such practices when they occur, including by failing to inform the Bank in a timely manner at the time they knew of the practices' (paragraph 1.16(c)).

III. PREVENTION OF COI AND CORRUPTION IN COUNTRIES' PROCUREMENT REFORMS SUPPORTED BY THE BANK

Besides the infrastructure and services projects financed under its fiduciary activities, the WB is also actively involved in promoting anti-corruption policies at the countries' level, through policy advice, research and analysis, and technical assistance to promote capacity development.

Considering that public procurement is the governmental activity most vulnerable to corruption and abuse, countries, donors and international organizations, through initiatives like the Paris Declaration or the Accra Agenda, have identified public procurement reforms as a significant instrument in promoting capacity development and aid effectiveness.[30] Inducing transparency, oversight and social accountability besides sound financial management, public procurement reforms are now seen as contributing significantly to the accomplishment of the governance agenda. Meanwhile, MDBs have identified the improvement of the domestic procurement process as a way to ensure the impact and the integrity of their lending policy.

As a result, the WB is closely working with the OECD through the OECD Development Assistance Committee (DAC) initiative,[31] and with other international organizations to implement international standards and harmonize government procurement rules. The OECD has promoted policies fighting corruption through several reports such as the OECD

[30] Public procurement reforms were presented during the 4th High Level Forum on Aid Effectiveness in Busan, December 2011: http://www.aideffectiveness.org/.

[31] The DAC is mainly a forum for policy makers from donor countries and MDBs. The OECD organizes periodic High Level Forums on aid policy which set the agenda for aid effectiveness, including the 2005 Paris Declaration, the 2008 Accra Agenda for Action, or the 2011 Busan Declaration.

Principles for Integrity in public procurement, published in 2009,[32] where chapters dedicated to 'Prevention of Misconduct, Compliance and Monitoring' and 'Risk mapping: Understanding risks of F&C in the public procurement cycle' display an inventory of risks all the way from procurement to contract performance. The Principles were conceived as benchmarks for OECD and non-OECD countries, and OECD Public Procurement Reviews by country have been recently completed.[33] Addressing the needs of governments, a toolbox is available, based on a collection of practices worldwide.[34]

OECD has also improved the analysis of COI. While insisting on the distinction between potential, actual, and apparent COI,[35] the toolbox promotes prior declaration and registration of private interests for public practitioners and immediate families. Depending on the country system, the declaration may be filed in the contract for future reference, or submitted to an independent public authority for records, or disclosed only to (peers) members, or be made publicly available. These recommendations echo other OECD works dedicated to the prevention of COI, such as the Guidelines for Managing COI in the Public Service[36] and its accompanying Toolkit.[37] All these materials are presented as models and guidance for legislators and regulators.

OECD and the WB have also jointly elaborated a Methodology for Assessing Procurement System (called 'MAPS' in its 2010 version) which promotes anti-corruption measures. Based on 54 indicators grouped under 4 pillars, the MAPS explores in detail the legal and institutional procurement framework, the capacities and management of the procurement functions as well as oversight and audit supervision.

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[32] http://www.oecd.org/gov/fightingcorruptioninthepublicsector/48994520.pdf.

[33] On Iraq, Morocco and Yemen, United States (forthcoming), Mexican Social Security Institute (forthcoming), and the Mexican Energy Sector (forthcoming), accessible at http://www.oecd.org/gov/fightingcorruptioninthepublicsector/integrityinpublicprocurement.htm (visited March 2013).

[34] The Toolbox can be accessed at www.oecd.org/governance/procurement/toolbox.

[35] 'A potential conflict is where a public official might have a private interest. An apparent conflict is where people may assume that a public official has a private interest. An actual conflict is where a public official does have a private interest.'

[36] Accessible at www.oecd.org/gov/ethics/conflictofinterest (last visited 4 October 2012).

[37] http://www.oecd.org/corruption/fightingcorruptioninthepublicsector/49107986.pdf.

Pillar 4 in particular covers integrity, review and prevention of corruption by checking if the country is a party to the UN Convention Against Corruption, or if ethics codes and alert tools are in place. The MAPS is actually based on a WB diagnostic tool used by Bank staff to prepare Country Procurement Assessment Report (CPAR) and action plans. Over 60 countries have already used the MAPS to conduct self-assessment, launching vast legal and institutional reforms to improve their public procurement functions and their integrity framework. This leads to the enactment of anti-corruption laws, creation of anti-corruption bodies, and setting up of whistleblowing mechanisms – a whole new legal framework for tackling F&C and COI, in line with the international standards that the World Bank policies contribute actively to design.

PART IV

European administrative law and the fight against corruption and conflicts of interest

17. Mismanagement by European Agencies: Concerns, institutional responses, and lessons

Edoardo Chiti

1. PURPOSE

In 1999, the Santer Commission was forced to resign through the political shock caused by the publication of the First Report of the Committee of Independent Experts. Although the Commissioners were not involved in fraudulent activities, the Committee found several instances of fraud, irregularities or mismanagement and concluded that the Commissioners did not have sufficient control over their services.

Has this been a single, unfortunate episode in the history of the European Union (EU) administration? Or have there been further instances of mismanagement in the functioning of the EU administrative system? If this is indeed the case, in what ways has the EU legal order reacted to mismanagement by EU administrations? And what lessons can be learned from the events that occurred? In particular, has the existing EU legal framework proved adequate to prevent and remove mismanagement by EU administrations? And what have been the objectives sought in the responses provided by EU institutions in cases of mismanagement?

This chapter will discuss these questions by considering one specific component of the EU administrative system, that of the European agencies (EAs). EAs may be said to be of particular relevance among EU administrations: they represent a quantitatively significant component of the EU administrative system; and they exemplify with remarkable clarity certain fundamental features of the overall EU administrative system, such as its networked structure and composite ways of functioning. Moreover, they have been subject to an abundance of theoretical and

empirical legal reflection.[1] The case of EAs may be therefore considered as an appropriate starting point for investigating mismanagement by EU administrations. An inquiry into the events involving a number of EAs might represent the first step in wider and comprehensive research into the mismanagement issues affecting the EU administrative system, as well as into the responses given by the EU legal order to such issues.

Before beginning the inquiry into mismanagement by EAs, one brief clarification is needed. Within the context of this chapter, the notion of European agency is used in quite a loose way. On the one hand, building on previous research on the topic,[2] EAs are here meant as bodies (i) aimed at establishing and managing a plurality of cooperative relationships involving both the Commission and the Member States' administrations, and (ii) enjoying a certain degree of autonomy from the Commission, but not fully insulated from the Commission's influence. On the other hand, other EU administrative bodies, presenting slight differences to the previous model, will be considered in this chapter. This is the case, in particular, of those EU bodies often associated with the EAs' family, but differing from EAs in their marked transnational character, such as Europol, Eurojust and the European Police College (CEPOL).

The structure of this chapter is simple enough. It opens with a discussion of the reported cases of mismanagement by EAs, as well as of the responses provided by the EU institutions (section 2). The section following this will discuss the lessons that can be learned from those

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[1] It would be useless to recall here the numerous studies dedicated to the subject; see, however, P. Craig, *European Union Administrative Law*, Oxford, Oxford University Press, 2nd edn, 2012, pp. 144ff.; M. Busuioc, *The Accountability of European Agencies. Legal Provisions and Ongoing Practices*, Delft, Eburon, 2010, pp. 35ff.; M. Groenleer, *The Autonomy of European Agencies. A Comparative Study of Institutional Development*, Delft, Eburon, 2009; D. Curtin, *Executive Power of the European Union. Law, Practices, and the Living Constitution*, Oxford, Oxford University Press, 2009, pp. 146ff.; E. Chiti, 'An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies', in *Common Market Law Review*, 2009, pp. 1395ff.; D. Gerardin, R. Muñoz and N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance*, Cheltenham, UK and Northampton, MA, USA, Edward Elgar, 2005; E. Chiti, *Le agenzie europee. Unità e decentramento nelle amministrazioni comunitarie*, Padova, Cedam, 2002.

[2] E. Chiti, 'An important part of the EU's institutional machinery', above, note 1, pp. 1395ff.; E. Chiti, *Existe-t-il un modèle d'Agence de l'Union européenne?*, in J. Molinier (ed.), *Les agences de l'Union européenne*, Brussels, Bruylant, 2011, pp. 49ff.

cases, by asking whether the existing EU legal framework has or has not proved adequate to prevent and remove mismanagement by EAs, and whether the EU institutional response was oriented only to the removal of the contested behaviors or also to institutional adjustment and reform (section 3). The last section will summarize the main conclusions of the inquiry (section 4).

2. MISMANAGEMENT BY EUROPEAN AGENCIES: THE REPORTED CASES AND THE EU INSTITUTIONAL RESPONSE

2.1 Increasing Concerns

As in any other EU administration, EAs have been made the subject of many criticisms by public law and political science scholars interested in the administrative machinery of the European legal order. Such criticisms have pointed to the 'baroque' and over-complex internal architecture of the EAs, to the limited effectiveness of their action, and to their uncertain function within the context of the EU administrative system. Yet, EAs have rarely raised concerns of mismanagement. Quite on the contrary, EAs have usually been represented as substantially responding to the standards of good administration.

An example of this widespread recognition of the EAs' commitment to good administration may be found in the report presenting an *Evaluation of Decentralised EU Agencies in 2009*.[3] A number of consultants were commissioned by the European Commission to prepare this report, which was made public in early 2010. In March 2008, indeed on the occasion of the eighteenth anniversary of the creation of the agency process in the EU, the Commission announced its intention to launch a thorough evaluation of EAs.[4] The purpose of such an evaluation was to contribute to the ongoing debate on the future of the EU 'agency system' by providing the European institutions with an overall and horizontal picture of the structure and operation of EAs. In doing so, the report highlighted several weaknesses of the agency system, but it did not identify a general mismanagement problem. Rather, it concluded that EAs had developed good administrative practices. Just to offer few examples, a significant

[3] *Evaluation of the EU Decentralised Agencies in 2009*, Report commissioned by the European Commission and carried out by Ramboll Management, Euréval e Matrix, vols. I–IV, December 2009.

[4] COM (2008) 135 final, *The European Agencies – The Way Forward*.

number of EAs were reported to have adopted, over the years, sound methods for the management of their resources.[5] EAs, it was submitted, were also in the process of developing systems for quality management. Again, all EAs were said to apply the transparency rules in accordance with the principles of good governance.[6]

Such a picture, however, ought not to hide the emergence, in recent years, of increasing concerns about mismanagement in EAs. Two main groups of cases may be recalled in this regard: the first is that of the management issues reported in the implementation of the budget by CEPOL; the second is that of the conflict of interests issues concerning the European Food Safety Authority (EFSA) and other EAs.

2.2 CEPOL and the Standards of Good Administration in the Implementation of the Budget

The CEPOL affair blew up in 2008. Newspapers reported private use of public funds. It was submitted that about £20 000 in EU funds was spent for staff use of cars, transport services, mobile phones and furniture. Further criticisms concerned the effectiveness of internal control procedures, the legality of the purchase of goods and services, the adequacy of recruitment procedures, and the appropriateness of the staff management policy. These administrative shortcomings, thought to be attributable to CEPOL's director, triggered the institutional response of the Court of Auditors and the European Parliament (EP). The Court of Auditors, in its reports on the annual accounts of CEPOL for the financial years 2008 and 2009, qualified its opinion on the legality and regularity of the underlying transactions on the grounds that the procurement procedures did not comply with the provisions of the Financial Regulation. The EP, in October 2010, refused to grant the CEPOL's director discharge for implementation of the College's budget for the financial year 2008, with an impressive majority of 618 votes in favor, none against and seven abstentions. This was an unprecedented decision as no European agency had ever been refused a budgetary discharge before. On that occasion, the EP stated that repeated audits had highlighted shortcomings in CEPOL's observance of the Financial and Staff Regulations, its accounting system, its management of budgets and staff, its procurement procedures and its rules governing expenditure on courses. And it expressed the view that at least four years would be necessary for CEPOL to meet the standards of

[5] *Evaluation of the EU Decentralised Agencies in 2009*, ibid., vol. II, pp. 105ff.

