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COMMENTS *

ON THE COMPATIBILITY OF THE FRATTINI LAW WITH THE COUNCIL OF EUROPE STANDARDS IN THE FIELD OF FREEDOM OF EXPRESSION AND PLURALISM OF THE MEDIA

By

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(*) *Non-official translation*

COMMENTS ON THE "DRAFT OPINION" (No. 309/2004) OF THE VENICE COMMISSION ON LAW 215/04 REGARDING CONFLICT OF INTEREST

Under resolution no. 1387/04 (*"Monopolisation of the electronic media and possible abuse of power in ITALY"*) the Parliamentary Assembly of the Council of Europe expressed the fear that in Italy pluralism of information was not *de facto* or *de jure* guaranteed. Article 13 of that Resolution required a request for an opinion be put to the so-called "Venice Commission" (a technical/legal organ of the Council of Europe) regarding the compatibility of the Gasparri and Frattini laws with Council of Europe standards regarding freedom of expression and pluralism in the media.

With specific regard to law no. 215/2004 dealing with conflicts of interest, this is stated both in paragraph 3 of the Parliamentary Assembly Resolution 1387 (2004) and in paragraph V of the Draft Opinion of the Venice Commission. In both instances, the aforementioned law is considered as part of an analysis of freedom of expression and the pluralism of the media in Italy.

In March last year, a number of considerations were submitted regarding the *preliminary draft opinion* on the compatibility of law 215 with Council of Europe standards. Despite this, however, the "*draft opinion"* on the agenda for the 10-11 June Venice Commission meeting reiterated most of those comments.

I believe we should note, first of all, that law no. 215/2004 does not deal solely with the mass media and information sector, but covers all possible conflicts of interest between government responsibilities and professional and business activities in general. Because of its particular nature, the mass media and information sector is the subject matter of a number of specific provisions in that law (see in particular article 7). These particular provisions do not replace the general rules governing any type of company, but are additional to them.

Before addressing the substance of the comments in the Venice Commission report, it may be useful to briefly introduce the question by explaining the scope of law 215, in order to prevent any later misunderstandings regarding its interpretation.

The combined provisions of articles 1, 2 and 3 of the law set out its scope.

Article 1 states that the Prime Minister, Ministers, Secretaries of State and Extraordinary Government Commissioners are all "government post-holders" (and are therefore the parties to which this law applies). Article 1(1) also imposes on government post-holders the obligation to devote themselves exclusively "to dealing with public interests", and prohibits them from "performing any acts and taking part in any collective decisions in conflict of interest situations".

Article 2 lists all the activities that are incompatible with holding a government post. The choice between incompatibility and ineligibility to stand for election has to do with the different purposes of these two institutions in the Italian legal system, as unanimously acknowledged in constitutional legal literature.

More particularly, the purpose of ineligibility to stand for election is designed to guarantee the regularity of the electoral process, placing restrictions on the fundamental right of all citizens to

stand for election, whereas the purpose of incompatibility, which is more appropriate for the particular situations to which law 215 applies, is to guarantee that the elected representatives perform their responsibilities properly when they are in personal situations which could, in theory, jeopardise that proper performance.

The causes for ineligibility to stand for election do not therefore stem from any personal situations linked to the *status* of the candidate, but from circumstances that might influence the electoral process such that it would not be considered a genuine demonstration of the will of the electorate.

Art. 3 defines the concept of "conflict of interest" with reference to two different and alternative situations (as evidenced from the use of the disjunctive conjunction "or"):

a) the existence of one of the situations of incompatibility listed in article 2;
b) the objective consequences of the action by public office-holders on their property or that of their spouses or relations to the second degree.

The regulation conflict of interest is completed by detailing the powers, functions and procedures of the independent administrative Authorities responsible for oversight, prevention and imposing penalties to combat such cases, together with the applicable penalties. For companies in general, this responsibility lies with the Competition Authority which was instituted by law no. 287/1990 (article 6); for companies in the printed press and media sector, the responsibility lies not only with the Competition Authority but also with the Communications Regulatory Authority instituted by law no. 249/1997.

In this connection, it is worth recalling that in the Italian legal system, the independent administrative Authorities (otherwise defined as "highly impartial Administrations") have been created in recent years as new administrative entities, without any political ties likely to condition their work. These new authorities are characterised by their independence of political parties, because they are not the expression or the instrument of a political majority or of minority groups, and above all of government, for it is an essential organisational requirement that they have no organisational relations whatsoever with the Executive.

