Persecution of the public interest in a scenario of multiple interests: the OECD's recommendations and the conflicts regulated by Law 12.813/2013*

Persecução do interesse public em um cenário de múltiplos interesses: recomendações da OCDE e os conflitos regulados pela Lei nº 12.813/2013

*Fabrício Motta***
*Bruno Belém****

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** Universidade Federal de Goiás, Goiânia, GO, Brazil. E-mail: fabricio.motta@uol.com.br.
Deputy coordinator of the Graduate Degree Program in Law and Public Policy at the Law School of the Universidade Federal de Goiás (Brazil). President of Instituto Brasileiro de Direito Administrativo (IBDA). Doctor of State Law (USP) and master of Administrative Law (UFMG). Prosecutor for the Accounts Prosecutor's Office (MPC TCM/GO).

*** Instituto de Direito Admnistrativo de Goiás (Idag), Goiânia, Goiás, Brazil. E-mail: brunomfmb@hotmail.com.
Master of Legal-Political Sciences (Universidade Clássica de Lisboa/USP). Director of Instituto de Direito Administrativo de Goiás (Idag). Goiás State lawyer and prosecutor.

ABSTRACT

The article analyzes the composure of conflicts of public and private interests, having as central focus the exercise of competences by public agents. Based on the studies carried out by international organizations, the elements that are part of the public policies of the management of conflicts of interest and their organization are identified, with a focus on preserving the integrity of public decisions and preventing corruption.

KEYWORDS

Public interest — conflicts of interest — corruption

RESUMO

O artigo analisa a estrutura dos conflitos de interesses públicos e privados, tendo como foco central o exercício de competências por parte de agentes públicos. Com fundamento nos estudos realizados por organismos internacionais, especialmente pela OCDE, são identificados os elementos integrantes das políticas públicas da gestão de conflitos de interesses e sua organização, com o foco voltado para a preservação da integridade das decisões públicas e prevenção à corrupção, analisando-se a normatização e o conteúdo da lei brasileira que disciplina o conflito de interesses no âmbito da administração pública federal.

PALAVRAS-CHAVE

Interesse público — conflitos de interesse — corrupção

Introduction

The international anti-corruption effort undertaken by bodies such as the United Nations Organization (UNO), the Organization for Economic Cooperation and Development (OECD) and Transparency International (TI), among others, has shown that this phenomenon is no respecter of borders and that it is the object of general concern because of its harmful effect.[1]

[1] "The cost of corruption is enormous. According to the OECD (Organization for Economic Cooperation and Development), corruption represents 5% of world GDP, and it is estimated

It is no exaggeration to say that corruption flourishes more vigorously in propitious climates formed by a combination of social, cultural, political, economic and also legal factors. Meanwhile, this initial reference to the legal aspect indicates the methodological thrust of this article, which does not ignore the complexity of corruption as a phenomenon, but opts for a strictly legal and normative approach, taking account of the judicial dogma currently in force in Brazil.

The complexity of the phenomenon of corruption creates conceptual difficulties, and one can admit the existence of a number of types of corruption of wider or narrower application. However, irrespective of any conceptual approximation, corruption has at its root the abuse of a position, of various types, in order to obtain personal advantages.

Thus the existence of different, opposing interests among those involved is inherent to corruption, whether in the public sphere, which is the subject matter of this paper, or in the private sphere. A conflict of interest involves, for this purpose, an opposition between public and private interests, with potential for damage to the former, arising because of a legal relationship involving the State and a public agent.

It is essential to understand that there is a multiplicity of interests permeating the actions of public agents. However, the maxim "administration is serving the public interest, not serving oneself" fails to reflect the complexity residing in the identification of a myriad of interests, protected or not by legal ordinance, with various sources of legitimacy, which coexist with a latent potential for conflict in the administrative sphere.

In Brazil, recent laws relating to the issue are the result of international commitments assumed. In this respect, under the Inter-American Convention

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that more than one trillion dollars are paid every year, adding a cost of twenty five percent (25%) to public contracts in developing countries, affecting their economies and citizens' rights. The OECD calls attention to the link between child mortality and corruption. Not just the lack of funds for healthcare can increase deaths (in children and in adults), but collusion between public agents and contractors when the purpose of a contract is being defined, or during execution, can lead to the use of inadequate or poorly made drugs. And one must bear in mind that countries where a corruption cost exists tend to receive lower amounts of investment, which exacerbates the social problem. According to Transparency International, there are other negative effects arising from corrupt practices: 1) technical innovation is jeopardized because corrupt companies have no interest in it (no reason for it), or do not need it to continue in business, while others are discouraged from allocating funds for this purpose; 2) jobs are destroyed because competition is affected and honest companies cease to exist" (FORTINI, Cristiana; MOTTA, Fabrício. Corrupção nas licitações e contratações públicas: sinais de alerta segundo a Transparência Internacional. *A&C* — Revista de Direito Administrativo & Constitucional, yr. 16, n. 64, pg. 93-113).

Against Corruption, approved by the Organization of American States (OAS) on March 29, 1962,[2] the member countries undertook to introduce measures to create, maintain and reinforce standards of conduct for the correct, honorable and appropriate performance of public functions, and with the additional aim of preventing conflicts of interest. The UN Convention against Corruption, in turn, signed on December 9, 2003,[3] brought the member countries new obligations in terms of promoting and reinforcing measures to prevent corruption more effectively and efficiently, requiring legislative changes and action concomitant with the application of the convention in each country.