[6] Ibid., pp. 61ff.

good administration. In May 2011, the Parliament decided to postpone its decision on granting CEPOL's director discharge in respect of the implementation of its budget for 2009. The EP explained its decision by indicating the 'structural internal management deficiencies' of CEPOL and the 'serious irregularities' in the implementation of the budget for 2009. The discharge was then granted in October 2011. This last decision reflected the orientation of the Internal Audit Service and the assessment of the Court of Auditors, which considered in its report that CEPOL was progressing according to the milestones established in its MAP for 2010–2014. The EP acknowledged the attempts of the new management and governance of CEPOL to tackle its deficiencies in response to Parliament's request for action, following the serious irregularities in the implementation of the budget for 2009. Finally, in May 2012, Parliament approved the closure of the accounts of CEPOL for the financial year 2010. In doing so, it welcomed the measures taken by the new management and governance structure of the College to tackle its deficiencies in response to Parliament's request for action: this was the case, for example, in the rules on reimbursement for CEPOL's activities, the measures for the strict implementation of the financial regulations, the rationalization of its internal organization and in the new procurement manual for internal use.

Three aspects of the CEPOL case should be noticed. To begin with, the mismanagement attributed to CEPOL covered a quite wide set of acts or omissions, labeled, as a whole, as breaches of the standards of good administration. Indeed, the EP did not qualify the contested practices as corruption, misappropriation of funds or fraud. It rather represented them as practices deviating from the standards of good administration expected from an EA. Although the two categories obviously tend to overlap, the EP's objection focused more directly on the principle of good administration than on the financial interests of the EU. Moreover, an articulated set of practices was considered to be in breach of the principle of good administration: ranging from the 'issues in the College's adherence to the Financial and Staff regulations' and to the accounting system, to the 'failings in budget management, human resources, procurement procedures and rules governing expenditure on courses'.[7] A second area of interest in the CEPOL case lies in the institutional channel that was activated. The main response to the mismanagement concerns came from

[7] Resolution of the European Parliament of 7 October 2010 with observations forming an integral part of its Decision on discharge in respect of the implementation of the budget of the European Police College for the financial year 2008, in OJ 2008 L 320, p. 12.

the EP acting within the context of the discharge procedure. This excluded the possibility of sanctioning CEPOL behavior, and limited the decisions that were possible to the postponement or refusal to grant CEPOL's director discharge for implementation of the College's budget. At the same time, however, the oversight carried out by the EP through the discharge procedure produced extensive and profound institutional effects. Indeed, the reiteration of the decision not to grant CEPOL's director budgetary discharge, together with the postponement of the decision in 2011, gradually drove CEPOL toward institutional adjustment and reform. On a more general level, the technical possibility of accompanying the parliamentary decision on discharge with observations forming an integral part of the decision gave the EP the opportunity to make a number of remarks of a horizontal nature. This is the case, for example, in the resolution of the EP of 5 May 2011 on the performance, financial management and control of EAs, where the 2008 discharge was used as an occasion to discuss the funding, budgetary, supervision and management issues concerning all EAs, and to link such issues to a review of the role and position of EAs in the EU institutional architecture.[8] A final reason why the CEPOL case is of some relevance deals with the institutional position that the EP took with respect to CEPOL. The EP's decisions were mainly oriented to redefining the CEPOL legal framework in such a way as to ensure that the College acts in compliance with the standards of good administration in budget management, human resources and procurement procedures. In this sense, the EP did not seek to strengthen the political dependence of CEPOL on the trust of Parliament, but rather aimed at identifying the administrative law tools that it considered necessary to reorientate the College toward the standards of good administration.

2.3 'Revolving Doors': European Agencies and Conflict of Interests

In May 2012, newspapers reported that Mrs Diána Bánáti, member and chair of the EFSA Management Board since October 2010, had accepted a full-time job as executive and scientific director of the European branch of the International Life Sciences Institute (ILSI). ILSI is a US non-governmental organization, funded by food, chemical and pharmaceutical companies and carrying out research and risk assessments on food safety and nutrition topics. Its European branch is a member of the EFSA's

[8] Resolution of the European Parliament of 5 May 2010 on the 2008 discharge: performance, financial management and control of EU agencies, in OJ 2010 L 252, p. 241.

Stakeholder Consultative Platform. Within this context, ILSI Europe contributes to the public consultation processes carried out by EFSA, which maintains the exclusive responsibility for the scientific decision-making procedure. Mrs Bánáti had already served at ILSI Europe as a member of the board of directors, a position from which she had resigned in October 2010.

Some research and advocacy groups operating in the food security sector and various members of the EP, such as the French Green member José Bové, demanded the resignation of Mrs Bánáti from the EFSA. Bánáti's position within ILSI, it was argued, was in conflict with the independence of EFSA, envisaged by the establishing Regulation and necessary to the appropriate exercise of EFSA's powers. Called to take a formal position on the issue, EFSA admitted that Mrs Bánáti's position at ILSI was not compatible with her role as member and chair of the EFSA Management Board. It recalled that the Code of Conduct adopted by the EFSA Management Board obliges all members to conduct themselves in a way that maintains and promotes the public's trust in the Authority. On 9 May 2012, EFSA announced that Diána Bánáti had resigned as chair of the EFSA's Management Board. The Bánáti affair followed numerous allegations by research and advocacy groups of cosy relationships between the EFSA and the food industry: for example, Mrs Suzy Renckens, the former coordinator of the EFSA Genetically Modified Organisms (GMO) Unit, moved directly from EFSA to a lobbying position with the Swiss company Syngenta, one of the world's leading producers of genetically engineered plants.

The EFSA scandal was not an isolated case. Between 2011 and 2012, two other EAs – the European Medicines Agency (EMA) and the European Environment Agency (EEA) – were forced to deal with conflicts of interest allegations. As for EMA, its Executive Director, Thomas Lönngren, was reported in March 2012 to be working as a pharmaceutical industry consultant almost immediately after leaving the EMA. The former Executive Director's new activities had been authorized by the EMA Management Board. Following questions and strong public criticism regarding Mr Lönngren's relationships with private industry, the Management Board then adopted limitations on the former Executive Director's activities for the next two years. As for the EEA, in 2011, Mrs Jacqueline McGlade, the Executive Director of the EEA, was reported to be concurrently serving as a trustee and a member of the International Board of Advisors of the Earthwatch Institute, an international environmental research and advocacy non-profit body. During the period of her participation on the Board, several Earthwatch research projects were partly financed by the EEA and actively contributed to by

EEA members, and Earthwatch also used EEA premises, paid for by the EU budget, without paying any rent. In April 2011, following advice from the President of the Court of Auditors, who highlighted the possible conflict of interests inherent in her conduct, the EEA Executive Director resigned from her positions in Earthwatch.

Each of these scandals was addressed in similar ways by EU institutions. To begin with, when it received complaints, the European Ombudsman opened inquiries and issued draft recommendations in accordance with Article 3/6 of his Statute. For example, in 2011 the European Ombudsman carried out an inquiry into the allegation that EFSA had failed to address adequately the issue of a potential conflict of interest in the move of its former coordinator of the GMO Unit from the EFSA to the Swiss biotechnology company Syngenta.[9] On the basis of his inquiry, the Ombudsman stated that EFSA had failed to observe the relevant procedural rules and to carry out a sufficiently thorough assessment of the potential conflict of interest arising from the move of a former member of its staff to a biotechnology company. Most importantly, he concluded that EFSA should strengthen its rules and procedures with regard to negotiations by serving staff members concerning future jobs of the 'revolving doors' type that may amount to conflict of interest. Moreover, the Court of Auditors published in Autumn 2012 a Special Report on conflicts of interest management in the EAs.[10] The main institutional reaction to the revolving doors issues, however, came from the EP, which decided to defer approval of EFSA's, EEA's and EMA's 2010 budget reports.[11] In these decisions, the EP urged the three EAs to

[9] See European Ombudsman, *Draft recommendations of the European Ombudsman in his inquiry into complaint 775/2010/ANA against the European Food Safety Authority*, available at http://www.testbiotech.de/sites/default/files/decisionOmbudsman.pdf.

[10] See http://eca.europa.eu/portal/page/portal/publications/auditreportsandopinions/specialreports.

[11] See, respectively, European Parliament resolution of 10 May 2012 with observations forming an integral part of its Decision on discharge in respect of the implementation of the budget of the European Food Safety Authority for the financial year 2010; (C7-0286/2011 – 2011/2226 (DEC)); European Parliament resolution of 10 May 2012 with observations forming an integral part of its Decision on discharge in respect of the implementation of the budget of the European Medicines Agency for the financial year 2010 (C7-0281/2011 – 2011/2220 (DEC)); European Parliament resolution of 10 May 2012 with observations forming an integral part of its Decision on discharge in respect of the implementation of the budget of the European Environment Agency for the financial year 2010 (C7-0278/2011 – 2011/2217(DEC)).

take appropriate measures in cases of conflict of interests and 'revolving doors' cases, in order to strengthen their independence *vis-à-vis* the industry and private parties. It highlighted that the three agencies reacted to the scandals by taking several initiatives in the area of prevention and management of conflicts of interest. But it pointed to the need for further improvements and insisted that implementation and concrete results should be considered the only elements to prove the efficiency of the new policies and procedures.

Three aspects of these 'revolving doors' cases should be pointed out. First, the contested mismanagements by the EFSA, EEA and EMA were labeled by the actors involved as 'conflicts of interest'. Interestingly enough, the EP, which formalized such qualification in its decisions postponing approval of the three agencies' 2010 budget reports, did not produce any formal definition of conflicts of interest. The only definition was given by one of the EAs involved in the revolving doors affairs. EFSA, indeed, stated in December 2011 that it would consider as a conflict of interest any 'situation when an individual is in a position to exploit his or her own professional or official capacity in some way for personal or corporate benefit with regard to that person's function in the context of his or her cooperation with EFSA'.[12] This definition was derived from the OECD 2003 Guidelines[13] that explicitly connected conflicts of interest and corruption, by arguing that conflicts of interest situations in the public service, when not properly dealt with, may lead to corruption, particularly in certain sectors characterized by substantial relationships between public bodies and private actors. Far from being neutral, the alignment of EFSA's definition with OECD guidelines implied the adoption of such an overall perspective, although the risk of corruption was not explicitly pointed out in the EFSA documents. Second, as for the institutional channel that was activated in these cases, the main institutional response came from the EP acting within the context of the discharge procedure. This implied that the 'sanction'

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[12] See EFSA, *Policy on Independence and Scientific Decision-Making Processes of the European Food Safety Authority*, December 2011, available at http://www.efsa.europa.eu/en/keydocs/docs/independencepolicy.pdf.

[13] See OECD, *Guidelines for Managing Conflict of Interest in the Public Service*, 2003, available at http://www.oecd.org/corruption/fightingcorruption inthepublicsector/48994419.pdf. According to these Guidelines, conflict of interest is 'a conflict between the public duties and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities' (p. 53).

adopted was largely symbolic and mainly oriented to affect the EAs' reputation. Yet, the oversight carried out by the EP within the context of the discharge procedure triggered a process of administrative adjustment and reform. Acting under the political pressure of the EP, the EFSA, EEA and EMA adopted a number of measures aimed at revising their independence policies and at re-regulating their relationships with industry and other private actors. On a more general level, the EP called for a horizontal assessment by the Court of Auditors on the practice of all EAs with respect to conflicts of interest situations, which is supposed to contribute to the wider reflection of the role and position of EAs in the EU institutional architecture. The third aspect to be commented on concerns the institutional position that the EP took with respect to the EFSA, EMA and EEA. What is important to point out in this respect is that the EP objections were not oriented toward the affirmation of a political link between the EFSA, EMA and EEA, on the one hand, and the EP, on the other. They rather aimed at restoring the scientific independence of those EAs *vis-à-vis* the private actors, by pointing to the 'porosity' of their practices as well as to the need for the EFSA, EEA and EMA to adopt a series of concrete measures and develop new independence policies.

