



Strasbourg, 8 February 2005

**Opinion no. 309 / 2004**

Restricted  
**CDL (2005)011**  
Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**“ RULES FOR THE RESOLUTION  
OF CONFLICTS OF INTEREST”**

**(“FRATTINI LAW”)**

**ANALYSIS AND REVIEW**

**by**

**Mr Karol JAKUBOWICZ**  
**(Expert, Poland)**

**Mr David WARD**  
**(Expert, United Kingdom)**

## FOREWORD

The present review, commissioned by the Venice Commission of the Council of Europe, deals with "Rules for the resolution of conflicts of interest" ("Frattini Law"), adopted by the Italian Chamber of Deputies on 13 July 2004. The purpose of this review is to ascertain whether the law is compatible with international standards and whether, in the light of those standards, it truly resolves the issues which prompted its adoption.

## BACKGROUND

### Conflict of Interest

According to a dictionary definition, a conflict of interest "refers to a situation when someone, such as a lawyer or public official, has competing professional or personal obligations or personal or financial interests that would make it difficult to fulfill his duties fairly" (<http://www.lectlaw.com/def/c095.htm>). The following are listed as the most common forms of conflicts of interests:

- Self-dealing, in which public and private interests collide, for example issues involving family, or privately held business interests;
- Outside employment, in which the interests of one job contradicts another;
- Accepting of benefits, including bribes and other gifts accepted to curry favor,
- Influence peddling, using one's position to influence other realms;
- Use of government / corporate / legal property for personal use;
- Unauthorized distribution of confidential information (see: [http://en.wikipedia.org/wiki/Conflict\\_of\\_interest](http://en.wikipedia.org/wiki/Conflict_of_interest)).

Conflict of interest is a widespread and growing phenomenon and it is regulated and managed in different countries in different ways<sup>1</sup>. International standards in this field are defined i.a. in Recommendation No. R (2000) 10 of the Council of Europe Committee of Ministers to member States on Codes of conduct for public officials, and in Recommendation of the OECD Council on Guidelines for Managing Conflict of Interest in the Public Service (2003).

Recommendation No. R (2000) 10 defines conflict of interest in Article 13 in the following way:

1. 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.
2. The public official's 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. It includes also any liability, whether financial or civil, relating thereto.

---

<sup>1</sup> See *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences*. Paris: OECD, 2004.

The Recommendation does not cover publicly elected representatives, members of government and holders of judicial office, but it still sets standards which are applicable in any conflict of interest situation.

This includes the following principles:

- **Article 6:** In the performance of his or her duties, the public official should not act arbitrarily to the detriment of any person, group or body and should have due regard for the rights, duties and proper interests of all others;
- **Article 7:** In decision making the public official should act lawfully and exercise his or her discretionary powers impartially, taking into account only relevant matters.
- **Article 8:** 1. The public official should not allow his or her private interest to conflict with his or her public position. It is his or her responsibility to avoid such conflicts of interest, whether real, potential or apparent. 2. The public official should never take undue advantage of his or her position for his or her private interest.
- **Article 14:** The public official who occupies a position in which his or her personal or private interests are likely to be affected by his or her official duties should, as lawfully required, declare upon appointment, at regular intervals thereafter and whenever any changes occur the nature and extent of those interests.
- **Article 21:** 1. The public official should not offer or give any advantage in any way connected with his or her position as a public official, unless lawfully authorised to do so. 2. The public official should not seek to influence for private purposes any person or body, including other public officials, by using his or her official position or by offering them personal advantages.

An Annex to the OECD Council Recommendation defines conflict of interest as involving “a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities”.

The Annex distinguishes three types of conflict of interest:

- actual, a current conflict of interest situation,
- apparent, when it appears that a public official’s private interests could improperly influence the performance of their duties but this is not in fact the case,
- potential, where a public official has private interests which are such that a conflict of interest would arise if the official were to become involved in relevant (i.e. conflicting) official responsibilities in the future.

According to the Annex, where a private interest has in fact compromised the proper performance of a public official’s duties, that specific situation is better regarded as an instance of misconduct or abuse of office, or even an instance of corruption, rather than as a conflict of interest.

The Annex recommends that clear rules should be set on what is expected of public officials in dealing with conflict of interest situations:

- a) Dealing with conflicting private interests -- Public officials should be required to accept responsibility for identifying their relevant private interests. An organisation’s policy

statement should make it clear that the registration or declaration of a private interest does not in itself resolve a conflict. Additional measures to resolve or manage the conflict positively must be considered.

b) Resolution and management options -- Options for positive resolution or management of a continuing or pervasive conflict can include one or more of several strategies as appropriate, for example:

- Divestment or liquidation of the interest by the public official.
- Recusal of the public official from involvement in an affected decision-making process.
- Restriction of access by the affected public official to particular information.
- Transfer of the public official to duty in a non-conflicting function.
- Re-arrangement of the public official's duties and responsibilities.
- Assignment of the conflicting interest in a genuinely 'blind trust' arrangement <sup>2</sup>.
- Resignation of the public official from the conflicting private-capacity function, and/or
- Resignation of the public official from their public office.

