

GOVERNMENT ETHICS: THE STRANGE ITALIAN “CONFLICT OF INTERESTS”

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Abstract

This paper is divided into three parts. Each part is devoted to four issues, which are always the same: the definition of conflict of interests; the scope of its regulation; the remedies for such situations; and the control and punishment mechanisms.

In the first part of the paper, these issues are addressed in general terms. In the second part, they are considered in a comparative perspective. The third part focuses on the Italian legislation and particularly on the cabinet members. The relative statute contains a very unusual definition of conflict of interests. It uses only one of the possible remedies, the disqualification, but under its provisions establishing the grounds for disqualification and proving a violation is practically impossible. The main provision of the statute, in fact, is a fake one.

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1. The issues.

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

In the first part of the paper, these issues are addressed in general terms. In the second part, they are considered in a comparative perspective: few remarks are proposed on the basis of the analysis of some countries' laws. The third part focuses on the Italian legislation and particularly on the national regulation of cabinet members' conflict of interests.

1.1. The definition of conflict of interests.

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

1.1.1. "Interests".

As for interests, it should be pointed out that not every contrast or tension between different interests is a legally relevant conflict of interest. Political activity necessarily requires comparing and balancing different interests. In fact, comparing and balancing are required by every public function – including those of administrative agencies – and also by every private function, such as those of the contract representatives and of the company

managers. For instance, when the government has to make choices concerning industrial development and to strike a balance between fostering the economy and protecting the environment, this is not sufficient to speak about conflict of interest. In these cases, politicians have only to take care of different, and possibly conflicting, public interests.

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

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

In this paper, however, I do not consider these hypotheses, as I focus on personal conflict of interests (mainly of politicians), which is the conflict between a public interest and a private one.

1.1.2. “Conflict”.

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

As far as I know, in all the languages in which the term is used, “conflict of interests” is intended in the first sense, the “static” one; it is a situation in which two interests are opposing or diverging from each other, cannot be both satisfied, and one of them *might* (although not necessarily it actually *will*) illegally damage the other. A very good definition is proposed in an Oecd document: «a conflict between the public duty and private interests of public officials, in which public officials have private-capacity interests which *could* improperly influence the performance of their official duties and responsibilities»¹.

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

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

¹ Oecd, *Managing Conflict of Interest in the Public Service. Oecd Guidelines and Country experiences*, Paris, Oecd Publishing, 2004, p. 15.

1.1.3. "Distingue frequenter".

Although the notion of conflict of interests is quite clear, in the Italian political and legal debate, and even in the Italian law, this issue is often confused and juxtaposed with different issues, such as the qualifications required in order to get a political or administrative post (for example, not being convicted for crimes against public administration), the funding of political parties, the regulation of political campaigns, and even the property of newspapers and television channels.

These other problems are certainly very important in every democratic system – even more important than that of conflicts of interests – and are certainly relevant in terms of government ethics. Some of them may even be solved by some of the remedies which are also suitable for conflicts of interest, such as incompatibility or disqualifications. However, they are distinct problems, which – owing to the peculiar political scenario of the last twenty years – Italian politicians and scholars tend to confuse and to group together under the label "conflict of interest".

The relations between these problems should be taken into account, but the different issues should not be mixed up. In the following pages, the ancient teaching "distingue frequenter" will be followed and the issue of conflict of interests will be considered separately by those other issues.

1.2. The scope of regulations.

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

I will exclude the private sector and focus on public agents. Among them, the law regulating the conflict of interests may include only politicians or also professional officers, i.e. civil servants. Secondly, the law may treat differently the members of the national government and of the regional and local ones. In federal or regional systems, like the Italian one, the diversity is implied – at least for regional government – by the apportioning of legislative power between the National and the regional Parliaments.

Finally, the law may decide to establish different regulations for members of Parliament (and of regional and local

assemblies) and for cabinet ministers (and members of regional and local boards).

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

1.3. The remedies.

1.3.1. Conflicting goals.

In a conflict of interests, an agent, who should take care of a principal's interest, has an interest of his own which collides with the former. The law does not like such situations, as they expose an inevitably weak interest (that of the principal, who is unable to take care of it by himself and has to delegate the agent) to the threats brought about by a strong one (that of the agent, who acts on behalf of the principal).

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

1.3.2. The three remedies.

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

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

This approach is a radical one. Remedies such as the incompatibility and the duty to sell one's shares in a company are very burdensome for the interested person. Good candidates, such as managers and practitioners, may be kept away from public posts if they have to give up their private interests or posts. This problem is even greater when the public posts are political offices, because strict rules on conflicts of interest can virtually exclude many people from electoral competitions. Therefore, this approach should be used cautiously.