3. TWO LESSONS

One could be tempted to consider the instances of mismanagement by EAs as very specific episodes, reflecting decadent administrative environments, a lack of personal and professional qualities by the civil servants, and the EP's subsequent commitment to restoring good management. Yet, it is important to ask what lessons can be learned from the events in which CEPOL, EFSA, EEA and EMA were involved. Two questions are prominent in this regard. One concerns the existing EU legal framework for preventing and removing mismanagement: has such legal framework proved adequate to prevent and remove mismanagement by EAs? Or do the events that occurred suggest that the existing legal framework should be developed and improved in some regards? The second question deals with the purpose of the institutional intervention against mismanagement: was the EP's response to mismanagement by EAs simply oriented to the removal of the contested behaviors? Or did that intervention have broader and more ambitious objectives, such as the promotion of institutional adjustment and reform? If so, how much has the link between mismanagement and institutional adjustment and reform proved effective?

3.1 The Existing Legal Framework and its Shortcomings

When assessing the capacity of the current EU legal framework to address the reported cases of mismanagement by EAs, one should begin by recognizing that those cases did not emerge in a legal vacuum. A wide range of formal legal norms was in place to prevent mismanagement by EU administrations, including EAs. And most of the contested episodes represented clear violations of existing principles and provisions of EU administrative law.

As for the CEPOL case, for example, many allegations relating to the staff concerned practices that were certainly illegal and not allowed under the Staff Regulation. Others related to acts or omissions that were clearly in breach of the EU Financial Regulation. Moreover, CEPOL violated several provisions of its own Financial Regulation, for example by not preparing the provisional accounts or the report on the budgetary and financial management, and by omitting to adopt the detailed rules required for the implementation of the Financial Regulation. As for the conflict of interest cases, one may refer to the revolving doors affair involving the departing coordinator of the EFSA GMO Unit, who moved directly from the EFSA to a lobbying position with an important biotechnology company. In that case, both the former staff member and the EFSA clearly failed to comply with the procedural rules established by Article 16 of the Staff Regulation and by Article 18 of the EFSA Decision on outside activities and assignments, in force at the time of the facts. Those provisions require the former official to inform the institution of the intention to engage in a new occupational activity within two years of leaving the service, and require the institution to take a decision on the case, having regard to the interests of the service. Yet, the departing staff member provided insufficient information to the Authority about her new intended occupational activity. And the EFSA, in turn, failed to carry out any real assessment of the information obtained in order to determine whether the new activity of its former staff member could lead to a conflict with the interests of EFSA.

A second aspect of the existing legal framework that should be pointed out concerns the instruments that were used to remove the violations of the substantive and procedural rules of EU administrative law. The response to mismanagement by EAs took a specific institutional form, that of the action of the EP within the context of the discharge procedure. As we have already noticed, this type of response was oriented more to affecting the EAs' reputation than to hitting them with specific sanctions. At the same time, however, it was capable of producing significant

institutional effects, by triggering processes of administrative adjustments. In this sense, the EP used its powers within the discharge procedure to drive EAs towards institutional reform and to conform their action to EU interests. This was facilitated, in any case, by the circumstance in which the EP's response was accompanied by the activation of other, complementary institutional channels. This was the case, in particular, of the supervision carried out by the Court of Auditors through its reports on the annual accounts of the various EAs, as well as of the supervision exercised by the European Ombudsman through the investigation of complaints concerning instances of maladministration in the activities of EU institutions. Quite surprisingly, instead, the European Anti-Fraud Agency (OLAF) was not substantially involved in the EU institutional response to mismanagement by EAs.

These observations might lead to the conclusion that the existing EU legal framework did not present, at the time of the events, any relevant shortcoming. Although in practice they had not been capable of preventing mismanagement by EAs, many substantive and procedural rules of EU administrative law were in place and should have been observed by CEPOL, EFSA, EEA and EMA. Moreover, the institutional response proved substantially capable of removing mismanagement. The reported cases, thus, could simply be seen as reflecting an ordinary institutional dynamic: the formalization in positive law of certain political choices to do with the quality of administrative action, the bypassing of positive law by administrations, and the subsequent legal and institutional response to such violations. Such a reading, however, would be unsatisfactory. Indeed, the EAs' cases do not only reiterate a typical institutional dynamic of legal formalization, administrative violation and legal response, but they also reveal certain grey areas of the existing EU legal framework for preventing and removing mismanagement by EU administrations.

As for the instruments available for removing violations of law, for example, the reported cases indirectly illustrate the limited role of private actors in the activation of significant instruments of control. The EU courts' jurisdiction obviously covers control of abuse of administrative power. Judicial review, though, may be triggered only by persons directly affected by measures of the administration. Objections by other private parties, such as pressure groups and individuals not directly affected by administrative actions, can be brought only as political initiatives or complaints to the Ombudsman. This may lead, as happened in the EAs' cases, to thorough institutional control of the actions of EU administrations. At the same time, however, the limitations on the right of private actors to bring actions before the EU courts considerably restrains the range of possible responses to instances of mismanagement. Those

responses may be worked out mainly through institutional channels that depend on the initiative of the supervisory body and that cannot rely on coercive and authoritative instruments.

The main shortcoming of the existing EU legal framework, in any case, concerns its actual capability to prevent mismanagement by EU administrations. The type of episodes involving EAs, in particular, show that formal legal norms are not sufficient, as such, to prevent mismanagement by EU administrations. In order to be able to really minimize the risk of mismanagement, formal legal norms must be designed in such a way as to trigger concrete administrative practices and to facilitate the emergence of an 'administrative culture' of good management. That was also the perspective of the EP in cases involving the EAs. In the EFSA affair, for example, the EP pushed EFSA to revise its procedures in order to ensure an effective implementation of the quite general obligations concerning the situations of conflicts of interest established by the Staff Regulation; and it called on EFSA to improve the way in which it applied its rules and procedures to avoid 'revolving door' cases. By doing so, the EP did not simply remind EFSA of the need to comply with certain overarching principles and rules of EU administrative law. It required EFSA to translate those principles and rules in a set of operational implementing provisions, designed to create an administrative environment oriented toward respect for the 'substance' of good management. This is, however, a highly difficult project. At the end of the day its success depends on the capacity for self-adjustment of EAs themselves. Moreover, the establishment of operational rules of implementation, both of a substantive and a procedural nature, may prove, in the medium term, a cause for rigidity and ossification. And the concrete elaboration of such rules is far from being an easy exercise, as is shown, for example, by the reluctance of EAs to formulate a precise definition of conflict of interests and to recognize in the rules of implementation the link between the failure to deal properly with these situations and the risk of corruption.

3.2 The EU Response to Mismanagement and Institutional Reform

A second general lesson that can be drawn from the EAs' cases concerns the purpose of the EU response to mismanagement. The EP's intervention was certainly oriented to remove the behaviors of EAs considered to be in violation of the existing EU administrative law provisions. This was not, though, the only purpose in the EP's action. As we have already noticed, the EP also aimed at improving the existing legal framework, by driving EAs to articulate certain principles and rules of EU administrative

law in a set of operational implementing provisions, destined to work within the specific administrative environment of each agency. In addition to this, the EP's intervention was oriented to set in train a process of institutional adjustment and reform. This is an important aspect of the EU response to mismanagement by EAs, deserving specific attention. The EP explicitly established a connection between the breaches of legal norms perpetrated by certain EAs and their overall organizational features. It initiated a process of reflection on the institutional architecture of EAs, with the purpose of identifying those organizational revisions and adjustments that could realistically avoid the risk of further instances of mismanagement. It included in that process of reflection not only CEPOL, EFSA, EEA and EMA, but all EAs, thus taking a horizontal approach to the issue of mismanagement by EAs.

This approach, linking EU response with institutional adjustment and reform, was particularly clear in the conflict of interest cases. The EP did not simply register a number of violations of EU administrative law provisions by EFSA, EEA and EMA. Taking a wider approach, it placed those violations in relation to the weakening or loss of scientific independence by EFSA, EEA and EMA. It then triggered a general reflection on the rationale of scientific independence of those EAs, and argued that scientific independence vis-à-vis the private actors is a necessary precondition for a proper exercise of the EAs' tasks within certain EU sectors of action. It called upon the EFSA, EEA and EMA to develop new 'independence policies', based on a more accurate understanding of their organizational position and functional role within the policy sectors in which they operate. It reached conclusions general enough to be extended to other EAs facing the issue of scientific independence.

The EU response to the instances of mismanagement by EAs, thus, is not at all limited to the removal of the contested behaviors. It has broader and more ambitious objectives, which include the promotion of institutional adjustment and reform. This makes the impact of the EU response to mismanagement potentially far-reaching. At the same time, however, one should not under-evaluate the difficulties inherent in a response connecting the removal of mismanagement with institutional reform. Admittedly, the launch of a process of institutional adjustment and reform implies engaging in a complex discussion on a number of awkward issues concerning the overall architecture of EAs, issues which do not have clear-cut answers and require thorough deliberation. As for the actors participating in such deliberation, the process of institutional adjustment and reform cannot but involve EAs, as assumed by the EP. EAs, indeed, are key players of that process, and are supposed to develop

a certain awareness of their overall institutional architecture as well as of its underlying issues. Institutional adjustment and reform, though, cannot be realized by EAs only. It also requires that it be based on a number of overarching political choices to be adopted by the EU political institutions and formalized in EU legislation.

The conflict of interests cases may be recalled once again as examples of such potential difficulties. Acting within the context of the discharge procedure, the EP required that the EAs concerned develop new 'independence policies' in order to re-establish a sound relationship with the private actors operating in their fields of action. Some EAs actually engaged in a serious reflection on the theory and practice of their independence vis-à-vis the market. This was the case, for example, with the EFSA, which reconsidered its previous policy on independence in light of the criticisms to which it was made subject. The EFSA reflected on the meaning to be conferred on its scientific independence, and revised the rules and procedures concerning its internal governance, both administrative and scientific.[14] The institutional modifications realized by the EAs themselves, however, are necessarily limited to certain specific aspects of their functioning, such as the rules of procedure of their administrative and scientific bodies. They cannot correct the ambiguities in the understanding of EAs' scientific independence that originates in the text establishing the regulations. One of those ambiguities deals with the internal organization of EAs. Far from tracing a clear distinction between regulator and regulatees, the regulations establishing EAs expressly qualified as independent often give voice within the agencies to the private sector, by setting up internal bodies composed of representatives of the affected parties. So, for instance, the internal organization of the European Network and Information Security Agency includes a 'Permanent Stakeholders' Group' – composed of experts representing the relevant stakeholders, such as the information and communication technologies industry, consumer groups and academic experts in network and information security – which is responsible for advising the Executive Director in the performance of his duties, in drawing up a proposal for the Agency's work programme, as well as in ensuring communication with stakeholders on all issues related to the work programme. Such

[14] An overall account of this reflection is provided in the *EFSA Report to the European Parliament on the Implementation of its Independence Policy 2007–2012*, 29 June 2012, available at http://www.efsa.europa.eu/en/keydocs/docs/independencepolicyreport0712.pdf. The specific measures adoted by EFSA to implement the new independence policy can be found at http://www.efsa.europa.eu/en/topics/topic/independence.htm.

organizational solutions are, not infrequently, welcomed by staff members of the EAs, the industry and EU law scholars, as instruments of 'inclusive governance' and as new, and potentially more effective, forms of public–private partnership. In the perspective of legal and political realism, however, it should be recognized that stable and institutionalized representation of private subjects within EAs presents a number of grey areas. It may give place to neo-corporative modes of governance, whose effects are far from clear and need careful assessment. While it may change the allocation of political authority in institutional frameworks,[15] it does not necessarily keep the promise of more effective administrative decision-making. And there are obvious risks of unequal access of different groups of private actors, starting with the basic opposition between non-governmental organizations and sectors of industry. If the removal of mismanagement by EAs is necessarily connected to the reaffirmation of their scientific independence, thus, such reaffirmation implies not only a revision of the EAs' internal rules of action, but also a fresh and balanced reflection on certain choices made in the establishing regulations. For example, one might wonder whether there are instruments, different from the establishment of internal bodies representing the private sector, capable of cultivating the ambitions of inclusive governance without at the same time jeopardizing the scientific independence of EAs. This could be the case, for instance, in the procedural arrangements established by various EU regulatory regimes, such as the notice and comment type procedure imposed on national independent authorities in the field of telecommunications, which seems a promising mechanism for allowing exchange of information and reasons between private and public actors within the context of a clear distinction of reciprocal positions.

4. CONCLUSIONS

This chapter has given a short account of cases of mismanagement that have involved EAs in the last four years; it has described the EU institutional and legal response to those instances of mismanagement; and it has tried to identify the lessons that can be drawn from them.