### **The Main Conflict of Interest Situation Covered by the Present Law**

This law is a culmination of a long period of attempts to adopt similar regulations in Italy <sup>3</sup> to resolve a situation in which the Prime Minister owns extensive media interests, including Mediaset with three major commercial television channels <sup>4</sup>, operating alongside RAI, the public service broadcaster, which operates the other 3 major national television channels <sup>5</sup>. Both companies are, of course, in competition for audiences and advertising revenue.

This situation has long been openly acknowledged by everyone to constitute a conflict of interest.

---

<sup>2</sup> This is defined as "A trust in which the beneficiaries do not have knowledge of the trust's specific assets, and in which a fiduciary third party has complete management discretion" ([http://www.investorwords.com/497/blind\\_trust.html](http://www.investorwords.com/497/blind_trust.html)), or as "A trust in which the executors have full discretion over the assets and the beneficiaries in contrast have no knowledge of holdings within the trust" (<http://www.investopedia.com/terms/b/blindtrust.asp>).

<sup>3</sup> Unsuccessful earlier attempts are described i.a. in the minority report, presented in the Italian Senate by Senator Stefano Passigli, on the government bill of the present law, approved by the Senate, 2 June 2002 (<http://users.ox.ac.uk/~hine/Passigli%20senate%20minority%20report.htm>), and in *Italy. A Media Conflict of Interest: Anomaly In Italy*. Investigation by Soria Blatmann. Paris: Reporters sans frontières, April 2003; Resolution 1387 (2004) "Monopolisation of the electronic media and possible abuse of power in Italy", and a Report under the same title adopted by the Council of Europe's Parliamentary Assembly on 3 June 2004.

<sup>4</sup> However, the Prime Minister, Mr. Silvio Berlusconi, does not appear in the organisation chart of any of his businesses (except the Milan football club, of which he is the chairman). The companies are run by family members and associates.

<sup>5</sup> For a description of the Italian media situation see Gianpietro Mazzoleni "Italy" (in) Mery Kelly, Gianpietro Mazzoleni, Denis McQuail (eds.) *The Media in Europe. The Euromedia Handbook*. London: Sage Publications, 2004; *European Media Ownership: Threats on the Landscape. A Survey of who owns what in Europe* (Supported by the European Commission). Brussels: European Federation of Journalists, September 2002; David Ward (with Oliver Carsten Fueg and Alessandro D'Armo) *A Mapping Study Of Media Concentration And Ownership In Ten European Countries*. Hilversum Commissariaat voor de Media 2004 ([www.mediamonitor.nl](http://www.mediamonitor.nl)).

One reason for this is the extensive influence that the ruling party (in this case Forza Italia, led by Mr. Berlusconi) and the government itself can exert on RAI.

RAI operates by virtue of a convention with the government. It also has to conclude a national service contract with the Ministry of Communications, as well as regional service contracts and, in the case of the autonomous provinces of Trento and Bolzano, provincial service contracts.

The Board of RAI is appointed by the presidents of both houses of Parliament<sup>6</sup>. Appointments are based on party political affiliation (3 members representing the ruling party/coalition and 2 the opposition). The Director General of RAI is appointed by the Chairman of the Board and the Minister of Economic Affairs.

In addition, the public broadcaster is subject to control by a parliamentary commission for the general direction and surveillance of radio-TV services. The commission has, and looks set to retain, extensive powers and competencies vis-à-vis RAI, including some decision-making powers concerning programming and finance<sup>7</sup>.

These and other provisions provide evidence of considerable and direct involvement of various State authorities, including those directly subordinate to the Prime Minister and leader of the ruling party, in the affairs of the public service broadcaster.

This state of affairs must be regarded as an actual conflict of interest, especially given the many instances of direct or indirect government influence on RAI<sup>8</sup>. It creates potential for actions constituting conflict of interest or abuse of office as defined in the CoE and OECD documents cited above.

## GENERAL COMMENTS AND ASSESSMENT

1. This law defines a mix of *a priori* incompatibilities (primarily of an administrative nature) and the *a posteriori* examination of individual acts of government. It does not contain “preventive” measures for solving a potential conflict of interest; instead, the Anti-Trust and Broadcasting Authorities have to investigate abuses on a case by case basis when a government act is considered to be in violation of the law. This would mean examining a huge number of acts.

---

<sup>6</sup> A BBC report notes: “In a highly-symbolic departure from normal practice - in which one president is always a member of the opposition - Mr Berlusconi has instead appointed both from his government”. Storm gathers around Italian TV, 15 February, 2002, <http://news.bbc.co.uk/1/hi/world/europe/1822643.stm>.