Brazilian Law No. 12.813/2013 was enacted with a view to complying with these international commitments, defining situations representing conflicts of interest in the country's Executive Branch. Although most of its provisions apply only to the federal public administration, the law has inspired the enactment of similar regulations in the states and municipalities of Brazil.

The key purpose of this article is to analyze the makeup of public and private conflicts of interest, focusing particularly on the exercise of their competencies by public agents. In the face of a frequent difficulty in identifying multiple interests, public policies for managing conflicts of interest must necessarily focus on transparency, information and prevention. This essay is intended to undertake a non-exhaustive approach to the OECD's recommendations for an effective public policy on conflicts of interest, and also to touch on some of the provisions of Law No. 12.813/2013. In relation to national standards, the purpose is to analyze important practical aspects relating to their application, principally because this set of regulations, as I have said, has inspired a number of countries to introduce similar rules.

1. Public interest and private interests

Public interest is like love, in the words of Guillermo Andrés Muñoz: many people may experience it, and say that it has made their hearts beat faster; but when it comes to defining it, it is as if it starts to blur, to disappear, to

[2] The Convention was approved by Legislative Decree No. 152, of June 25, 2002 (promulgated by Presidential Decree No. 4.410, of October 7, 2002).

[3] The Convention was approved by the National Congress under Legislative Decree No. 348, of May 18, 2005 (promulgated by Presidential Decree No. 5.687, of January 31, 2006).

lose its meaning — so best not try to define it[4]. This inspired metaphor shows how difficult it is to define an expression that by nature is fluid, imprecise, used with different meanings and functions. In fact the ideological use of the expression "public interest" has awakened intense academic arguments, in Brazil[5] and elsewhere.

In spite of the lack of definition, public interest as a legal category is fully operative within the law, one reason being that it is present in fundamental statutes of certain ordinances such as the Constitutions of Brazil and Portugal.[6] In public administrations where dialogue exists,[7] where human dignity is the main aim and legal order the compass, public interest is a central category.

Without any pretension to conceive of or even to specify the different meanings that the expression can have, it is important to identify, as a subject,

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4 MUÑOZ, Guillermo Andrés. El interés público es como el amor. In BACELAR FILHO, Romeu Felipe; HACHEM, Daniel Wunder. *Direito administrativo e interesse público*: estudos em homenagem ao professor Celso Antônio Bandeira de Mello. Belo Horizonte: Fórum, 2010. pg. 23-30.

5 In this respect, see SARMENTO, Daniel (Org.). *Interesses públicos versus interesses privados*: desconstruindo o princípio da supremacia do interesse público. Rio de Janeiro: Lumen Juris, 2010 and HACHEM, Daniel Wunder. *Princípio constitucional da supremacia do interesse público*. Belo Horizonte: Fórum, 2011.

6 In addition to the references to the various categories that can be considered to be of public interest in the broad sense, such as general interest and collective interest, the Constitution of the Federative Republic of Brazil uses the expression "public interest" in articles 19, I; 37, IX; 57, para. 6, II, 66, para. 1; 93, VIII and IX; 95, II, 114, para. 3; 127, para. 5, I, "b", and 231, para. 6. In the Constitution of the Portuguese Republic, it is sufficient to refer to article 266, according to which "1. The purpose of the Public Administration is to fulfill the public interest, in respecting the legally protected rights and interests of the citizens" and to article 269. Public function regime: "1. In exercising their functions, employees of the Public Administration and other agents of the State and other public entities are exclusively at the service of the public interest, as it is defined, pursuant to the law, by the competent bodies of the Administration".

7 The transformations and challenges of the public administration and of administrative law are well summarized by Carla Amado Gomes: "Since the end of the last century, Administrative Law has faced a number of severe, and possible terminal, challenges. One could say that the trigger for the changes was the transition from an aggressive Administration to an (also) provider Administration, welcoming cooperation from the private sector in carrying out numerous new tasks under contract; with the new awareness of the need for planned management in the economic, social, urban and environmental areas through regulation; with the perception that achieving real democracy requires a change in the physical reality and not just legal injunctions, by means of material operations. In parallel with these new ways of behaving, which have called into question the monopoly of administrative action, we now have an unholy mix of public law and private law in the heart of the Administration, and the privatization of subjects in the administrative body, in the name of efficiency; openness to the adversary system, through methods of creating accords preliminary to a decision; consensualization, by means of contracts substituting for administrative acts; massification, through informatization; commercialization, with the attribution of effects of securities to licenses for CO2 emissions; informality in dealings — to name but a few" (GOMES, Carla Amado. O dom da ubiquidade administrativa: reflexões sobre a atividade administrativa informal. *Textos dispersos de direito administrativo*. Lisbon: AAFDL, 2013. pg. 371- 422).

the elements that make up the concept of public interest, which is the stage preceding the delimitation of conflicts of interest:

a) public interest depends on recognition by the legal framework, and it cannot be sought or realized beyond the limits of lawfulness. So what we have is a legal-positive concept, i.e. one whose elements depend on the laws existing in a specific legal framework. Celso Antônio Bandeira de Mello, Brazil's leading authority on public interest, argues that the legal content of the principle of public interest can only be found in the substantive law itself;[8]

b) public interest has a material substrate, lying in the pursuit of the common good and respect for human dignity, and it is the fundament, criterion and limiter of every action of the public administration,[9] according to the guidelines of each legal framework;

c) the defense of public interest is not an exclusive responsibility of the State, but it is shared with society; and public interest it not the same as state interest. The concept of public interest is not constructed out of the State, but from society;

d) the multiplicity of equally public interests does not detract from the importance of the category, because it can be credited to changes in society and to the increasing complexity of identifying the demands attributed to the State. In specific situations, the State acts as mediator, regulator and/or assessor: "concrete public interest is the result of a procedure involving public authorities and citizens, in a multipolar context, each of them expressing a vision of the common good which is decisive in configuring and resolving the underlying situation".[10]