Moreover, these Authorities are characterised by their neutrality with regard to the parties with conflicting interests to be resolved and third parties, and are therefore *iusdicenti* in any conflict in which the main players to be regulated confront one another. Hence their status as arbiters or, in some sectors, as economic judges, not politically conditioned by any preferences in terms of regulating interests, all of which are placed on the same plane, including public interests, to ensure strict compliance with the law.

These Authorities have wide-ranging powers to conduct investigations and impose penalties in accordance with current legislation. They can also act at their own initiative, guaranteeing the principle of *audi alteram partem* and the rules of administrative transparency. Their powers do not exclude the powers of the courts or of any other authorities with regard to criminal, civil, administrative or disciplinary offences, and indeed they are required to report any cases of criminal offences to the judicial authorities.

Moving on to address the substance of the Resolution of the Parliamentary Assembly of the Council of Europe and the "draft opinion" of the Venice Commission, both texts emphasise the alleged in effectiveness of law 215 to resolve real situations of conflict of interest on the basis of serious considerations, in the light of compatibility with European standards and the case law of the European Court of Human Rights, and call for the following clarifications.

The first point in the report considers that the description of cases of conflict of interest in law 215 is excessively specific and peculiar in comparison with the general definition of "conflict of interest" given in article 13 of Recommendation (2000) 10 of the Committee of Ministers of the Council of Europe (containing "A Code of Conduct for Public Officials"). According to this definition "*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"* and the concept of private interest includes "any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations".

But the notion of conflict of interest adopted by this law contains all the elements in this definition:

a) Article 3 defines both "prior and potential conflict", referring to the cases of incompatibility given in article 2, and "conflict in a specific case" (an act or the omission to perform a due act having a specific effect on the property of a government office-holder or a member of his or her family);
b) Article 3 specifies and concretely spells out the concept of *"private interest"*;
c) it considers all the cases of acts or conduct whether individual or collective, referring to a government post-holder, and even including the case of merely "*formulating a proposal"*;
d) the act which creates a conflict of interest is not only the one performed by the government post-holder, but also the act not performed which should have been performed, thereby excluding decisions taken in situations of conflict due solely to inertia;
e) the case of the advantage obtained (as well as the obligation of "*disclosure"* referred to in article 5) has also been extended to include the spouse, relatives up to the second degree, and any companies which the individual owns;
f) the law also considers cases of *"top-down conflict"* (relating to cases in which the government post-holder reserves favourable treatment to a company belonging to him or her, or to their relatives) and cases of *"bottom-up conflict"* , (when the company working in the communications sector belonging to the government post-holder acts in violation of laws 223/1990, 247/1999, the Law instituting the Communications Regulatory Authority, and law no. 28/2000, the *par condicio* law, giving special support to the government post-holder).

The second point raised in the Report stems from the idea that law 215 does not include the *"ownership as such"* of a company among cases of incompatibility or cases of conflict of interest. This is partly inaccurate, because the whole approach of the law considers the "ownership" of the company from various points of view:

S There exists "conflict of interest" pursuant to article 3 of the law even when *" the act or the omission has a specific and preferential effect on the property of the post-holder, his or her spouse or relatives to the second degree, or any companies controlled by them"*. This situation is therefore wholly independent of any situations of incompatibility referred to in *

article 2, considering that the consequences of the act performed for the purposes of identifying a conflict of interest are of relevance both *in se* and from the point of view of the benefits accruing to the property of the government office-holder or his or her spouse;

S Article 5 requires the government office-holder, his or her spouse and even relatives up to the second degree, to declare their assets and shareholdings, including those held up to three months prior to taking up the office *("disclosure"*);
S pursuant to article 6(3) the Competition Authority (responsible for conflicts in respect of every type of entrepreneurial activity) monitors the entrepreneurial activities of the government post-holder (declared pursuant to article 5), and whenever an act is identified which, pursuant to article 3, might constitute a concrete case of conflict of interest (in other words, an act with a specific and preferential effect on the property of the post-holder or that of his or her relatives) it conducts the necessary examination, imposes a penalty on the company, and submits a report to Parliament against the post-holder (*political censure*);
S under article 7, the Communications Regulatory Authority performs the same monitoring activity specifically in the mass media industries, imposing fines on companies, even in cases where they provide privileged support to the government office-holder;
S the fines imposed on companies, by definition, strike at the owner of the company and not the manager, because they have an effect on the assets, which relate directly to the proprietorship.

On the basis of these considerations, the criticism in the draft opinion regarding the failure to include "ownership" among the cases of conflict of interest would appear to be groundless, because – on the contrary – ownership is one of the autonomous elements of relevance to the notion of conflict of interest, and is the object of penalties which directly affect it.