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[15] For this perspective see F. Wendler, 'The public-private regulation of food safety through HACCP: What does it mean for the governance capacity of public and private actors?', in E. Vos (ed.), *European Risk Governance. Its Science, its Inclusiveness and its Effectiveness*, Connex Report Series No. 6, Mannheim, 2008.

The main conclusions may be summarized as follows. First, EAs have proved less oriented to the standards of good administration than was, and still is, generally assumed in the scientific and institutional reflection on the 'agencification' process in the EU legal order. The conduct of some EAs from 2008 to 2012 raised increasing concern and revealed that the system of EAs cannot be considered immune from the risks of mismanagement. Four EAs were involved in the mismanagement cases, and the main allegations concerned management issues in the implementation of the budget (the CEPOL case) and conflict of interests issues (the EFSA, EEA and EMA cases).

Second, the various EU responses to the cases of mismanagement by EAs presented a number of recurrent elements. In all cases, the main institutional response came from the EP, acting within the context of the discharge procedure. As for the formalization of the allegations, in all cases the EP qualified the contested acts or omissions in general terms, as breaches of the standards of good administration or as conflicts of interest. Yet, the EP seemed to have little interest in defining the precise terms of its allegations. It neither defined the notions of good administration and conflicts of interest, nor clarified their mutual relationships. Moreover, the EP did not overtly point to the risk of corruption inherent in the contested practices. EAs, on their side, seemed reluctant to fill this lacuna. With the exception only of the EFSA, they did not work out possible definitions of good administration or conflict of interests. Nor did they reflect on the connection between their conduct and the danger of corruption. As for its effects, the oversight carried out by the EP within the context of the discharge procedure triggered in all cases processes of administrative adjustment and reform within the EAs concerned. The EP, though, also launched a wider reflection of the role and position of all EAs in the EU institutional architecture.

Third, the reported cases of mismanagement by EAs reveal some shortcomings in the existing EU legal framework for preventing and removing mismanagement by EU administrations. As for prevention, the cases involving EAs show that formal legal norms are not sufficient, as such, to prevent mismanagement by EU administrations. In order to be able to minimize the danger of mismanagement, they must be designed in such a way as to trigger operational administrative practices and facilitate the emergence of an administrative culture of good management. What is required, thus, is a set of operational implementing rules, both of a substantive and a procedural nature. Such a set of implementing rules could, yet, in turn raise further issues, for example by causing rigidity and ossification within EAs. As for the instruments available to remove violations of the law, the reported cases of mismanagement by EAs

illustrate the limited role of private actors, as judicial review may be triggered only by persons directly affected by measures of the administration, and objections by other private parties can be brought only as political initiatives or complaints to the Ombudsman.

Fourth, the EU response to mismanagement by EAs, far from being limited to the removal of the contested behaviors, has broad and ambitious objectives, including the promotion of institutional adjustment and reform. This makes the impact of the EU response to mismanagement potentially far-reaching. At the same time, however, a response connecting the removal of mismanagement with institutional reform is inevitably destined to face a number of difficulties. Institutional reform, indeed, implies the engagement in a thorough discussion on a number of uneasy institutional issues, and it requires the involvement of a number of key players, including the EU political institutions, called to take some overarching political choices.

These conclusions are of some relevance in that they deepen the institutional understanding of EAs by shedding light on some of their structural weaknesses. The cases of mismanagement by the EFSA, EEA and EMA, for example, confirm and substantiate a critical element of the EAs' architecture that had been already pointed out in 2009,[16] namely the lack of independence of EAs toward the market, which risks making those bodies excessively permeable to private parties. In addition to this, the EFSA, EEA and EMA cases clarify that such lack of independence in regard to the market may concretely open the way to practices of mismanagement and finally lead to a loss of reputation and credibility of EAs. The lack of independence, in any case, is not at all the only structural problem of the EAs' architecture capable of creating the preconditions for mismanagement. Other problems include the excessive complexity and 'baroque' nature of the internal organization of EAs, the tensions inherent in the techniques of integration used to allow EAs to operate as coordinators of transnational administrative networks, and the limited development of the instruments of control with respect to certain specific EAs.[17] The cases of mismanagement by EAs considered in this chapter should lead scholars and institutions to renew their interests in those problems and to engage in a fresh discussion on their possible correction. Otherwise, further instances of mismanagement by

[16] E. Chiti, 'An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies', above, n. 1, pp. 1401ff.

[17] For a discussion of these issues, see E. Chiti, 'An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies', above, n. 1, pp. 1401ff.

EAs will not come as a surprise. The reported cases may also be taken as a starting point for a discussion on the instruments needed to ensure that EAs and their staff act in the general interest of the European Union. The EP, as we have observed, has connected the removal of mismanagement to a process of legal revision and institutional reform. This project, however, is at the same time highly promising and rich in difficulties. Scholars and key institutional actors, thus, should reflect on the possible ways to deal with those difficulties, proposing technical solutions, political strategies, and, where appropriate, better alternatives.

The conclusions presented above, though, might also be of some relevance beyond the studies on the agencification process in the EU legal order. Indeed, they might be used within the context of a comprehensive and systematic inquiry into mismanagement in the EU administrative system. Such an inquiry could reveal similarities and differences in the types of mismanagement practices in which the various EU administrations are involved, in the applicable principles and rules of administrative law, and in the institutional responses provided by the EU legal order. This would be a valuable research project for EU administrative law scholarship, as it would provide a realistic account of the qualities and pathologies of EU administrations. And the conclusions reached in this chapter could be recalled within the research at least as a useful source of comparison with the practices of other components of the EU administrative system.

18. Footprints in the sand: Regulating conflict of interest at EU level

Simone White

A number of comparative studies have shown how states handle particular conflicts of interest, and to what extent they seek to prevent them or to criminalise them.[1] International and EU bodies have not been immune to conflicts of interest, although their internal regulatory systems seem to have attracted less in-depth or comparative analysis.[2] In this chapter, the author argues that a comprehensive EU regulatory framework, dedicated to conflicts of interest at EU level, is needed. Conflicts of interest involving senior public servants are a political embarrassment and damage the confidence of the public in democratic institutions, because of the perceived connection between conflicts of interest and corruption.

The OECD[3] has defined a conflict of interest as 'a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities'. A conflict of interest can be actual, apparent or potential. In an *actual* conflict of interest, a public official is in a position to be influenced by his private interests in the performance of his official duties. An *apparent* (or

[1] See for example: OECD (2005) Conflict of interest policies and practices in nine EU Member States: a comparative review (paper prepared by SIGMA); OECD (2010) Post-public employment good practices for preventing conflict of interest; Council of Europe (2012) Rules and experiences on integrity issues, February 2012 (south eastern Europe); C. Demmke et al (2007) Regulating Conflicts of Interest for Holders of Public Office in the European Union – A Comparative Study of the Rules and Standards of Professional Ethics for the Holders of Public Office in the EU-27 and EU institutions.

[2] See for example European Voice newspaper of 10 May 2012, article by Toby Vogel 'European Parliament delays approving 2010 accounts of three agencies over allegations of conflicts of interest'.

[3] OECD (2003) Recommendation of the Council on Guidelines for Managing Conflict of Interest in the Public Service.

perceived) conflict of interest refers to a situation where there is a personal interest that might reasonably be considered by others to influence the public official's duties, even though there is no such influence. A *potential* conflict of interest may exist where a public servant has private-capacity interests that could cause a conflict of interest to arise at some time in the future. An example is the case of a public official whose spouse would be appointed in the coming weeks as executive director or CEO of a company which is the subject of a recent decision made by the official, and the public official is aware of the spouse's appointment. A reasonable person, knowing all of the relevant facts, would conclude that the official's private-capacity interest could improperly influence his/her conduct or decision-making.[4] So there may be a potential conflict of interest when a public official may in the future have private interests, which could influence how he carries out his duties as a public servant.

This chapter will focus on two types of conflicts of interest: those conflicts of interest involving the private sector, either through lobby groups and/or via 'revolving doors' (post-employment conflicts of interest); and those arising mostly out of an EU procurement or grant-making procedure that involves the allocation of resources by an EU official (called here the 'command over resources' model). By delineating these two types of conflicts of interest, the author does not mean to imply that they are mutually exclusive, but that they have attracted specific policy responses. One proposition is that EU institutions may find external actors (lobby groups) less amenable to control than their own officials, who are duty-bound to obey internal rules. A corollary of this is that conflicts of interest involving lobby groups may be more intractable. Because of this, we start with some historical context on lobbying and the EU.

1. CONFLICTS OF INTEREST IN POLICY-MAKING

The Context: Commercial Influence as an Integral Part of Policy-making

As Anderson and Eliassen discussed in 1993, the 'lobbyfication' of the EU emerged as a distinct phenomenon after an initial phase during which

[4] SIGMA (2005) Conflict of interest policies and practices in nine EU Member States: a comparative review, p. 3. SIGMA stands for Support for Improvement in Governance and Management.

lobbying was directed at the Member States separately, first at domestic level and then also at Council level. Further 'Europeification' of lobbying occurred, following the Single European Act, as the Delors Commission placed the Commission on its present path as the driver of legislation. Lobbyists switched their attention to the Commission for early stages of development of policies, whilst also keeping a focus on the Council of Europe (the Council) as proposals hardened up into draft legislation. What is remarkable in this phase, according to Anderson and Eliassen,[5] is not just the expansion of lobbying directed at the Commission, but also the degree to which the Commission came to rely upon the lobby for energising policy-formation. Finally, with the passage of the Treaty of Maastricht and the emergence of the Parliament as a full player, so it too becomes a focus for intense lobbying. Relationships with lobby groups have attracted the attention of groups such as Corporate Europe, which seek to expose the power of corporate lobbying in the EU,[6] so strong disapproval of lobbying behaviour often comes across.

The lobby, as a collective entity, well understands the dynamics between and within the institutions and the need to take account of formal roles and informal sensitivities. Regarding the former, proposals have to be phrased in terms of harmonisation if they are to catch the eye of the Commission. At the same time, proposals have to be tailored to relate to the competences and interests of MEPs, in particular rapporteurs of the relevant EP committees. Governmental trade-offs around the Council also have to be accommodated.

Good professional lobbyists, in other words, are rather like mediators: they oil the wheels. What usually stands in the way of commercial objectives is not an isolated official, MEP or Council staff member, but rather the complexity of intra-institutional interests and negotiations (for which 'win–win' solutions have to be creatively engineered). However, when individuals or small groups are in a position to act as gatekeepers, then the potential for greasing palms may arise more strongly.

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[5] Ibid.

[6] Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy-making. See for example http://corporateeurope.org/agribusiness/efsa.

Lobby Groups and Transparency

The most remarkable aspect of the current approach to conflicts of interest is that it undeniably focuses on EU officials. The regulatory situation at EU level can only be described as totally asymmetric.

Officials are subject to a large number of measures and their employment may be at risk if they become entangled in a conflict of interest. External parties lobbying officials have to weigh potentially high rewards from their lobbying activities against the possible consequences of a breach of a code of conduct (which of course does not apply to them if they have not registered as an EU lobbyist). This hangs on the definition of lobbying. One narrow view of lobbying focuses on direct representations by pressure groups to legislators. A more realistic view includes the different forms of communication and research activities that underpin, inform and support the preparation of policy proposals before lobbyists put them to legislators and decision-makers. Unfortunately, the present policy on lobbying seems to have been informed by the narrow view, as we shall see.

In 2011, the European Parliament and the Commission adopted an Inter-Institutional Agreement on the establishment of a Transparency Register for organisations and self-employed individuals engaged in EU policy-making and policy implementation.[7] This register builds on the system set up in 1996 by the European Parliament and by the Commission in 2008. The Transparency Register covers all activities carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making process of the EU institutions, irrespective of the channel or medium of communication used.[8] Registrants voluntarily disclose their particulars and their interests and agree to comply with a code of conduct. Anyone may submit a complaint regarding non-compliance with the code. The incentive and sanction mechanisms are discussed below.

The Agreement opens up the Register to other institutions and bodies. In particular it invites the European Council and the Council to join the Register. Other institutions, bodies and agencies are encouraged to use this system themselves as a reference instrument for their own interaction with organisations and self-employed individuals engaged in EU policy-making and policy implementation.