For these reasons, the fluidity and uncertainty of the concept make it workable, rather than watering it down or making it useless;[11]

e) in a social and democratic state under the rule of law, the participative administrative procedure, with the full, true involvement of the citizen, is the lodestone that assures that the administration can legitimately and effectively identify and defend the public interest;[12] and

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8 BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo.* 27th ed. São Paulo: Saraiva, 2010. pg. 68.

9 OTERO, Paulo. *Direito do procedimento administrativo*. L Coimbra: Almedina, 2016.

10 Ibid.

11 "Lack of determination is not a defect in the concept, but an attribute intended to permit a more efficient application in each case. Lack of determination of the limits of the concept permits the approximation of the normative system to the richness of the real world" (JUSTEN FILHO, Marçal. Conceito de interesse público e a personalização do Direito Administrativo. *Revista Trimestral de Direito Público*, n. 26, pg. 116, 1999).

12 BITENCOURT NETO, Eurico. *Concertação administrativa interorgânica*. Direito administrativo e

f) public interest is not independent of the interests of individuals because it is considered to be their public dimension, in other words, it represents the interests of an individual taken as a member of society, in the classical view of Celso Antônio Bandeira de Mello.[13] So public interest is not necessarily antagonistic to the interests of individuals because it is one of their dimensions. One of the most respected essayists on the subject in Brazil, Daniel Wunder Hachem, takes the distinction further by proposing two meanings for public interest:

> (a) public interest in the broad sense: this is public interest taken generically, covering all legally protected interests, from the group interest as such (general interest) to individual and collective interests (specific interests), when protected by substantive law. [...] (b) public interest in the strict sense: concern for the group interest as such (general interest), to be identified in actual cases by the Public Administration, using a competency granted to it expressly or implicitly by law. It can manifest itself in the form of a legal concept or a discretionary duty. It requires a positive presumption of the validity of administrative action, and the legal framework will only authorize the action when this public interest is present in the strict sense, and in these circumstances it will be empowered to prevail over individual and collective interests (specific interests) which are also protected by the legal system.[14]

Without going further into the complex relationships between public interests and private interests, it should be remembered that rights and interests are not the same thing — in the classical formulation of Rudolf Von Ihering, rights are interests that are protected by law.[15] So a private interest that is protected by law is public interest in the broad sense; interests that should always yield to the public interest are those that are "exclusively private, selfish interests of the individual as such, without the protection of the law. They consist of the

organização no século XXI. São Paulo: Almedina, 2017.

13 Celso Antônio Bandeira de Mello, Curso de direito administrativo, op. cit., pg. 60-62.

14 HACHEM, Daniel Wunder. A dupla noção jurídica de interesse público em direito administrativo. *Revista de Direito Administrativo & Constitucional* — A&C, yr. 11, n. 44, pg. 59-110.

15 In the words of Emerson Gabardo, "interests are different from rights, among other reasons precisely because there is no duty corresponding to them, and they are free from the obligatory nature typical of legislation" (GABARDO, Emerson. *Interesse público e subsidiariedade* — o Estado e a sociedade civil para além do bem e do mal. Belo Horizonte: Fórum, 2009. pg. 304).

interest pure and simple of a person (an individual or a legal entity, public or private) lacking the protection of the legal framework, and illicit interests".[16]

2. Conflict of interest

A quotation from the Bible is irresistible as an introduction to an analysis of conflicts of interest: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and Mammon".[17]The exercise of a public function must be underpinned by public standards — rules and, above all, principles — which can even contain prerogatives that create an uneven legal relationship with the citizen. Even if we admit the existence of private interests of public agents, including selfish ones which, if legal, can be sought by ordinary means, in the exercise of a public function there can be no overlap between these personal interests and the public interest. The essential question is precisely to identify the private interests of a public agent and how they might possibly put the attainment of the public interest at risk.

On the other hand, it is no easy task to establish, *a priori,* the cases where there is clearly and objectively a permanent conflict of interests.

In order to reduce the level of uncertainty surrounding the issue, Federal Law No. 12.813/2013 defines a conflict of interest as "a situation generated by a conflict between public and private interests, which could damage the collective interest or improperly influence the performance of a public function" (art. 3, I).

Regulation of conflicts of interest has an essentially preventive purpose, to avoid acts of corruption materializing. The purpose is to identify risks to the integrity of public objectives and of the means to attain them, avoiding losses for the public purse and the public interest, and also observing the principles that govern public administration (among them equity and morality).

One of the reasons for the State's substantial exposure to these conflicts is precisely its lack of exclusivity in defending public interests, which it shares with society. The large number of players who interact in different public procedures, and their diffuse array of interests, make strict public interest more vulnerable to different private interests.

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[16] Daniel Wunder Hachem, Princípio constitucional da supremacia do interesse público, op. cit., pg. 292.

[17] Gospel according to St. Matthew, chapter 6, 24.

Similarly, the increase in the different types of partnership with private institutions — whether in the social or the economic field — is typical of a number of States today, and increases the potential for external factors to influence public decisions, above all in cases of economic issues.

