

Introduction

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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, Çağla 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

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.'