The second approach consists of duties to disqualify for the officer who, having to make a single decision, finds himself in a conflict of interests. It is obviously a less effective remedy, as it involves the acceptance of the conflict of interests, but it can prevent its degeneration. It is often used by the law, especially for corporations: here, a conflict of interests situation does not usually force the manager to choose between the company job and the personal interest (or between the jobs in two different companies); the conflict of interests does not imply his dismissal and his decisions are not void, if the company interest is not adversely affected.

This approach, however, has its flaws. First and obvious, the duty to disqualify may be violated. Second, this system may work for occasional conflict of interests situations, but not when conflicts of interests are likely to arise frequently. Moreover, the higher the concerned public post, the greater the problems brought about by the duty to disqualify: a minister's or regional councilor's

disqualification distresses the political representation mechanism; if it is the Prime Minister or the Regional President to be forced to disqualify himself, the stress on the mechanism is even harder; and if this happens frequently, the functioning of the national or regional government can be troubled. Consequently, when serious and recurring conflicts of interests take place at the highest political level, there may simply be not a good solution at hand.

The third approach, the transparency one, entails the duty to display the conflict of interests. The law accepts that the agent finds himself in a conflict of interests and it also accepts that he makes his decisions in spite of it. But it requires that the principal be informed of it. It is obviously the softest remedy, but it is always useful, irrespective of the use of the other two. Corporation law adopts sometimes this remedy, imposing a duty of disclosure to the companies' managers in conflict of interests.

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

1.3.3. The possible combinations of remedies.

One should notice that the said remedies are not alternative to each other: they can coexist in the same regulations, as each of them is fit for different hypotheses. The first is useful when dangerous conflicts of interests can arise frequently. The second is more suitable in serious but occasional conflicts of interests. The third is always helpful. The good regulations of conflicts of interests are the ones combining the three approaches.

But how should they be combined? How to decide when the private good, from which the conflict of interests arises, should be sold, when the officer should disqualify himself and when it is enough to display the conflict? There are two possible approaches: a scrupulous list of the various hypotheses; and a general clause, conferring to a reliable authority the duty to select the right

remedy for every concrete case. A continental European lawyer would probably opt for the first approach, an anglo-saxon lawyer for the second one.

1.4. Checks and penalties.

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

Penalties can hit the agent (as it happens with dismissal or suspension from the public post, or with fines, criminal penalties and civil liability), the issued act (which can be deemed void or annulled) or both. They can work not only on the public side, but also on the private one: for instance, fines may be inflicted to the business, in which the public officer has a personal interest, or which have been favoured by his illegal decision.

Remedies and penalties need to be implemented by public authorities, which can be either courts or administrative agencies. Some remedies, such as those affecting a contract and the criminal sanctions, are normally administered by courts. Other remedies, such as fines, can be an administrative agency's business, although such an agency needs obviously to be independent from the concerned person.

2. Comparative remarks.

2.1. The definition of conflict of interests.

It should be noticed, at the outset, that not all legal systems have a well-defined regulation of politicians' conflicts of interests: important and respectable countries, such as France and Germany, seem to be satisfied with some provisions which establish cases of incompatibility, some of which are intended to prevent conflicts of interests.

This remark corroborates the notion of conflict of interests that I have proposed. Incompatibility, in fact, is a device designed to avoid situations of conflict of interests. Therefore, in these countries - as well as in those which do have a regulation of governmental conflicts of interests - the current notion of conflict of interests is plainly the "static" one, expressed in the mentioned Oecd definition. A conflict of interests is a situation, not a behaviour.

2.2. The scope of regulations.

As for the scope of regulation of conflicts of interests, in many legal systems there are different provisions for members of Parliament and for cabinet members, although in other systems there are common rules for both. For example, in the United States, at the federal level, there are: some general provisions, relevant for all public officers; special provisions for the members of each Congress House; other special provisions for administrative agencies' personnel; and further provisions for single agencies. In the United Kingdom, each House of Parliament has its own code of conduct, while ministers' rules are included in the *Ministerial Code*, which is updated by every new Cabinet.

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

2.3. The remedies.

As for the remedies, as I mentioned before, the good regulations are those which combine the three approaches. The law should use very carefully the first (removal), more often the second (neutralization), and extensively the third (exhibition). North American countries provide good examples. In the United States and in Canada extreme solutions, such as the duty to sell company shares and the blind trust, are used exceptionally and are mostly voluntarily chosen by the concerned agents. Nevertheless, at times they are the only possible way, for a candidate, to be eligible for a certain post, without facing an even more draconian set of rules and criminal penalties. These regulations use massively the *financial disclosure*. Following the officer's statement, the competent authority makes an assessment of his conflicts of interests: this can start a procedure, in which the agent can dispute the authority's findings. The necessary measures to manage the conflict of interests are determined in the final decision.

It should be stressed that the strictest remedies, proceeding from the first approach, have to be used cautiously. As these remedies force the candidate to choose between the public post and his private interest, they end up in strong limitations of the

right to take up political and administrative jobs. As far as political elections are involved, they produce limitations not only to the right to be elected (for possible candidates), but also to the right to elect (for the voters, who are prevented from choosing certain candidates).