There may also be conflicts of interest in the relations between the State and its various service providers. Companies, or professionals acting on behalf of companies, with interests that conflict with those of the State, may subsequently enter into a relationship with the State in the same production sector, with a different interest. In this case, it is clear that public servants are not the only ones with interests potentially in conflict with the public interest.

3. Managing conflicts of interest: the OECD guidelines

Lack of confidence in the integrity of public institutions corrodes the trust of the citizen, who is entitled to expect public agents to use their prerogatives and exercise their attributes to serve the public interest, not to be served by it. Environments propitious for conflicts of interest also represent a risk to the integrity of the markets and to fair competition, and these situations can be aggravated by government decisions which are lacking in transparency.

Certain sectors of the public administration are at a greater risk of conflicts because they have closer dealings with the private sector, and because of the management of public powers. In fact, public contracts (including all the preparatory procedures), the exercise of the power of the administrative police (including inspections, sanctions, authorizations, for example) and social and economic regulation are examples of sensitive sectors that should be subject to more care and, above all, transparency.

A recognition of the nature, probability and seriousness of the risks is essential for designing a public policy of prevention. In practice, different strategies must be adopted, depending on the risks, taking as a parameter the multiple activities undertaken by the public administration. Situations of severe conflicts (nature) which are highly likely to occur (chances of verification) require specific policies for facing the problem, tough controls and external monitoring.[18]

[18] NATIONAL AUDIT OFFICE, Conflicts of interest — report by the controller. London, 2015. Available at: <www.nao.org.uk/report/conflicts-interest-2/>. Accessed on: Mar. 20, 2018.

The risk of damaging the interests of society and the integrity of the markets explains the current concern with conflicts of interest, in the public and private sectors, above all in western nations. This scenario forced the OECD to set guidelines for managing conflicts of interest in the public sector, with the declared objective of helping institutions and government agencies to develop public policies whereby conflicts of interest will be adequately identified and resolved or managed, properly and transparently, to help avoid the practice of corruption.[19]

There are various possible models of public policy to regulate conflicts of interest, and there is no absolute solution. The various possibilities depend on the historical, social, political and cultural circumstances of each nation, in addition to the need to fit them into the corresponding legal framework.

As a general rule, as one would expect and as the OECD makes clear, the issue is handled as part of a broader public anti-corruption policy. The guidelines accordingly propose a minimum overall structure that can be applied to any design for preventive public policy.

The initial recommendation of the OECD is to define, for each legal framework, what is considered to be a conflict of interest, so that the respective situations can be identified and effectively managed. For the Organization, "conflict of interest" involves the possibility of divergence between the public duty and private interests of a public agent, with the agent having a private capacity and interests that could unduly influence the performance of his public duties.

It should be noted that it is important not to confuse a conflict of interest with financial loss or damage or even with acts of corruption or improbity. The broad definition covers any abuse of position, by a public agent, that brings him an advantage over the common citizen. This is the case, for example, of the use of privileged information for one's own or another's benefit, or the receipt of any type of advantage — not necessarily financial — that can *influence* an agent's decisions. The focus is eminently preventive, intended to prevent undue interference

When putting any model of public policy into effect, the OECD stresses the importance of promoting individual responsibility and personal example

[19] OECD, Managing Conflict of Interest in the Public Service — OECD guidelines and country experiences. Paris, 2003. Available at: <www.oecd.org/gov/ethics/managingconflicto finterestinthepublicservice.htm>. Accessed on: Mar. 20, 2018.

— public agents must act at all times in such a way that their integrity serves as an example to other agents and also to the public.

It also recommends stimulating an organizational culture of intolerance for conflicts of interest, which depends on communication, guidance and training to promote the rules and practices introduced. The implementation of "partnerships for integrity" with the business sector and third sector entities is recommended as a way of making people aware and for cultural assimilation.

Encouraging the involvement of citizens and civil society organizations is also recommended by Transparency International[20] as a way of increasing the effectiveness of the various integrity policies. TI stresses the importance of whistleblowing, which can supply important information about the risks of corruption and conflicts of interest, and of a policy for incentives, handling the information and, particularly, protecting the informant.

Some of the OECD guidelines deserve special attention.

3.1 Defining specific situations of material conflicts of interest

The existence of what are sometimes blurred lines between public interest in the broad sense and private interests makes it necessary to describe, as clearly and realistically as possible, the situations and circumstances that can represent a conflict of interest. The clear definition of these situations is intended to protect not just the integrity of the public interest but also the good faith of the public agent in the face of complex situations subject to various interpretations.

The specific identification of situations, the OECD recommends, should be made with the help of examples of private interests that are likely to give rise to conflict: financial and economic interests, corporate shareholdings, party memberships, participation in not-for-profit organizations, membership of trade unions or professional organizations.

The situations can include relationships where personality is a major factor, such as personal, professional, ethnic, family or religious relationships. In this case, the aim to is identify any conditions that may affect the duty

[20] MARTINI, Maíra. *Conflict of interest in public procurement.* Transparency International, 2013. Available at: <www.transparency.org/whatwedo/answer/conflict_of_interest_in_public_procurement>. Accessed on: Mar. 20, 2018.

of impartiality of a public agent in the exercise of his duties, even if unintentionally.