It is true that no provision is made for the *"ownership as such@* of a company as one of the cases of incompatibility under article 2 (relating to the identification of cases of incompatibility with taking up government office); but, as we have already pointed out, this would not have been possible because it would have been in conflict with articles 42[1] and 51[2] of the Italian

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[1] *Article 42 of the Constitution; Property may be public or private. Economic goods may belong to the State, to public bodies, or to private persons.*
Private ownership is recognised and guaranteed by laws which determine the manner by which it may be acquired and enjoyed, and limitation on it, in order to ensure its social function and make it accessible to all.
Private property, in cases provided by law, and subject to payment of compensation, may be expropriated for reasons of public interest.
The law shall establish the rules and limits of legitimate and testamentary succession, and the rights of the State over inherited property."

[2] *Article 51 of the Constitution. "All citizens of either sex shall be eligible for public office and for elective positions on conditions of equality, according to the rules established by law. The Republic issues specific measures to foster gender equality. The law may recognise Italians who do not belong to the Republic as having equivalent status to citizens for the purposes of their admission to public and elective office.*
Any person elected to public office shall be entitled to the time necessary for the performance of those duties and to retain their employment.

Constitution, which protects the right of ownership and free access to elected posts in government as fundamental rights of the individual person.

Furthermore, the inclusion of "*ownership as such*" among cases of incompatibility would have required the company or shareholding to be *"coercively sold";* this effect would create a

permanent and irreversible *de jure* situation which could not be reversed after relinquishing the government post. In this case, too, it would have been a blatant violation of the articles of the Italian Constitution already mentioned.

This would have been quite different from all the other cases of incompatibility (such as the exercise of a profession) which provide for *de jure* situation to be suspended temporarily and then "revived" juridically upon leaving public office.

This comparison reveals that a rigid and categorical differentiation of treatment between possible cases of incompatibility linked to company ownership and the other cases could, if unjustified, constitute a violation of article 3 of the Italian Constitution and of the other precepts mentioned above.

Any proprietor who is coerced into disposing of his property permanently forfeits access to it; whereas other temporary situations of incompatibility (linked to professions or paid employment) temporarily suspend the grounds for incompatibility, which can subsequently be made good.

It is all too obvious that coercively depriving a proprietor of a company, with all its know-how, history, goodwill, etc, can never be compensated merely by money, however much that may be.

We believe that despite the real difficulty of the subject-matter and the sensitivity of the interests at stake, law 215 has succeeded in remaining compliant with the principles of the Italian Constitution.

First and foremost, as already indicated, it is compliant with the principle enshrined in article 3 of the Constitution, because any *"owner as such@* who would be forced to sell, would have to reconstruct the property *ex novo* on ceasing the hold government office, unlike what happens in virtually all the other cases of incompatibility.

Moreover, it also safeguards the constitutional rights to engage freely in business enterprise – which cannot be considered a kind of *"shameful label"* - as a condition to be removed in order to accede to public office, and to protect private property, which can only be expropriated on the grounds of general public interest.

The mandatory disposal of a company in this way would be in contrast with constitutional principles, because the sale would not be performed under free market conditions, but would place the vendor in a state of total weakness compared with the buyer, skewing the conditions of parity which are safeguarded by the Constitution and guaranteed by the free market..

Our Constitution acknowledges expropriation as a lawful instrument for the purposes of the pursuing the general public interest, but it is something that cannot in any way be invoked in this case, because expropriation presupposes that the asset will be put to public use in the general interest, and does not include the transfer of private property from one party to another.

More specifically, where article 42 of the Constitution provides limits on private property, it refers to only two ways in which the authority of the State may interfere with the status of the proprietor: one is expropriation, as already indicated, for which the equitable indemnity must be paid, but it is important above all to note that it has nothing at all to do with the either the transfer of the property belonging to a private individual to another private individual, or with placing the property on the market for public sale. The second way in which the State may interfere with private property is by regulating its use: all property may be used subject to the restrictions laid down by statute.

In conclusion, it would be utterly and totally unconstitutional to impose an obligation to sell property, or to put the property under statutory Administration.

The extremely serious damage caused to the proprietor would distort the market by almost totally eliminating the vendor's negotiating strength, obliging the vendors to accept a valuable consideration which would be below the true value of the assets. Furthermore, this would be tantamount to punishing not a conflict of interest, or the act through which the conflict is brought into being, but the suspicion or the possible eventuality of a conflict occurring.