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[7] OJ (2011) L191/29.

[8] Activities excluded and specific provisions are detailed in the Agreement. Ibid.

As registration is voluntary, the system has to offer a 'carrot': access to the European Parliament buildings, in the form of an access badge. In the same way, a typical sanction for a breach of the code of conduct would entail the removal of this badge.

One cannot help but wonder whether this 'carrot and stick' approach is adapted to the nature of lobbying. The real issue here is not – as mistakenly reported in some sections of the press – that lobbyists have to sign a register in order to have a badge in order to lobby. Whilst direct observation of meetings takes place in the Parliament building, and whilst observation of such meetings helps to keep lobbyists au fait with developments, more significant contacts with MEPs and with their staff may take place elsewhere. MEPs, just like Commission officials, swim within a politico-commercial sea, in which exchange of information – sometimes dignified as 'evidence-based' policy-making – is inseparable from social life in the capital.

In its 'Dodgy Data' report,[9] ALTER-EU (Alliance for Lobbying Transparency and Ethics Regulation) opines that registration needs to be improved.[10] The report also notes that, curiously, a number of registrants are not actually lobby groups. One presumes that some entities might register for the free publicity registration confers, or in case they might develop a lobbying base. Conversely, large groups known to lobby the European Commission have in fact not registered. According to ALTER-EU, the data contained in the Transparency Register is often misleading and disclosure requirements should be tightened – lobbies should disclose what topics they have lobbied on, on whose behalf and with what budget – and registration should be compulsory.[11] Nevertheless, even if more EU institutions and bodies adhere to the Transparency Register, implementation may well remain patchy.

An EU Lobby Group on the International Stage

One example relates to a conflict of interest at the International Agency for the Research on Cancer of the World Health Organization. Professor Anders Ahlbom, who was appointed to chair the expert group evaluating

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[9] ALTER-EU (2012) Dodgy data: time to fix the EU's Transparency Register (report), edited by Helen Burley.

[10] See also Friends of the Earth Europe (2012) Transparency in the European Parliament, analysis of the Declarations of Financial Interest of Members of the European Parliament – July 2012.

[11] See European Voice newspaper of 28 June 2012, p. 12 'Transparency list is being abused' letter by Koen Roovers of ALTER-EU.

the carcinogenicity of mobile phone radiation, was also the co-founder of Gunnar Ahlbom AB, a Brussels-based lobby aiming to assist the telecom industry on EU regulation, public affairs and corporate communication. In this case, Professor Ahlbom had apparently failed to report either his involvement in the lobby firm or his close family relation to a mobile phone industry lobbyist, Gunnar Ahlbom. It has been argued that Professor Ahlbom has consistently underestimated the long-term carcinogenic effects of mobile phone radiation to the WHO, to the benefit of the mobile phone industry.[12]

EU Regulatory Agencies

EU regulatory agencies have come under the scrutiny of the European Parliament's Budgetary Control Committee.[13] There were queries over the impartiality of staff and seconded national experts of the European Medicines Agency in London, allegedly too close to the pharmaceutical industry. The Mediator[14] scandal has also had an impact. In parallel, the EU Food Safety Agency in Parma had allegedly been quite close to the food industry[15] and the EU Environment Agency in Copenhagen on (too) good terms with an environmental pressure group. In many cases senior staff resigned positions in favour of the private sector.[16] In 2012, these allegations led the Budgetary Control Committee of the European Parliament to postpone budget discharge in the affected regulatory

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[12] http://electromagnetichealth.org/electromagnetic-health-blog/ce-less-emf/.

[13] See European Voice newspaper of 3 May 2012, p. 4: 'Parliament to reject Council's 2010 accounts'.

[14] Mediator is the French brand name for an anti-diabetic drug called benfluorex which was withdrawn from the French market in November 2009 after it caused up to 2000 deaths. Produced by French pharmaceutical firm Servier, the drug was widely prescribed as a weight-loss drug for non-diabetics despite a number of warnings that it caused potentially fatal heart valve problems. It has been alleged that this arose out of conflicts of interest involving both the French authority and the European Medicines Agency's failures to react to conflicts of interest.

[15] In 2010, it was alleged that more than half of the EFSA's GMO panel had conflicts of interest and this had contributed to the approval of the GM potato. In 2011, conflicts of interest were also alleged in relation to food additives, including aspartame.

[16] See E. Chiti's contribution on European agencies in this volume.

agencies.[17] In a report concerning the European Medicines Agency, the Budgetary Control Committee made it clear that it expected the agency to

– assess thoroughly, before the allocation of project team leaders to products, whether the interests declared by staff members might influence their impartiality and independence; expects that the Agency's documents on the conflicts of interest shall be updated;
– inform the discharge authority on actions taken on issues relating to the effective compliance with its Code of Conduct as regards the management of conflicts of interest;
– adopt a risk-based approach and focusing checks on staff who declare interests; calls on the Agency to inform the discharge authority on the timing and plan to apply this IAS recommendation before the end of 2011.

The Committee also stressed that it is not only the Agency's reputation that could be affected in cases where evaluations can be challenged on the grounds of possible conflicts of interest but also that such conflicts of interest do not guarantee the optimal protection of European citizens' health.[18] The discharge for the European Medicines Agency was granted in plenary in October 2011.

A European Parliament Resolution of May 2011 on the 2009 discharge has a number of general messages to the EU agencies.[19] They include the following remarks on conflict of interest management. The EP Budgetary Control Committee

– reminds the agencies of the importance of fully guaranteeing the independence of their staff and experts; encourages, in particular, the agencies to carefully file and assess their controls on this; stresses, in fact, that an agency's reputation could be affected in cases where it is challenged on the ground of conflicts of interest;
– calls on the Commission to provide Parliament with a detailed overview of the criteria applied in order to ensure the independence of recruited staff, in particular with respect to possible conflicts of

[17] Second Report of 6 October 2011 on discharge in respect of the implementation of the budget of the European Medicines Agency for the financial year 2009, Committee on Budgetary Control, Rapporteur: Georgios Stavrakakis PE 469.789v02-00, A7-0329/2011.

[18] Ibid.

[19] The Resolution deals with the performance, financial management and control of EU agencies (2010/2271(DEC)).

interest, and to apply dissuasive sanctions where any irregularity is found and

– calls on the Court of Auditors to undertake a comprehensive analysis of the agencies' approach to the management of situations where there are potential conflicts of interest.[20]

These cases highlight the relations between lobby groups and public officials and more generally between public and private sectors, with the private sector in a position to reward handsomely for services. As described below, steps have now been taken to deter some senior EU officials from working closely to lobby groups and from making a seamless entry into the private sector after ceasing to hold EU public office. Measured against that admittedly modest progress, there remain many questions to ask about the integration of lobby groups into the policy-making process, as a structural aspect of the way the EU functions. This context, and its political normality, need to be kept in mind when discussing issues around conflict of interest.

2. CONFLICTS OF INTEREST – COMMAND OVER RESOURCES

A specific legal framework applies for conflicts of interest arising in the context of EU officials having command over resources, or access to information concerning resources. Here the official holding the information may not necessarily have decision-making powers, but he/she may be part of a technical or decision-making team and in that sense have a possibility of influencing the outcome in resource allocation.

EU Financial Regulation: Wide Definition of Actors

Article 52 of the EU Financial Regulation states that all financial actors and any other person involved in budget implementation, management, audit and control shall be prohibited from taking any action which may bring their own interests into conflict with those of the Communities (now the European Union). This definition is wider than that adopted in the Staff Regulations, the latter limiting its application to EU officials. Should a conflict of interest arise, a financial actor must refrain from taking budget-related decisions and refer the matter to the competent

[20] Ibid.

authority. 'Competent authority' is defined in the Implementing Regulation[21] as the hierarchical superior of the member of staff concerned, who must confirm in writing whether or not there is a conflict of interest and take appropriate action. A conflict of interest occurs where the impartial and objective exercise of the functions of a financial actor or other person is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary. Article 34 of the EU Regulation implementing the Financial Regulation gives a broad definition of a conflict of interest. Acts likely to be vitiated by a conflict of interest may include (a) granting oneself or others unjustified direct or indirect advantages; (b) refusing to grant a beneficiary the rights or advantages to which that beneficiary is entitled and (c) committing undue or wrongful acts or failing to carry out acts that are mandatory. A conflict of interest is presumed to exist if an applicant, candidate or tenderer is a member of staff covered by the Staff Regulations, unless his participation in the procedure has been authorised in advance by his superior.

Contracts, Specification and Expertise

There is an implicit acknowledgement that a conflict of interest may occur at any stage of a procurement procedure (whether it is open, restricted or negotiated). In a procurement process, conflicts of interest may arise at the stage of defining the specification of a project and award criteria, at the time of selecting the procurement procedure, at the verification and selection stage and finally at the award stage. Experts on evaluation committees may also have conflicts of interest. At the specification stage, an expert writing up the specification may hope to be involved in the project at a later stage. There may be some interest in choosing one particular procurement procedure, without realising that a conflict of interest is dictating the official's choice. At the verification and selection stage, potential or actual conflicts of interest may be ignored. At the award stage, experts on an evaluation committee may not realise they should refrain from being involved, when for example they have personal relationships with the tenderers. Conflicts of interest potentially vitiate the equal treatment of commercial operators.

Some conflicts of interest situations are widely regarded as being inevitable and as not necessarily implying improper conduct. This view is

[21] Commission Regulation 2342/2002 laying down detailed rules for the implementation of Council Regulation 1605/2002 OJ (2002) L357/1.

sometimes taken in relation to highly specialised organisations, where expertise is in limited supply. However, there are questions to be asked about such situations. In particular, has the organisation made real efforts to open up the requirement to a wider pool of expertise (who might sometimes have a different set of solutions) – or has the organisation allowed what is effectively a cartel of experts to define the need for expertise? For example, in terms of research services, do officials and experts in effect operate a sort of intellectual 'revolving door', in which the official consults the experts on the research requirements? Given the best will in the world, it must be unlikely that experts would define themselves out of the game, by referring to the intellectual outputs, forms of arguments, or models of other experts. It therefore falls upon the EU institution or body to take active steps to keep the intellectual climate diverse and challenging.

In this chapter, two (main) types of conflicts of interest have been discussed. It is of course possible for conflicts of interest to occur during staff selection procedures, or as a result of a past occupation, as the Camos Grau case shows.[22]

3. REAPPRAISING THE EU REGULATORY FRAMEWORK

There is no comprehensive regulatory framework dedicated to conflicts of interest ensuring comparable minimum requirements applicable to all EU institutions and bodies. A comparative study carried out in 2007 shows that regulation density differs from institution to institution, with the highest regulation density in the European Commission and the European Central Bank and the lowest regulation density in the European Parliament and the Court of Justice of the European Union. According to the study, this pattern is replicated at national level in the EU Member States.[23] The study also found that the density of regulation was however higher in the EU institutions than in the EU Member States.[24]

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[22] Case T-309/03 M Camos Grau v Commission judgment of the Court of First Instance of the European Union of 6 April 2006.

[23] See note 2, 2007 comparative study.

[24] See note 2, 2007 comparative study, pp. 64ff.

The EU regulatory framework dedicated to conflicts of interest is scattered in the EU Staff Regulations,[25] the Financial Regulation and its implementing regulation,[26] the Code of Good Administrative Behaviour,[27] the Code of Conduct for Commissioners,[28] various guidelines on ethics and conflicts of interest and codes of conduct, and Internal Control Standards.[29] Some principles can also be found in rules of procedure. Typically, guidelines take into account the specificities of a service or of a group of officials.

The EU Staff Regulations do not give a definition of a conflict of interest, but state that an EU official shall not, in performance of his duties, deal with any matter (in particular, family and financial interests) in ways that impair his independence.[30] An official must notify any personal interest that might impair his/her independence;[31] mitigating measures must be taken;[32] officials must seek approval for engaging in outside activities and declare gainful employment of spouses.[33] Furthermore, officials continue to be bound by the duties and integrity and discretion after leaving office as regards the acceptance of certain

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[25] Regulation No 31 with subsequent amendments laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Energy Community.

[26] Council Regulation 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities OJ (2002) L 248/1 amended by Council Regulation 1995/2006 OJ (2006) L390/1 and Council Regulation 1525/2007 OJ (2007) L343/9. The consolidated version takes account of numerous corrigenda.