The first step is to define the situations, and at the same time organization and practical strategies should be used to help identify, *in concreto*, the different cases of conflicts of interest. The OECD highlights the need for a set of rules as a necessary stage, but regards it as insufficient for a preventive policy. Guidance, training and the possibility of getting answers to queries are initiatives that will underpin the clarity and effectiveness of public policy.

3.2 Existence of procedures to identify situations of conflict

Legal certainty requires public agents to know what is expected of them in relation to the defense of the public interest, above all in situations where it is not altogether clear whether there is in fact a conflict.

The requirement for an express declaration, by certain public agents, of details of their private interests is a strategy recommended by the OECD and also by Transparency International. In this case, care must be taken to obtain certain information from agents who are going to hold certain positions, and this information must be updated from time to time.

Material private interests that could cause conflict with public duties may be disclosed to the public in general, or be for internal access by the control and governance bodies. The OECD also emphasizes the importance of speed in disclosing information and updating it, if there is a change in the original circumstances, to give the public confidence and ensure that the agents fulfill their duties.

3.3 Need for clear rules for managing and resolving conflicts identified

A declaration of material private interests and the correct identification of situations will not resolve a conflict of interest. The OECD stresses the importance of introducing clear measures for resolving or managing conflicts, according to each situation.

Concrete conflict management can result, for example, in the dismissal of an agent under a definitive administrative process, transfer to another

sector or change of duties, restricted access to certain information etc. The procedure should ensure that a strategy is adopted that is compatible with the specific conflict identified. These recommendations do not apply to situations involving financial loss, criminal practices or misdemeanors, which require special investigation.

4. Aspects

The recommendations of the international bodies point to three major factors for structuring a policy to prevent conflicts of interest: normative, institutional/organizational and functional.

4.1 Normative aspect

Policy for preventing conflicts of interest in the public sphere requires the issue of regulations at various hierarchical levels. Valid norms are those produced in accordance with a higher-ranking and earlier norm, indirectly inked to the system's fundamental norm, as Kelsen well argues, and integrated into the legal framework.

An investigation about integration must examine the source of the normative act and the existence of authorization or recognition for it. Normative acts are general or abstract to differing degrees, as are the extension and applicability of their effects, although it is always possible and necessary to ascertain the incorporation of the source responsible for their issue.

Insertion in the legal framework is necessary to confer cogency on the rules, otherwise they will be taken to be nothing more than moral or functional advice. The creation of standards of conduct and the establishment of infractions and penalties, in particular, are achieved by the field of legal reserve, requiring the enactment of a law in the formal sense. Federal Law No. 12.813/2013, for example, describes situations that represent a conflict of interest and typifies them as acts of administrative improbity, and as such subject to the strict sanctions of Law No. 8.429/1992.

The various norms and their different degrees of integration with the legal framework depend on the conception of public policy and also on the limitations of each system. Brazilian law, invoked once more, uses the technique of normative remission to require that certain elements of past

or subsequent norms drafted by the administration should be regulated, to supplement the framework established by the law itself.

In these cases the law imposes expressly on the Public Ethics Commission the task of setting standards, procedures and mechanisms intended to prevent or impede any conflicts of interest (art. 8, I).

The use of this technique is very common and necessary, principally due to the need to detail some specific points of the business of administration, which normally change with ease, and which for this reason are not properly handled in the strict process of drafting the law.

The contents of the regulations issued with the support of the law must conform to legal parameters. Observance of constitutional principles is also imperative, even if no clear legal parameters exist. The process of interpretation, application and control of these regulations must follow a path of successive generalization: from specific principles to sector principles; from sector principles to general principles; and so on.

The soft law can also be used, depending on the nature of the risk of conflict and the public policy strategy. If it is not recognized by the legal framework (because it complies with the formal and material requirements for publication), its effects will not be mandatory, being more useful for interpreting norms and indicating standards of conduct. This is the situation of Codes of Ethics and Codes of Conduct, the recognition of which by the legal framework is necessary on a case-by-case basis.

It is advisable to note that the establishment of norms meets the need for predictability, which means the possibility of foreseeing how the administration is going to act. The norms enacted may have pretensions to stability and permanence, enabling citizens with links to the administration to plan their activities with security and certainty. The issue of infralegal norms is also important for creating criteria and guidance for the application of the law, preferably through purposeful public procedures.

4.2 Institutional/organizational aspect

We can talk about "organization of the public administration" in a *broad sense*, covering both *subjective* and *objective* meanings, defining it as a composition and conformation of structures, competencies, processes and instruments of administration for the purpose of achieving public goals.

In this broad sense, the organization of the administration includes various aims, such as: a) the creation and composition of subjective and objective structures sufficient for attaining goals; b) the determination and distribution of tasks between structures and agents according to established criteria aimed at achieving objectives; c) the provision of staff to undertake tasks; d) relations of coordination, subordination and control between the different structures of the organization; e) the structuring of the execution of various activities by the administration in order to satisfactorily attain specific public ends; and f) control of all the processes planned and executed.[21]

This is the *assessment and conception of institutional designs and management tools aimed at achieving specific objectives.* In relation to the *public administration in a subjective sense,* we must find within the legal framework the most appropriate legal-subjective structure for the realization of specific aims.

The "structural organization of the public administration" has *its own guarantee function* linked to the predetermination of the conditions for the future performance of the activity. In this case, the guarantee for the citizen is in the assignment of a function to an entity or body with the characteristics necessary for realizing it. The guarantee is not only in individualizing functions and establishing a legal regime, but also in its proper assignment to predetermined subjects.