<sup>7</sup> Under Art. 4 of the Law No. 103, 14 April 1975 (as amended), the parliamentary commission “formulates the general directions for the execution of the principles mentioned in art. 1, the arrangement of programmes and their equal distribution in the time available; it checks that the directions are being respected and rapidly adopts the necessary decrees to ensure they are observed; establishes [...] the regulations to guarantee access to radio-TV [...]; indicates the general criteria for the creation of annual plans and those lasting several years for expenditure and investment by referring to the prescription of the concessionary act; approves the maximum plans for annual programming and those lasting several years and watches over their execution; it receives reports on programmes broadcast by the provider company's administrative council and ascertains compliance with the general directions formulated [...]”.

<sup>8</sup> In addition to the other reports cited above, see also the European Parliament's Report of 5 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI); A5-0230/2004 FINAL); and Crisis in Italian Media: How Poor Politics and Flawed Legislation Put Journalism Under Pressure. Report of the IFJ/EFJ Mission to Italy, 6-8 November 2003;

2. The law only declares incompatibility between the management of a company and public office, not between ownership and public office;
3. In the case of a conflict of interest, no sanctions are envisaged for owners, only for the company managers. Information on conflicts of interest must be brought to Parliament, which means that there could potentially be political sanctions;
4. Circumstances when the Anti-Trust and Broadcasting Authorities are authorised to act to resolve conflicts of interest are very carefully and narrowly defined. This refers to cases when companies under the authority of government officials act improperly, but not when the government official acts improperly, e.g. by acting to discriminate against, or weaken, a competing company.
5. Abuse of a dominant position is banned, but no mention is made of Law no 112 of 3 May 2004 "Principles governing the broadcasting system and RAI-Radiotelevisione italiana Spa, and the authority delegated to the Government to issue the consolidated legislation on television broadcasting" (Gasparri Law) which changes the framework of analysis of dominant position by adopting the concept of the "integrated communications system". This vastly extends the scope of the "relevant market" and complicates the ascertainment of a dominant position.

## **DETAILED COMMENTS**

### **SECTIONS 1-3**

Section 1 identifies public officials affected by the provisions of the law (persons holding government office, i.e. the Prime Minister, ministers, deputy ministers, junior ministers and special government commissioners) and puts them under an obligation to devote themselves solely to the public interest and refrain from taking measures and participating in joint decisions in situations where there is a conflict of interest.

Section 3 defines conflicts of interest as the occurrence of one of two situations:

- An act of commission (introduction or a measure, or the act of proposing a measure) or omission (failure to take a measure that should have been taken) while he/she is disqualified under Section 2 (1);
- Or when the measure or omission has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest.

Section 2 (1) disqualifies persons holding government office from:

- holding specified types of offices or occupying specific kinds of posts, including in profit-making companies or other business undertakings;
- undertaking an occupational activity of any kind or any work in a self-employed capacity, on behalf of public or private undertakings, in an area connected with the government office in question, occupying posts, hold office or performing managerial tasks or any other duties in professional societies or associations;
- performing any kind of public- or private-sector job;

Pursuant to Section 2 (2), individual entrepreneurs must arrange to appoint one or more authorised managers.

## **ANALYSIS**

Definitions of conflict of interest cited above refer in very general terms to situations when public officials have personal or financial interests that would make it difficult for them to fulfill their duties with nothing but the public interest in mind. Here, the approach is, on the whole, different. The definition refers in most cases to very specific situations: particular kinds of jobs or activities are defined as being incompatible with government office. However, the broader approach is also manifested in some cases. This refers in particular to provisions relating to situations when an act of commission or omission by a government official “has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest”.

## **COMMENT**

The narrower and more administrative definition of conflict of interest suggests that no such conflict appears when specific circumstances listed in the law do not arise. In short, a conflict of interest appears when a government official is a manager of a company, but not when he/she is an owner of that company without holding any position in it.

This is contradicted to some extent by the prohibition of behaviour which could have “a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest”. The appearance of such a direct “specific and preferential” effect could be difficult to prove, however.

## **SECTION 4**

This section reaffirms existing regulations concerning the abuse of a dominant position and liability of persons found guilty of such behaviour.

## **COMMENT**

No mention is made in this Section of Law no 112 of 3 May 2004 "Principles governing the broadcasting system and RAI-Radiotelevisione italiana Spa, and the authority delegated to the Government to issue the consolidated legislation on television broadcasting" (Gasparri Law) which changes the framework of analysis of dominant position by adopting the concept of the “integrated communications system”. This vastly extends the scope of the “relevant market” and complicates the ascertainment of a dominant position.