[27] European Commission (2000) Code of Good Administrative Behaviour – Relations with the public. Article 4 states inter alia that staff 'shall never be guided by personal or national interest or political pressure'. This code applies to all the European institutions.

[28] C (2011) 2904.

[29] The Commission's Internal Control Standard No 2 requires the Commission to have in place 'procedures to ensure that all staff is [*sic*] aware of the relevant ethical and organisational values, in particular conduct, avoidance of conflict of interest, fraud prevention and reporting of irregularities'.

[30] Article 11a of EU Staff Regulations. The case study mentions ethical training for staff now and compulsory training for participants in evaluation committees, in order to increase awareness.

[31] Ibid. The case law of the Courts of Justice of the European Union requires 'impairment of independence' to be interpreted widely; see case T 100/04 Giannini v Commission, judgment of 12 March 2008, points 223–224, 228–229.

[32] See n. 2.

[33] Articles 12b and 13 of the Staff Regulations.

appointments or benefits, and they must notify any employment entered into for two years after leaving the service.[34]

The requirements set out in the EU Staff Regulations only refer to EU officials: other key players involved in decision-making processes such as Members of Management Boards and experts are not covered by them.

The European Court of Auditors (ECA) has identified risks of conflicts of interest inherent to particular organisational structures in the past. In its Report on the annual accounts of the European Medicines Agency for the financial year 2010, the ECA noted that, in that agency, the Management Board included mainly representatives of national authorities responsible for deciding the remuneration of scientific services provided to the Agency by the same national authorities.[35] In such cases, the structure of the organisation should be reviewed for its potential to create inherent conflicts of interest.

The European Parliament does not have an ethics code or an ethics committee, although some basic principles are outlined in its Code of Procedure. This situation may evolve following the 'cash-for-influence' scandal. In 2011, when the European Anti-Fraud Office (OLAF)[36] tried to gain access to the European Parliament premises in order to investigate this case, the European Parliament denied OLAF access.[37] This case takes us beyond conflicts or interest; however it shows that the prevailing culture inside the European Parliament was not one conducive to the identification of conflicts of interest.

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[34] Article 16 of EU Staff Regulations.

[35] Report on the Annual Accounts of the European Medicines Agency for the Financial Year 2010 OJ (2011) C366/27.

[36] Article 4 of Regulation 1073/99 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF) OJ (1999) L136/1 and the Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) OJ (1999) L136/15 give OLAF the right of immediate and unannounced access to any information held by the EU institutions, bodies, offices and agencies and to their premises.

[37] See newspaper articles: 'Get out and stay out – should OLAF investigators have access to MEPs' offices?' European Voice of Thursday, 21 June 2012; also 'Buzek allows Olaf probe, continues to deny access to offices', 31.03.11, EUObserver http://euobserver.com/9/3210; also material on http://www.corporateeurope.org/sites/default/files/Severin%20Ombudsman%20%20OLAF.pdf; Financial Times, March 23, 2011, 'Fraud investigators barred from MEPs' offices' http://www.ft.com/intl/cms/s/0/5e6e8d3e-5558-11e0-87fe-00144feab49a.html#axzz21AFVElPm.

In 2008, a Communication from Vice-President Kallas made recommendations for enhancing the environment for professional ethics in the European Commission.[38] The Communication points out that the mere arising of a situation of conflict of interest is an objective situation creating a risk. It must be handled by the official concerned and his or her superiors swiftly and in accordance with the Staff Regulations. The Communication goes on to recommend that the guidelines on favours, gifts and hospitality[39] should be revised, as well as the existing decision on outside activities and assignments,[40] in order to reassess the distinction between commercial activities and other activities. These rules are now in place.[41]

More steps have been taken by the European Commission to tackle the 'revolving door'/'*pantouflage*' phenomenon at senior level. According to the OECD, post-employment conflicts of interest arise when a public official (i) seeks future employment outside the public service (ii) is involved in lobbying public institutions, (iii) switches sides in the same process and (iv) uses insider information.[42] The revolving door implies the risk of a conflict of interest between the loyalty owed to the former employer and the likely demands of the new employer.

The Code of Conduct for Commissioners now regulates post term-of-office activities, following a string of problems involving ex-Commissioners. If a Commissioner intends to engage in an activity related to the content of his portfolio, the Commission has to seek the opinion of an Ad Hoc Ethical Committee. In the light of the Committee's findings, the Commission decides whether the planned occupation is compatible with Article 245 TFEU. Furthermore, ex-Commissioners are forbidden, during the eighteen months after ceasing to hold office, from lobbying or advocating with members of the Commission and their staff of her/his business, client or employer on matters for which they have been responsible within their portfolio as Member of the Commission during their mandate.[43] ALTER-EU[44] has argued for a three-year prohibition, which would coincide with the period when ex-Commissioners

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[38] SEC (2008) 301.

[39] SEC (2012) 167.

[40] Commission Decision on Outside Activities and Assignments C (2004) 1597 (amended).

[41] See nn. 23 and 24.

[42] OECD (2010) Post-Public Employment: Good Practices for Preventing Conflict of Interest, OECD, Paris.

[43] Point 1.2. of the Code of Conduct for Commissioners C (2011) 2904.

receive their post-employment allowance, and so would avoid a situation in which the Commission could be paying an ex-Commissioner whilst he or she lobbies the Commission. By comparison, Article 16 of the EU Staff Regulations requires officials intending to engage in an occupational activity, whether gainful or not, within two years of leaving the service to inform their institutions thereof. Commissioners' interests (and their spouses') now have to be registered on the Commission Transparency Portal.[45]

MEPs are not subject to post-employment restrictions and this raises questions about the ability of MEPs to defend the public interest while in office and is a source of possible future conflicts of interest.

4. SUMMING UP AND THE WAY FORWARD

As a general rule, attempts to 'regulate out' conflicts of interest have been directed at states[46] and the public service. At national level, approaches have tended to be sectoral. For example, the financial services environment[47] and the medical research environment[48] have attracted sector-specific prevention measures and codes of ethics. The EU institutional space is only partially regulated as far as conflicts of interest are concerned, and this regulation is fragmented. Regulatory density mirrors that in the Member States, with Parliaments typically having the lowest regulatory density. As a result, every EU institution or body appears to

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[44] The Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) is a coalition of about 200 civil society groups, trade unions, academics and public affairs firms concerned with the increasing influence exerted by corporate lobbyists on the political agenda in Europe, the resulting loss of democracy in EU decision-making and the postponement, weakening, or blockage even, of urgently needed progress on social, environmental and consumer-protection reforms.

[45] http://www.ec.europa.eu/commission_2010-2014/interests/index_en.htm.

[46] See COM (2011) 376 Communication from the Commission (…) on the Commission Anti-Fraud Strategy.

[47] O. Kadan et al (2009) Conflicts of interest and stock recommendations: the effects of the global settlement and related regulations, Review of Financial Studies, 22(10): 4189–4217, https://rfs.oxfordjournals.org/; UK Financial Services Authority (2003) Conflicts of interest: investment research and issues of securities, consultation paper 171.

[48] A.V. Neale et al (2005) Conflict of interest: can we minimize its influence in the biomedical literature?, Journal of the American Board for Family Practice, Vol 18, No 5 411–413: 'Pharmaceutical-sponsored research may affect biomedical publications, marketing and ultimately medical practice.'

have a unique constellation of binding rules and soft law, covering various aspects of conflicts of interest.

One question is to what extent we should accept, at the level of the EU institutions and bodies, the same level of density in regulation that exists in the Member States, or whether we should demand more consistency from our EU institutions and bodies. The European Parliament requested the European Court of Auditors to undertake a comprehensive analysis of EU agencies' approach to the management of situations where there are potential conflicts of interest. This report may help to shed some light on current practices.[49]

The regulatory space is also uneven because EU rules only cover EU officials' behaviour, leaving out important players such as experts and lobbyists. The approach to lobbyists seems to have been informed by a narrow definition of lobbying, which overlooks the manner in which they are often integrated within policy-making. The registration of lobbyists is voluntary and offers weak incentives for compliance with a code of conduct. The impact of lobbying practices on the integrity of public decision-making needs some more thought, bearing in mind the historical evolution of lobbying in policy-making[50] and the presence of lobbies at all stages of policy-making.

The focus of regulation has been on certain types of conflicts of interest (where public officials act as gate keepers to resources in procurement and the grant-making process involving EU funds). This is no doubt because of the perceived greater amenability to control of EU officials on EU financial matters.

Going beyond the Transparency Register, an EU inter-institutional ethics committee (or committee on standards) could be set up in order to promote an ethics programme common to all EU institutions and bodies. This committee would have to be separate and independent (or as independent as possible) from the institutions and bodies that it is overseeing. It could be charged with the supervision and implementation of general standards applying to all EU institutions and bodies and could report annually.[51] Such a committee could assess the effectiveness of

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[49] Resolution of the European Parliament of 10 May 2011 on the 2009 discharge: performance, financial management and control of EU agencies OJ (2011) L250/269.

[50] See OECD (2007) OECD Guidelines for managing conflict of interest in the public service – report on implementation.

[51] For a similar recommendation, see L. Dercks (2001) The European Commission's business ethics: a critique of proposed reforms, Business Ethics: a European Review, Vol 10, No 4 (October), p. 351. L. Dercks also recommended

each aspect of conflict of interest prevention or ethics policy, starting perhaps with the EU Transparency Register and post-public employment policies. This would help to bring together good practice, increase transparency and create inter-institutional standards.

Looking to the future, the Commission (and other EU institutions and bodies) could consider improving and complementing the Transparency Register. Improvements could include the revision of categories to be designated as lobbyists, a requirement to state clearly what the lobbying activity is and how much is spent on it, and making registration and its regular updating compulsory. In addition to the Transparency Register, the Commission and the European Parliament could proactively report on who has assisted in preparing legislative proposals. This would mean that legislative proposals could include *legislative footprint reports*.[52] This would constitute a giant step forward for transparency.

In conclusion, a short 'shopping list' might cover issues arising in policy-formulation as well as in resource allocation; issues in the private sector as well as in EU institutions and bodies; consistency across the institutions and bodies and a move to complementing the Transparency Register with legislative footprint reports.

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that specific training be provided to all top officials in the importance of ethical leadership.

[52] ALTER-EU, above, n. 10.

19. OLAF: The anti-corruption policy within the European Union

Patrycja Szarek-Mason

1. INTRODUCTION TO THE EU'S POLICY AGAINST CORRUPTION

In the midst of the financial crisis, the European Union (EU) is coming under ever closer public scrutiny, and this will inevitably cast a harsher light on whether EU funds are distributed and managed in a fair and transparent manner. In particular, corruption and related activity not only compromise the EU's finances but also corrode trust in the EU's integration project. It is the approach towards corruption within EU institutions that matters most to the perception of the EU as a democratic and legitimate project that can win popular support among its citizens. Moreover, EU citizens have a legal right to a corruption-free administration enshrined in the Charter of Fundamental Rights.[1] Article 41 of the Charter sets out the right to good administration, which means that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the EU.'

The appearance of favouritism or protection of special interest can undermine the trust of citizens and damage the EU's reputation. The evidence suggests that much needs to be done to win this trust. According to the 2012 Eurobarometer survey,[2] an overwhelming majority of respondents (73 per cent) agreed that there is corruption within EU institutions. This perception among EU citizens has been consistently strong over the years: 71 per cent of respondents agreed in 2005[3] and 76

[1] Official Journal C364/1, 18.12.2000.

[2] Eurobarometer 374, (2012), at 26–28, http://ec.europa.eu/public_opinion/archives/ebs/ebs_374_en.pdf.

[3] Eurobarometer 245, (2006), at 14, http://ec.europa.eu/public_opinion/archives/ebs/ebs_245_en.pdf.

per cent in 2009.[4] These results demonstrate that greater efforts to tackle corruption are needed.

Since the first policy document calling for an anti-corruption policy at EU level in 1997,[5] the EU has put in place a comprehensive policy to fight against all acts of corruption within EU institutions, committed by EU officials or adversely affecting EU funds. The Commission claims that the EU now has a 'zero tolerance' policy in regard to misconduct inside EU institutions.[6] In addition to the criminal law framework penalising the bribery of EU officials, the EU has developed a policy to prevent corruption in relation to its finances. In this context, provisions in the area of public procurement and accounting and auditing standards are especially important.