When he teaches that the "law of organization" is generally descriptive, Schmidtt-Assmann notes that the activities of the administration occur *in* and *through* organizations, and it is in them that the State as an organization enters into contact with social forces. According to this author, it is precisely the law of organization that enables the service-providing activities of the administration and the possibilities for citizens to participate, to meet in specific structures.[22]

The subjective structures acting to identify, manage and resolve conflicts of interest must be adequately shaped for the exercise of their function. It is of extreme importance that the organogram of government-owned companies is suitably structured to prevent political and partisan interference. The structure must be modeled so as to ensure total fulfillment of its attributes, without hierarchical subordinations that put at risk the management of conflicts of interest.

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[21] DI PIETRO, Maria Sylvia Zanella; MOTTA, Fabrício. *Tratado de direito administrativo*, Vol. II — Administração pública e servidores públicos. São Paulo: Thomson Reuters, 2014.

[22] SCHMIDT-ASSMANN, Eberhard. *La teoria general del derecho administrativo como sistema.* Madrid; Barcelona: Marcial Pons, Ediciones Jurídicas y Sociales, 2003. pg. 251.

4.3 Functional aspect

While the institutional aspect focuses on organizational structures conceived for the execution of administrative activities, the functional aspect considers the public agents who are to perform their legally attributed competencies.

In this context, the efficient and effective management of conflicts of interest requires not only that the agents who are to apply the set of norms be properly trained, but also that there are adequate guarantees that they will perform their functions correctly and impartially.

Job tenure in public service or in the function and exercise of a mandate is one of the types of guarantee normally offered to give a public agent the peace of mind necessary to do his job correctly and efficiently, without any fear of persecution or professional retaliation for performing duties that are not always to everyone's liking.

5. Transparency, the democratic premise

Democracy and transparency go hand in hand, since opacity is incompatible with the recognition that power emanates from the citizens. Publicity, a component principle of a republic and of democracy, is the fundamental means for providing legitimacy, a necessary premise for effecting popular control and participation, and a requirement for guaranteeing the democratic responsibility of the administration. The principle of administrative publicity is also one of the fundamental rights of the citizen, inseparable from the democratic principle, and it has a *positive substrate* — the duty of the state to provide broad, free access to information as a precondition for awareness, participation and control of the administration — and a *negative* one — except in cases that affect the safety of society and the State, and the right to intimacy, administrative actions cannot take place in secret.[23]

Following this line of reasoning, behind the principle of publicity we find the requirement for legal certainty and the prohibition of the "secrecy" policy, this latter meaning not just a ban on discretion, but also a duty of satisfaction on the part of the State.

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[23] CANOTILHO, J. J. Gomes. *Direito constitucional e teoria da Constituição.* 7th ed. Coimbra: Almedina, 2003.

The visibility necessarily conferred on the public administration makes it possible to combat the ineffectiveness of legally instituted guarantee provisions. In a work on what he calls the "parallel administration", Agustín Gordillo writes about informal procedures which occur in parallel to those that are formally established.[24] The author concludes that popular participation and publicity in drafting the regulations applicable to the administration are conditions for future efficacy, avoiding the creation of a para-system, or, using the terminology of Bobbio, an invisible power. These ideas bring with them the notion of *transparency*.

Once the words have been generally accepted, we can understand *publicity* as a characteristic of that which is public, known, not kept secret. Nevertheless, *official publicity* acts as a requirement for the efficacy of actions in general performed by the public authorities.[25]

Transparency, in turn, is an attribute of that which is transparent, clear, crystalline, visible; it is what lets light pass through it, so that one can clearly see what lies behind. Transparency requires not just the availability of knowledge, but also the possibility of *understanding* what is done.

Administrative acts must be public and transparent. Public because they must be brought to the attention of the interested parties by means of legal instruments (quotation, publication, communication etc.); and transparent because they must be easily accessible and enable people to clearly understand their content and all the elements of their composition, including their motive and purpose, so that it is possible to control them.

Transparency is an essential requisite for social participation and for the control of the administration, making real the power granted to the people by the law.

Management of conflicts of interest must be based on total transparency, as has been repeated throughout this article, to permit citizens to be aware of them and to control them. Full knowledge of the private interests of agents who perform public functions make the citizen and civil society jointly responsible for avoiding conflict, in the many different types of relationship that exist, to the detriment of the public interest.

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[24] GORDILLO, Agustín. *La administración paralela*. Madrid: Civitas, 1992. pg. 54 (free translation).

[25] MOTTA, Fabrício. Notas sobre publicidade e transparência na Lei de Responsabilidade Fiscal no Brasil. *A&C — Revista de Direito Administrativo & Constitucional*, Belo Horizonte, yr. 7, n. 30, pg. 91-108, Oct./Dec. 2007.

6. Conflicts of interest in Law No. 12.813/2013

Finally, in the context of the normative aspect which I described earlier, I would like to make some comments about the provisions of Law No. 12.813/2013, which deals with conflicts of interest in the exercise of positions or employment in the federal Executive branch, and subsequent impediments to such exercise.

To the extent that it can be considered a normative anti-corruption system, Law No. 12.813/2013 expresses a specific set of regulations intended to anticipate and restrain the conduct of public agents representing conflicts of interest.

A first approach could consider the challenge of making the interpretation and application of the rules of this Law compatible with norms that include other subsystems in the nature of sanctions and/or indemnities, formed by commands of an administrative, penal or judicial-political nature, such as: the law of misconduct in public office, disciplinary regulations applicable to certain categories of public servants, the law of misconduct in office applicable to the private sector, and electoral rules aimed at political agents.