## **SECTIONS 5 AND 10**

Under these sections, government officials are under an obligation to declare, within 30 days of taking office, to the Anti-Trust Authority (and, where appropriate, to the Broadcasting authority) disqualification situations covered by Section 2 (1), as well as, within 60 days of taking office, their own assets, including shareholdings. They must also declare any subsequent changes in the information concerning their assets as previously supplied, within 20 days of the events giving rise to those changes.

Under provisional provisions, also incumbents holding offices when the law goes into effect have an obligation to make such reports.

Such declarations must also be made by the spouse and relatives up to the second degree of the person holding government office.

## COMMENT

The law places no other obligations on government officials to act to remove conflict of interest in ways foreseen by the OECD Council Recommendation (divestment or liquidation of the interest by the public official<sup>9</sup>; recusal of the public official from involvement in an affected decision-making process; restriction of access by the affected public official to particular information; transfer of the public official to duty in a non-conflicting function; re-arrangement of the public official's duties and responsibilities; assignment of the conflicting interest in a genuinely "blind trust" arrangement<sup>10</sup>; resignation of the public official from the conflicting private-capacity function, and/or resignation of the public official from their public office)<sup>11</sup>.

## SECTIONS 6 and 7

This section defines the obligations of the Anti-Trust Authority and the Broadcasting Authority to remove conflicts of interest, when they occur.

In the first instance, this means ensuring that a government official loses the posts, offices or jobs listed in Section 2(1) as incompatible with government office.

In the second instance, this means an obligation to act when:

- an undertaking under the authority of a person holding government office or that of his or her spouse or relatives up to the second degree, or companies or other undertakings controlled by them, operate in such a way as to take advantage of measures introduced in a situation of conflict of interest within the meaning of Section 3, and there is proof that those concerned were aware of the conflict of interest (Section 6 (3));
- companies operating in the sectors referred to in Section 2, paragraph 1, of Law No 249 of 31 July 1997 that are under the authority of persons holding government office or their spouses or relatives up to the second degree or controlled by them, act in such a way as to provide preferential support for a person holding government office (Section 7(1)).

---

<sup>9</sup> It is argued that compulsory selling of assets could not be envisaged in this law as this would be anti-constitutional in Italy.

<sup>10</sup> According to reports, earlier proposals involved this idea, but it has been rejected since the "trust" could never be really "blind", i.e. the owner of Mediaset could not help but find out what decisions had been taken with regard to this company.

<sup>11</sup> According to one report (Stefano Passigli, *The Politics and Legislation of Conflict of Interest in Italy*, <http://users.ox.ac.uk/~hine/Passigli%20paper%201.doc>) the opposition had proposed a system similar to the one used in the United States: an independent Authority along the lines of the Office of Government Ethics which would negotiate on a case-by-case basis which assets should be sold, which assets could be held in trust, with a ban on exercising property rights over them (for example using the shares to vote with) while enjoying all the benefits accruing (for example, collecting the dividends), and which assets could be held freely. That proposal was not retained.



Where such circumstances arise, the two authorities are authorized to enjoin the company to refrain from any such conduct, to take steps to put a stop to the infringement, or to take the necessary remedial action. In case of non-compliance, they are under an obligation to inflict a fine according to the seriousness of the conduct, the maximum amount of which shall be proportional to the pecuniary advantage actually obtained by the company, or to the seriousness of the violation.

Both authorities must inform the Speakers of the two houses of Parliament of their actions to ascertain the existence (or otherwise) of conflicts or interest and of any action to remedy the situation.

## **ANALYSIS AND COMMENT**

Apart from the “administrative” incompatibilities (holding of specific posts, jobs and positions in addition to government office), circumstances when the authorities are authorised to act are very carefully and narrowly defined. This refers to cases when:

- an undertaking under the authority of a person holding government office or that of his or her spouse or relatives up to the second degree, or companies or other undertakings controlled by them, operate in such a way as to take advantage of measures introduced in a situation of conflict of interest within the meaning of Section 3, and there is proof that those concerned were aware of the conflict of interest;

- broadcasting companies that are under the authority of persons holding government office or their spouses or relatives up to the second degree or controlled by them, act in such a way as to provide preferential support for a person holding government office.

Thus, they are not authorized to act when the government official acts improperly, e.g. by offering unfair privilege to his/her own company, or acting to discriminate against, or weaken, a competing company. This is indirectly mentioned in Section 3 as constituting conflict of interest, but there does not appear to be any provision for dealing with such situations.

## **SECTION 8**

The Anti-Trust Authority and the Broadcasting Authority must submit to Parliament a six-monthly report on the progress of the monitoring and supervisory activities referred to herein.

## **SECTION 9**

This section makes provision for increasing the staff of the Anti-Trust Authority and the Broadcasting Authority, in order to be able to take on additional duties resulting from this law.

## **SECTION 10**

This section sets deadlines for the execution of obligations resulting from this law.