There is also an increasing recognition at EU level that conflicts between private interests and public duties of officials, if inadequately managed, can result in corruption. Corruption appears where a prior private interest improperly influenced the performance of the public official's duties. The conflict of interest policies are, therefore, an indispensable part of a broader policy to prevent and combat corruption. There are now regulations put in place to prevent conflict of interests among EU officials. These matters are primarily regulated by Staff Regulations, codes of conduct and rules on declaration of financial interests that govern the ethics and set professional standards within EU institutions. All these rules were adopted to guarantee the impartiality and integrity of all those who work for these bodies. Breaches of these rules can be sanctioned by the institutions in disciplinary proceedings or, in case of a criminal offence, by national enforcement authorities.

The European Anti-Fraud Office (OLAF) plays a vital role in ensuring that all possible cases of corruption and conflict of interests are investigated and brought to justice. It is the main EU body responsible for the protection of the EU's financial interests. The successes of OLAF's investigations also send a message to the citizens that the EU institutions are under constant scrutiny as to their impartiality and ethical governance.

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[4] Eurobarometer 325, (2009), at 18, http://ec.europa.eu/public_opinion/archives/ebs/ebs_325_en.pdf.

[5] European Commission, 'Communication from the Commission to the Council and the European Parliament on a Union Policy against Corruption', COM(97) 192, 21.05.1997.

[6] European Commission, 'Report of the European Anti-Fraud Office' (2004), at 5. http://ec.europa.eu/anti_fraud/documents/reports-olaf/rep_olaf_2004_en.pdf.

This chapter focuses on the practical aspects of OLAF's administrative investigations into the possible cases of corruption and conflicts of interest that occur within EU institutions and in the administration of EU finances. To that end, the chapter starts with an overview of the main types of OLAF's investigations. Next, it explains what is understood by 'corruption' and 'conflict of interests' for the purposes of OLAF's work, and it discusses the practical difficulties resulting from the lack of uniform definitions across the EU. Furthermore, there are examples of OLAF's anti-corruption investigations and an examination of OLAF's investigative powers within EU institutions and Member States. The chapter also elaborates on the effectiveness of OLAF's work by analysing Member States' responses to OLAF's findings. It presents some survey evidence on the recognition of OLAF among EU citizens and discusses the prospects for an evaluation of OLAF by international bodies. Finally, the chapter concludes with an evaluation of the main shortcomings of OLAF's operations.

2. THE ROLE OF OLAF IN COMBATING CORRUPTION AND CONFLICTS OF INTEREST

OLAF was created in 1999[7] after a series of corruption scandals and cases of misconduct within the European Commission. Although set within the organisational structures of the European Commission, OLAF is given full investigative autonomy.[8] It is a central body that investigates cases of fraud, corruption and other irregularities which are detrimental to EU finances.[9]

OLAF is an administrative investigative service, but its work extends into a sensitive area of criminal justice. The subjects of OLAF's investigations include crimes, such as the bribery of EU officials. OLAF performs work which national authorities could undertake themselves, but due to the complexity of fraud cases and the cross-border nature of cases, OLAF appears better placed to deal with investigations at EU

[7] Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (1999/352/EC, Official Journal L 136/20, 31.5.1999 ('OLAF Decision').

[8] Article 3 OLAF Decision.

[9] Article 2(1)(a) OLAF Decision.

level. OLAF was established because the existing mechanisms within Member States did not adequately deal with the threats to EU financial interests.[10]

One of OLAF's main tasks is to ensure that EU funds are distributed and managed in a fair and non-corrupt manner. To this end, OLAF conducts administrative investigations within EU institutions (internal investigations), the Member States and even non-EU countries, wherever the EU budget is at stake (external investigations).[11] In addition, OLAF contributes to investigations carried out by Member States or other competent EU bodies by gathering and exchanging information. Member States or third countries may also ask OLAF for assistance in carrying out criminal investigations in matters that fall into the realm of OLAF's competences.

As far as the administrative investigations inside EU institutions are concerned, OLAF not only investigates the proper use of EU funds, but it also scrutinises the ethics of EU officials. Here, OLAF's responsibility extends beyond the protection of financial interests to include all activities related to the safeguarding of EU interests against irregular conduct liable to result in disciplinary or criminal proceedings.[12] In other words, it is OLAF's task to detect and investigate serious professional misconduct by EU officials even if there is no fraud or corruption affecting EU financial interests.

2.1 Definitions

OLAF's investigations cover fraud, corruption, embezzlement and any other irregularity, including alleged conflicts of interest.[13] However, there are no uniform and fully recognised definitions of 'corruption' or 'conflict of interests' across the EU legal area. The term 'corruption' is used to cover many types of conduct, including bribery, nepotism, patronage or illegal party financing. The understanding and regulation of

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[10] Wade, M., 'OLAF and the Push and Pull Factors of a European Criminal Justice System', EUCRIM The European Criminal Law Associations' Forum, Issue 3–4 (2008), at 129.

[11] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), Official Journal L 136/1, 31.5.1999 ('Regulation 1073/1999').

[12] Article 2(1)(b) OLAF Decision.

[13] European Commission, 'Report of the European Anti-Fraud Office' (2003), at 6. http://ec.europa.eu/anti_fraud/documents/reports-olaf/rep_olaf_2002_2003_en.pdf.

these different types of conduct varies from Member State to Member State. There are still wide differences across the EU in definitions of relevant criminal offences, such as 'embezzlement' or 'abuse of power', in the sanctions which those offences attract, and in time limitations for criminal offences.[14] Moreover, the concept of 'public official' in relation to anti-corruption rules is not the same, which leads to cases of impunity in some Member States, whereas in others conviction of an individual for the same behaviour would result in a penal sanction and removal from public office.[15] This contributes to uncertainty as regards the legal outcomes of OLAF's investigations.

Nevertheless, since 1996 Member States have agreed on a uniform criminal law definition of bribery. 'Corruption of EU officials' is defined in the Convention on the fight against corruption involving EU officials or officials of Member States,[16] together with the Protocol to the Convention on the protection of the European Communities' financial interests.[17] Both instruments contain the same definitions of active and passive corruption with the exception that the First Protocol is limited to corruption harmful to EU financial interests. On the basis of these instruments, Member States are obliged to make bribery of national and EU officials an offence punishable by effective, proportionate and dissuasive penalties.

OLAF is pursuing cases of possible conflict of interests among EU officials on the basis of a definition contained in the Staff Regulations.[18] Article 11a of the Staff Regulations provides that 'an official shall not, in the performance of his duties, deal with a matter in which, directly or

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[14] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers' money', COM(2011) 293 final, 26.5.2011, at 7.

[15] Ibid.

[16] Convention drawn up on the basis of Article K.3 (2) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, Official Journal C 195, 25.06.1997.

[17] Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, Official Journal C 313/10, 23.10.1996.

[18] 'Staff Regulations' (2004), http://ec.europa.eu/civil_service/docs/toc100_en.pdf.

indirectly, he has any personal interest such as to impair his independence, and in particular, family and financial interests'. Moreover, 'an official may neither keep nor acquire, directly or indirectly, in undertakings which are subject to the authority of the institution to which he belongs or which have dealings with that institution, any interest of such kind or magnitude as might impair his independence in the performance of his duties.'

As far as investigations within Member States are concerned, OLAF is confronted with a recurrent problem as regards the definition of conflict of interests. For example, OLAF's investigations show that in some Member States the beneficiary of a public procurement can participate in the design of a public tender without committing a criminal offence.[19] Other Member States choose to ban such conduct, as although a conflict of interest does not necessarily lead to corrupt conduct, it can improperly influence public procurement decisions with the effect of distorting competition and equal treatment of tenderers.

To remedy this situation, in 2011 the EU decided to amend its public procurement rules to include provisions pertaining to conflicts of interest. The opponents of adopting a common definition argued that 'this issue should rather be addressed through national legislation, for subsidiarity reasons and in order to take account of the very different administrative and business cultures in the Member States.'[20] Nevertheless, the proposed Directive[21] in this area requires Member States to put in place effective, proportionate and rapid mechanisms to prevent, identify and immediately remedy conflicts of interest arising in the conduct of public procurement. They also define the 'conflict of interest' as, at least, covering any situation where persons involved in the conduct of procurement procedure have, directly or indirectly, a private interest in the outcome of the procurement procedure, which may be perceived as impairing the impartial and objective performance of their duties.[22] 'Private interest' means

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[19] See: n. 14.

[20] European Commission, 'Green Paper on the modernisation of EU public procurement policy – towards a more efficient European Procurement Market', at 17. http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf.

[21] European Commission, 'Proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors' COM(2011) 895 final.

[22] Ibid. Article 36.

any family, emotional life, economic, political or other shared interests with the candidates or the tenderers, including conflicting professional interests.[23]

2.2 Case Studies

As noted earlier in the chapter, the Eurobarometer opinion polls show that EU citizens widely perceive corruption to be a serious problem within EU institutions. However, this does not find confirmation in OLAF's statistics. According to OLAF's Director General, corruption cases are a relatively small but important part of OLAF's investigative mandate.[24] The annual OLAF activity reports do not regularly specify the number of corruption cases that were the subject of OLAF investigations. The report for 2003–2004 presents the most comprehensive statistics on the scale of OLAF's anti-corruption activity. It mentions the financial impact of anti-corruption cases as a very small fraction of a total number of cases investigated by OLAF at that time.[25]

As far as the number of reports of alleged corruption is concerned, they constituted 17 per cent in the 2004 reporting period of the overall number of new reports communicated to OLAF.[26] This number was substantially smaller according to the 2008 report,[27] when there were only seven cases of corruption out of a total of 411 cases of irregularities communicated to OLAF in 2007. However, when one looks at OLAF's internal investigations, the number of anti-corruption allegations reported to OLAF is quite substantial. Here, in 2003–2004 the most prevalent allegation giving rise to internal investigations is corruption, which accounts for 31 (65 per cent) of 48 cases.[28] Not surprisingly, the large majority of anti-corruption investigations are conducted within the Commission.[29] This is due to the fact that the Commission is by far the biggest institution and carries out the vast majority of financial transactions within the EU institutions. Clearly, while anti-corruption cases

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[23] Ibid.

[24] Press Release, OLAF/12/3, 28.6.2012.

[25] European Commission, 'Report of the European Anti-Fraud Office' (2003–2004), at 22. http://ec.europa.eu/anti_fraud/documents/reports-olaf/rep_olaf_2003_2004_en.pdf.

[26] See: n. 6, at 13.

[27] European Commission, 'Annex to the 2007 Report from the Commission on the protection of the European Communities' financial interests and the fight against fraud', SEC(2008)2300, 22.7.2008, at 113.

[28] See: n. 25, at 32.

[29] See: n. 6, at 15.

constitute a major part of ongoing internal investigations, they are only a fraction of the overall number of cases reported to OLAF.

One practical example of a successful investigation is the case where an EU official employed as a project manager in a European Commission delegation in Ukraine was accepting bribes from bidders submitting offers in several tender procedures.[30] In one of these tenders, concerning the implementation of aid under the Technical Assistance to the Commonwealth of Independent States (TACIS) programme, he requested a 4 per cent commission. However, the tender was subsequently stopped before the contract was awarded, and there was no direct impact on the EU budget. OLAF received the information from a company that had rejected the defendant's request for a bribe. After allegations were confirmed in OLAF's investigation, the case was referred to the Belgian courts. As a result, the EU official's immunity was lifted, he was dismissed by the European Commission and arrested in Belgium.

There are other examples of successful investigations. For instance, there was a criminal law prosecution of an EU official who was sentenced by a criminal court in Brussels to 40 months' imprisonment and €50 000 in fines for leaking confidential information to private companies in exchange for payments. The successful prosecution in this case was the result of investigations carried out by both OLAF and judicial authorities in Belgium.[31] Another example shows that it is possible for OLAF to detect the instances in which national officials are found to be in situations of conflict of interests, especially in the context of public procurement procedures. OLAF's investigators managed to uncover conflicts of interests among Italian officials who were awarding contracts to companies they also worked for.[32]

Cases involving corruption or conflicts of interest among national officials as illustrated above are, however, matters of national law primarily and should be addressed by the competent national authorities in the first instance. In accordance with Article 325 of the Treaty on the Functioning of the European Union (TFEU),[33] combating fraud and other illegal activities affecting EU financial interests is the shared responsibility of the EU and Member States. In fact, national authorities are in charge of the daily management and control of approximately 80 per cent

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[30] European Commission, 'OLAF Success stories' http://ec.europa.eu/anti_fraud/investigations/success-stories/index_en.htm.