It is necessary that, on the one hand, the system is coherent, stable and, as far as possible, complete, i.e. without any regulatory gaps; and, on the other, that it objectively outlines the type and nature of the responsibilities that could be imposed on the (public and private) individuals who practice illegal acts.

In the plan holding people liable for acts of administrative misconduct, it should be noted that only the federal government has the legislative authority to deal with the matter (art. 37, paragraph 4, and art. 22, I of the FC).[26]

It was in this constitutional context that the federal government enacted Law No. 12.813/2013, which is for the protection of the public interest in situations of conflict with private interests, namely in situations involving public servants or former public servants. So one of the key objectives of the law is to ensure that the public agent acts impartially, i.e. without being influenced by tactical or legal factors existing in his private life.

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[26] In this regard, José Roberto Pimenta Oliveira considers that the following provisions of Law No. 12.813/13 are national norms: article 3 and article 4 and its paragraph 2, because of the definitive character of the rules; articles 5 and 6, because of the way they typify illegal conduct; and article 12, because of the defining nature of the sanctions applicable to the crimes described (OLIVEIRA, José Roberto Pimenta. O conflito de interesses como ato de improbidade administrativa. *Revista Brasileira de Estudos da Função Pública — RBEFP,* Belo Horizonte, yr. 3, n. 9, pg. 104, Sep./Dec. 2014).

For comparison, we can point to other Brazilian laws which have long regulated private conflicts of interest, specifically in the field of civil law and company law.

In the so-called private law, the Civil Code of 2002 provides for conflicts of interest in the management of companies. According to paragraph 3 of art. 1.010, a partner is liable for damages when, "having interests contrary to those of the company in a certain transaction, he takes part in the resolutions and the transaction is approved thanks to his vote".

Similarly, the sole paragraph of art. 1.017 of the Civil Code provides that "a manager is subject to sanctions if, having interests contrary to those of the company in any transaction, he takes part in the corresponding resolutions".

Also in the area of protection of private interests, art. 156 of Law No. 6.404, of December 15, 1976, prohibits managers of joint-stock companies from involvement "in any corporate transaction where their interests conflict with those of the company". And what could be considered a conflict of interest?

In the management of joint-stock companies, in case the regulations do not provide for a definition of conflict of interest, Luis Felipe Spinelli asserts that:

> [...] there is a conflict of interest in the strict sense in the management of a joint-stock company when a manager, having information on the entity, makes use of his position and, having a private interest that clearly influences some decision (whether it is his individual decision or a joint one — but in which he participates), ends up with an advantage to the detriment of the company.[27]

In public law, before Law No. 12.813/2013, which is aimed at a preventive approach to conflicts of interest, Brazilian law already provided for situations of conflict of interest in statutes for public servants, establishing for the purpose certain disciplinary sanctions (art. 117, VII, VIII, IX, X, XI, and XVIII of Law No. 8.112/1993).

It is interesting to note that art. 9 of Law No. 8.666/1993 prohibits direct or indirect participation in tenders for or the execution of works or services, or the supply of goods, by: (i) the author of the basic or executive project, whether an individual or a company; (ii) a company, alone or in a consortium,

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[27] SPINELLI, Luis Felipe. *Conflito de interesses na administração da sociedade anônima.* São Paulo: Malheiros, 2012. pg. 137.

responsible for drafting the basic or executive project, or of which the author of the project is an officer, manager, shareholder or holder of more than five percent (5%) of the voting capital, or the controlling shareholder, technical in charge or subcontractor; or (iii) an employee or officer of the contracting body or entity, or responsible for the bidding process.

In art. 3, I, of Law No. 12.813/2013, there is a definition of conflict of interest, which is described as "a situation generated by a conflict between public and private interests, which might compromise the collective interest or improperly influence the performance of a public function".

It is curious how the law requires, for a conflict of interest to exist, the potential for the collective interest to be compromised, or for there to be an "improper" influence on the performance of a public function.

The pressure exerted by a group of interests wishing to influence the conception or modification of public policies, or the alteration of regulatory scenarios, is a reality which cannot be denied. In fact, the participation of such pressure groups can sometimes improve the regulatory decisions made by the government.[28]

The challenge is to guarantee the quality of the decisions made with the intervention of these pressure groups and, above all, to ensure that they are in harmony with the public or general interest.

Following its effort to define conflict of interest, Law No. 12.813/2013 indicates some situations of conflict both during the exercise of a public function and after an agent has left the service (Chapters II and III, respectively).

Given the limitations of this essay, and my purpose of examining conflicts of interest in public law *vis-à-vis* the regime in force under private law, I will restrict this analysis to the hypothesis of art. 5, II, of Law No. 12.813/2013. And this is principally because the circumstances described in this section reveal a typical example of approximation between public and private that can at the same time jeopardize public decision-making and upset the access of private agents to the command center of political power.

Here is what the article says about conflicts of interest:

> Art. 5 A conflict of interest in the exercise of a position or employment in the federal Executive Branch occurs when:

[28] In this respect, compare SELIGMAN, Milton; BANDEIRA, Mateus Affonso. Manual de melhores práticas em relações institucionais. In: SELIGMAN, Milton; MELLO, Fernando (Org.). *Lobby desvendado.* Rio de Janeiro: Record, 2018. pg. 217-225.

> [...]
> II — services are provided or a business relationship is maintained with an individual or company which is interested in a decision of the public agent or of a body to which he belongs.