These are the reasons why the law 215 addresses the only safe case from the point of view of the law, consistently with the principles enshrined in the Italian Constitution: it regulates asset use, but does not remove the right to asset use.
This, moreover, would appear to be the approach taken in all the other European legal systems that govern this matter (for example Austrian, German, English and Spanish law). There is not one case in any of these systems, apart from the rules restricting property use, in which the suspicion of a conflict, rather than acts committed in a state of conflict of interest, is punished by enforcing the sale of the property.

During the framing of law 215 consideration was also given to case of transferring property to a trustee, and to the case of the *blind trust*.

The first case was deemed not to be effective, because the trustee company (which is well-known in the Italian legal system) has to be created transparently, because it acts in the name and on the behalf of the party which at all events retains ownership of the assets placed in trust: it did not therefore seem to be the appropriate solution.

Since the *blind trust*[3] is a typical creation of *common law* it cannot be adopted into the Italian system because there is no specific legislation governing it, and the Convention signed in The Hague on 10 July 1985, which was ratified by the enactment of law no. 364/1989, merely requires cross-border recognition of the *trust*.

[3] *In a trust, property is temporarily assigned to the trustee, albeit subject to the performance of a number of management obligations and the requirement to return the property (international law speaks of "property segregation"), while guaranteeing that the owner of the property has a neutral relationship to their property.*

Furthermore, the *blind trust* only refers to movable assets or assets that can be easily converted into movable property. It is not possible to *"blindly manage"* a specific company. Moreover, it would not be effective either, because the management of an economically powerful company

would also be obvious to the proprietor, even in the case of a *blind trust*, such that the proprietor could easily find out about its contingent conditions and structure.

Neither was it possible to envisage selling property and then breaking it up and selling it in an indeterminate and indeterminable number of minority equity interests, on which to impose the *blind trust*. Quite apart, for the moment, from the consideration of the massive economic damage that this operation would cause to the owner of the property, the Italian Constitution would not permit this process of splitting up the ownership of assets.

Another point raised in the *draft opinion* focuses on the considerable increase in the workload which the monitoring of situations of conflict of interest would place on the Authorities under Law 215. Put very succinctly, the powers vested in the Authorities are powers that are already being institutionally exercised in the fields for which they are competent. We should like to reiterate here the fact that these Authorities act as "umpires" and in some cases as "economic judges" over the areas for which they have oversight. In order to ensure that they are best able to perform their functions, article 19 of law 215 makes provision for the personnel of both the Competition Authority and the Communications Regulatory Authority to be increased.

One further comment raised in the report refers to the alleged ineffectiveness of the penalties adopted.

In this connection we would reiterate that law 215 provides that in the cases of top-down conflict and in the cases of bottom-up conflict, fines (article 6(8), article 7(3)) can be imposed on companies and administrative penalties can be imposed on the government post-holder (article 6(1)) and on the companies (article 7(1) and (34) 4).

In addition to these penalties, the government post-holder can also be subject to political sanctions, resulting from the obligation on the part of the independent Authorities to submit their report to the Speakers of both Houses of Parliament.

From this it follows that the fact that if government post-holders have acted in pursuit of their personal interests rather than the national interest, this is bound to become public knowledge. This sanction is extremely important, because it is obvious that transparency in the performance of official government duties and the publicising of such offences are the best possible way to prevent and combat the pursuit of private interests in the course of performing public duties.

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[4] *The fine and administrative penalties imposed on media companies are given in Law no. 223 of 1990 (governing the public and private radio and television broadcasting services), law no. 249 of 1997 (instituting the Authority and the telecommunications and radio and television broadcasting systems) and Law no. 28 of 2000 (the so-called 'par condicio' law). These three laws lay down the main general provisions governing radio and television broadcasting, the overall structure and organisation of the media industry and media policy through the mass media. Each law places a number of different obligations and prohibitions on companies trading in this sector, and penalties for violations against them, giving the Communications Regulatory Authority specific regulatory and oversight powers over the industry and the authority to investigate violations and issue penalties.*

Furthermore, the importance of the political penalty emerges clearly from a reading of the "*Explanatory Memorandum*" to Recommendation (2000)10 containing the code of conduct for public officials, which emphasises the fact that this particular code does not apply to holders of elective office who, unlike public officials, are accountable to their Parliament and their electorate.

In conclusion, we believe that we have exhaustively demonstrated that law 215 is consistent with the European standards laid down in the code of conduct for public officials which, as the "*draft opinion*" della Venice Commission itself states, also apply *mutatis mutandis* to government post-holders.