[31] See: n. 24.

[32] EUObserver, 'Massive fraud of EU funds rarely reported by Member States', 03.07.2012.

[33] Official Journal C115/47, 9.5.2008 (TFEU).

of the annual EU budget. However, if national authorities do not take the required action, OLAF conducts investigations in defence of the EU budget.

2.3 OLAF's Investigative Powers

OLAF can open an investigation either on its own initiative or following a request from the EU institution within which the investigation is to be conducted or from a Member State concerned.[34] Statistics show that a large number of investigations are indeed initiated by OLAF, which strongly supports the idea that OLAF as an independent investigator is sorely needed. Since 2004, the number of OLAF's own investigations has progressively caught up with and overtaken the number of cases in which OLAF assists national authorities, to the point where 'own investigations' account for about 75 per cent of cases opened.[35]

The purpose of investigations is to collect the evidence needed to identify the facts, and to verify whether an irregularity, fraud, corruption, or serious misconduct has occurred. In order to do so, OLAF has gained a number of investigative powers which differ depending on the type of investigation. In relation to internal investigations, OLAF's powers are much more extensive. In accordance with Regulation 1073/1999, OLAF has 'the right of immediate and unannounced access to any information held by the institutions, bodies, offices and agencies, and to their premises' and 'may request oral information.'[36] EU institutions, bodies, offices and agencies also have a duty to inform OLAF without delay about any information relating to possible cases of fraud or corruption or any other illegal activity.[37] These provisions allow OLAF to act swiftly and independently, which increases the effectiveness of the investigations.

OLAF's investigative powers within Member States are more restrained. On the basis of Regulation 2185/96,[38] OLAF can carry out on-the-spot checks and inspections within Member States; however, these

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[34] Article 5 Regulation 1073/1999.

[35] European Commission, 'Annual Report 2009' (2009), at 27, http://ec.europa.eu/anti_fraud/documents/reports-olaf/rep_olaf_2008_en.pdf.

[36] Article 4 Regulation 1073/1999.

[37] Article 7 Regulation 1073/1999.

[38] Regulation (EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, Official Journal L 292, 15.11.1996 ('Regulation 2185/96').

inspections must be prepared and conducted in close cooperation with the relevant national authorities. Member States also should be notified in good time of the object, purpose and legal basis of these checks and inspections. OLAF's inspectors have access to all the information and documentation required for the proper conduct of the inspections under the same conditions as national administrative inspectors and in compliance with national legislation.[39] These rules ensure that OLAF fully respects the jurisdiction of national authorities, but often leaves OLAF dependent on the readiness of Member States to cooperate.

2.4 The Results of OLAF's Investigations

OLAF does not impose sanctions, but its investigations may end with a recommendation for judicial, disciplinary, financial or administrative action to be taken by EU institutions or the Member States concerned. The willingness of national authorities to cooperate with OLAF is crucial for an effective investigation and prosecution of corruption and related activities. Such cooperation is required at all levels of OLAF's work, from receiving information, to the collection of evidence, and through the follow-up of OLAF's final report with judicial proceedings.

Regrettably, however, Member States do not pass information to OLAF willingly. For example, in 2011 only 54 out of a total of 1046 reported allegations to OLAF came from national authorities.[40] As OLAF's Director-General admitted, 'public sources are becoming more reluctant to denounce fraud because of an inherit fear of being labelled corrupt.'[41] It is worth noting that in 2011 the greatest amount of information was received from individuals and private sector sources, which can be largely explained by the introduction of the Fraud Notification System (FNS)[42] that accounted for nearly 20 per cent of all incoming information.[43] FNS is an Internet-based system that allows every citizen to report suspected corruption or other serious misconduct by EU staff anonymously.

Once a case has been transmitted to the national judicial authorities in a Member State, they act independently to determine what further action should be taken in light of the national legal framework. This means that

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[39] Article 7 Regulation 2185/96.

[40] European Commission, 'OLAF Report 2011' (2012), at 16, http://ec.europa.eu/anti_fraud/documents/reports-olaf/2011/olaf_report_2011.pdf.

[41] See: n. 32.

[42] https://fns.olaf.europa.eu/.

[43] See: n. 40.

the commencement of judicial proceedings, even in cases concerning EU officials, depends on the goodwill of national enforcement authorities in Member States with the appropriate jurisdiction. National judicial authorities do not open criminal investigations systematically upon OLAF recommendations, which leads to a lack of equivalence of criminal law protection throughout the EU.[44] One explanation for this might be the fact that the Member States, when allocating criminal justice system resources, often have to choose which interest to protect, and the cases of corruption detrimental to the EU budget do not represent the highest priority for them.

The Director of OLAF forwards directly to the judicial authorities of the Member State information acquired in the course of investigations concerning situations likely to result in criminal proceedings.[45] OLAF's final report has a status of admissible evidence in administrative and judicial proceedings in the Member State concerned.[46] Sometimes the use of such evidence is not considered sufficient to open criminal investigations. Experience shows that the results of OLAF's investigations frequently remain unused by national criminal courts because of restrictive procedural rules which include limits on the use of evidence collected in a foreign jurisdiction.[47] OLAF's final report is analysed by a variety of legal and judicial systems across Member States, which leads to different legal outcomes in similar cases.

The main goal of the ongoing reform process is to strengthen the efficiency of OLAF's investigations and their legal outcomes. In particular, the creation of a European judicial authority competent to deal with OLAF cases and to control OLAF's investigative work has been proposed. The Treaty on the Functioning of the European Union (TFEU) provides for the possibility of establishing the European Public Prosecutor's Office[48] (EPPO), which would perform a criminal prosecution function to supplement an administrative investigation. It would integrate the investigation and prosecution roles at EU level and exercise the functions of prosecutor in the competent courts of EU countries in relation to offences that are subject to OLAF's investigations. This would help to overcome the fragmentation of the EU's criminal law-enforcement area, as the EPPO would be responsible for investigating,

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44 See: n. 14, at 5–6.
45 Article 10 Regulation 1073/1999.
46 Article 9 Regulation 1073/1999.
47 See: n. 14, at 8.
48 Article 86 TFEU.

prosecuting and bringing to judgment the perpetrators and accomplices in offences against EU financial interests.

To allow OLAF to focus on serious cases of misconduct by EU officials, less significant matters related to those officials' performance of professional duties are referred to the European Commission's Investigation and Disciplinary Office (IDOC), which was set up to perform administrative investigations into breaches of Staff Regulations rules. IDOC deals with all matters falling outside the remit of, or not already being investigated by, OLAF, and its investigations may lead to the opening of disciplinary proceedings.

2.5 OLAF's Recognition

OLAF is very much at the forefront of defending the reputation of EU institutions. By ensuring that all acts of fraudulent conduct and misuse of EU funds are met with a decisive response, OLAF can contribute to enhancing public trust in the EU project. To achieve this goal, OLAF's action must be clear and known to EU citizens. The problem is, however, that the awareness and recognition of OLAF among those citizens is very low. For example, according to the 2008 Eurobarometer survey,[49] a staggering 86 per cent of EU citizens had not heard of OLAF, and only 37 per cent of those who had heard of OLAF said that they trusted it completely.

Even more worryingly, the awareness of OLAF's functions is not complete even within EU institutions. According to a 2011 study,[50] some EU staff remain unaware of OLAF activities and the FNS, which permits allegations to be reported directly to OLAF. This not only questions the anti-corruption information strategy within EU institutions, but might also lead to dangerous situations in practice, especially from the point of view of those who decide to report an alleged case of corrupt conduct. The management, having received information about possible fraudulent activity or misconduct, is left free to investigate by itself in the first instance, thereby potentially contaminating and damaging evidence before OLAF becomes involved.[51]

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[49] Eurobarometer 236 (2008), http://ec.europa.eu/public_opinion/flash/fl_236_en.pdf.

[50] European Parliament, 'Corruption and conflict of interest in the European Institutions: the effectiveness of whistleblowers', PE 453.222, 30.11.2011, at 26.

[51] Ibid.

3. INTERNATIONAL SCRUTINY?

In addition to its own endeavours to establish anti-corruption and ethics standards for its administration, the EU is also actively involved in international initiatives against corruption. As a result, the EU has taken on an international obligation to develop a comprehensive policy against corruption within its institutions. Two initiatives need to be mentioned in this context: the Council of Europe's Group of States against Corruption (GRECO) and the United Nations Convention against Corruption[52] (UNCAC), both of which provide for international scrutiny over the anti-corruption bodies of their members.

The EU's membership in GRECO, which is the most comprehensive anti-corruption monitoring system in Europe, is currently under discussion. The exact modalities of the EU accession are yet to be determined,[53] but membership in GRECO requires that EU institutions undergo an unprecedented degree of scrutiny of their anti-corruption standards. The evaluation of EU institutions would concern mainly the Twenty Guiding Principles for the Fight against Corruption,[54] which includes the evaluation of their independence and of OLAF's activities. According to the Commission, 'evaluation of EU institutions by GRECO is an endeavour that needs to be assessed in more depth in terms of requisites, feasibility and potential impact.'[55]

The idea that the anti-corruption policies within the EU institutions and functioning of OLAF could be reviewed by other international organisations is not new. The EU is already a full member of UNCAC, which was officially approved in 2008.[56] UNCAC is the most recent international agreement on anti-corruption standards. It requires from its signatories that they establish independent preventive anti-corruption bodies and provide the means for the public to inform such bodies of

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[52] http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (UNCAC).

[53] European Commission, 'Report from the Commission to the Council on the modalities of European Union participation in the Council of Europe Group of States against Corruption (GRECO)', COM(2011) 307 final, 6.6.2011.

[54] http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution(97)24_EN.pdf.

[55] See: n. 53, at 7.

[56] Decision 2008/201/EC of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption, Official Journal L 287, 29.10.2008.

incidents which may constitute corruption.[57] The implementation of UNCAC is monitored by mutual peer review, and the EU as a full member should undergo the same scrutiny as any other State Party. Unfortunately, the EU has thus far delayed in formally signing up to the review process.

4. CONCLUSION

OLAF is in a unique position to provide incentives for, and guide the fight against, corruption not only within EU institutions, but also across Member States. Although the remit of its powers is narrow and focuses on the protection of EU financial interests, in the course of its external investigations OLAF at times detects cases of corrupt practices or conflicts of interest among national officials. In this way, OLAF is able not only to assist national authorities in their efforts to uncover these illegal activities, but its investigations may also highlight weaknesses in national systems and, hopefully, stimulate a more robust response to these problems from national governments.

The main shortcomings of the current mechanism lie within the transmission of OLAF's investigative reports to national prosecuting authorities. In its efforts to eliminate corrupt practices within EU institutions and in relation to EU funds, OLAF's action is reliant on the goodwill of Member States to cooperate in a swift and efficient manner. Although OLAF has proved to be efficient in uncovering and investigating offences against EU financial interests, its investigations often lack proper follow-up.

As a result of not having any prosecuting power, OLAF must refer the cases it has investigated to national prosecuting authorities, and it is entirely up to national authorities to decide whether or not to prosecute a case referred by OLAF. At this point, many cases are simply dropped or not thoroughly prosecuted. Even when OLAF's investigations are followed up by prosecution, the different criminal procedure laws and practices in Member States result in uneven responses across the EU. This creates a danger that perpetrators of crimes will choose to commit their illegal activities in a Member State which is less likely to prosecute or has a legal system that is viewed by the perpetrators as more advantageous due to, for example, less severe penalties than in other jurisdictions.

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[57] Article 6 UNCAC.

The most appropriate solution to these problems is to ensure consistently high anti-corruption systems in all Member States. It should be a priority for the EU to devise a framework that would allow for appropriate monitoring of ethics and anti-corruption standards across national administrations. Moreover, the EU must continually stress the need for improvements to the quality of national mechanisms and resources responsible for investigating and prosecuting non-compliance with these standards.

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