Situations defined as conflicts of interest under article 5 apply to the holders of senior management positions or employment listed in art. 2, and the holders of positions or employment which grant access to "privileged information" capable of resulting in an economic or financial advantage for the public agent or a third party, as defined in the regulations. It is important to note that the situation of conflict affects the agent even when he is on vacation or on leave of absence (art. 5, sole paragraph).

For a conflict situation to exist, it is necessary first to identify a legal-business relationship between the public and the private agent. This relationship may be occasional or permanent.

On the other hand, the private agent must have an interest in a decision of the public agent or of the body of which the latter is a member. Here an interesting question arises: does the material private interest reside in a specific situation or transaction or in any and all activity undertaken by the public administration of which the public agent is a part?

The text of the final part of section II, of art. 5 of Law No. 12.813/2013 leaves no room for doubt: a material conflict must be related to a specific situation, on which the public agent should or can exercise decision-making powers. This provision expressly mentions the interest of the private agent in "a decision of the public agent or of the body of which the latter is a member".

In other words, for a conflict of interest to exist, under the law referred to, it is assumed that there is a specific, concrete situation of conflict. In other words, it is not enough simply for there to be an employment relationship with the public administration.

This does not mean that there are no rules prohibiting action by public servants, when a situation of permanent conflict of interest has been reached, taking into account only the link between the public agent and the public administration.

An example of this can be found in the legal profession, where there are situations of incompatibility and impediment listed in chapter VII of Law No. 8.906/1994. In this context, the incompatibilities result in a total ban and the impediments a partial ban of the exercise of the law.

To make the distinction clearer, we can consider the situation described in section II of art. 30, which imposes a ban on the exercise of the law by servants of the direct and indirect administration and foundations, "against the Public Treasury which remunerates them or to which the employer entity is linked".

In the previous case, the servant is prevented from exercising the law in opposition to the public administration to which he is administratively linked, whatever the actual situation. It is enough for his interest to be contrary to that of the public entity which remunerates him, and for this purpose the only important thing is the identity of the entity or the public body to which the agent is *formally* linked.

In the situations of conflict of interest indicated in Law No. 12.813/2013 the focus is on the decision-making powers of the public agent, taken individually or as a member of a collegiate body. And this is why we have to look at the conflict from the perspective of *substance*, since permanent, general conflict of interest really exists. And this is because the aim of the law is to avoid a public agent with an interest from interfering in the decision-making process either favorably or even unfavorably to the private agent with whom he has a business relationship.[29]

In the words of José Roberto Pimenta Oliveira:

> [...] what is legally important is that the private interest aroused by these activities and links is recognized by the public agent, compromising or influencing the exercise of his function and creating the conflict forbidden by law.[30]

The same author also calls attention to the important question of timing. He says that the "provision of services" or the "business relationship" must come before the time when the public agent acts.[31]

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[29] Commenting on the general rule on conflict in the corporate environment (art. 156 of Law No. 6.404/1976), Luis Felipe Spinelli goes so far as to assert that, if the transaction in which the manager has an interest is not within his remit, but in that of another person, no special procedure will be necessary (Luis Felipe Spinelli, Conflito de interesses na administração da sociedade anônima, op. cit., pg. 223).

[30] José Roberto Pimenta Oliveira, O conflito de interesses como ato de improbidade administrativa, op. cit., pg. 113.

[31] Ibid., pg. 113.

So now we have some interpretative parameters which may, at the first approach, help construct an effective and balanced legal system to deal with cases of conflicts of interest in the administration. This, it is to be hoped, will end up reinforcing the public institutions, so as to create a stable legal-institutional environment, with conditions that will reduce uncertainty and contribute to a favorable climate for people to cooperate with each other.

The public agent must remain faithful to the public interest. This sounds obvious, but it is sometimes overlooked, and it implies the conclusion that the pursuit of the public interest must prevail over seeking to satisfy purely private interests. And with the aim of reacting against the allied forces of a patrimonial or patrimonialist State, in which the *res publica* is mixed up with private property, as well argued by Raymundo Faoro,[32] it is imperative to set the boundaries between public interest and private interest as objectively as possible.

On the other hand, we should not forget that there are many practical difficulties in precisely outlining the boundary between private interest and general or public interest, and that this therefore affects the also far from easy task of identifying conflicts of interest between the one and the other.

Conclusion

The issue of conflicts of interest is a new and urgent one for the public administration and their efficient management is essential to preserve the integrity of public decisions and avoid the practice of corruption.

The current complexity of social demands and multipolarity of the administration make handling conflicts a major challenge, calling for a serious, knowledgeable and transparent response.

On top of the necessity not to distort the operation of the market and the impartial identification of public interests there is an overriding need to recover the confidence of the citizen in the State and in the government. Corroding the confidence of the citizen is, without doubt, to deprive the State of its legitimacy.

In the context of the normative aspect of reinforcing confidence in Brazilian institutions, Law No. 12.813/2013 was enacted to deal with conflicts

[32] FAORO, Raymundo. *Os donos do poder*. Formação do patronato político brasileiro. São Paulo: Globo Livros, 2001. pg. 63.

of interest in the exercise of a position or employment in the federal Executive Branch, and with impediments subsequent to such exercise.

In what could be taken as the normative system for confronting corruption, Law No. 12.813/2013 expresses a specific set of ordinances aimed at anticipating and restraining the conduct of public agents involved in conflicts of interest.

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