On the other hand, this approach is the only appropriate one in special cases which do occur in many countries, such as Italy in recent years, when one of the richest men of the country becomes president or prime minister. In these cases, the other remedies are not suitable: the second approach, because the concerned person could be forced to disqualify for most of (or for the most important) governmental decisions; the third, because it is very difficult to be aware of all the interests of a very wealthy man and even more difficult to trace the effects of governmental decisions on his personal interests. In such cases, there is a hard choice between the electoral principle and government ethics and the law is probably not the best instrument to solve the problems, which can be more effectively solved by the voters.

2.4. Checks and penalties.

All the mentioned regulations provide for severe penalties for wrongdoers, which are at times subject to criminal law rules. These penalties are administered by independent authorities, free from political influence, sometimes by courts.

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

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

3. The Italian law.

3.1. The definition of conflict of interests.

While describing the Italian law, I will primarily refer to the bill n. 215 of 2004, which regulates the cabinet members' conflicts of interests.

This statute contains a definition of conflict of interests which diverges from the way in which this notion is usually intended, as it entails an event of damage and not a situation of danger. Doing violence to the Italian language, it states that «there is a situation of conflict of interests [...] when the holder of a cabinet post takes part to the performance of an act, even with a proposal, or does not issue a mandatory act, being in a disqualifying situation [or gaining an advantage], causing a harm to the public interest». A conflict of interests (in the sense of the law), therefore, takes place not when there is a conflict of interests (in the common sense), but when someone, being in a conflict of interests, gains an undue advantage from it or breaks a disqualification rule. The law does not regulate the conflict of interests, but some possible behaviours of the minister who finds himself in a conflict of interests.

It should also be remarked that, if the minister is in conflict of interests and acts consequently, gaining an undue advantage, this is still not sufficient to have a conflict of interests (in the sense of the law): a harm to the public interest is necessary as well. To have an “Italian conflict of interests”, thus, three elements are necessary: a conflict of interests in the common sense; an advantage for the cabinet member; and a harm to the public interest.

What is a public interest, however? Everybody knows that public interests are many, do not exist in isolation, frequently collide with each other and often are not material in nature. Any decision, favouring a private interest, can be easily justified by reference to a convergent public interest. The minister of health, for instance, might decide the purchase of a large amount of medicines from the company of which he owns a share: he will certainly get richer, but he will be able to deny the harm to the public interest: he will claim having taken care of the people's health. Any private interest may become public by political decision. To make choices involving interests is the politicians' job, to decide objectively if the balance is positive or negative is

impossible. Requiring the evidence of a harm to the public interest, then, means demanding a Devil's proof, a *probatio diabolica*.

The main provision of this statute, therefore, is a fake or useless one, as its factual grounds cannot possibly occur.

In the Italian legal system, however, there are also different legal regulations, which use a more acceptable notion of conflict of interests. A very good provision, for example, is the one relating to the local government: it simply prevents local politicians to make decisions when they have a conflict of interests, regardless of the advantage that they may gain. If they do, their decision is illegal and can be annulled by a court. This provision is almost one century old and has always worked very well, allowing every interested party to challenge before a court the suspect decisions.

3.2. The scope of regulations

As for the scope of regulation, the mentioned Italian statute regulates only cabinet members' conflicts of interests. As I have already reported, however, there is a good provision concerning local politicians. There is also a sound provision in the national frame statute concerning regional politicians, which entitles regional statutes to provide for incompatibility as a remedy to conflicts of interests.

On the opposite, there are no provisions concerning members of Parliament, which are among the few Italian public officers lacking any regulation of conflicts of interests.

As for administrative agencies, there are general provisions and special ones. The latter can be found in law concerning single agencies, such as certain independent regulatory authorities. The former are contained in the Code of behaviour for the civil servants, issued by the Government, which combines quite well the different approaches which I have described. In very rare cases, it requires the public employee to get rid of his private interest. More often, it imposes a duty to disqualify. In still broader terms, it establishes duties of disclosure.

3.3. The Remedies

As for the remedies, the recurrent confusion between the conflict of interests and other important issues, which I have

noticed, produces some confusion. For example, the ineligibility is often put forward as a suitable remedy for conflicts of interests, although it has little to do with it: ineligibility, i.e. the exclusion from an electoral competition, is an instrument to regulate electoral campaigns and to make them fair. The conflict of interest is a problem which can arise after the election, not before. Another example is the statute regulating cabinet members' conflicts of interest, which I have already mentioned: it regulates matters which have nothing to do with it, such as competition and the media.

Among the three approaches which I have described, this statute rejects obviously the first one, which is based on a "static" definition of the conflict of interests. As I have already noticed, the statute is based on the denial that a situation of conflict of interests is a problem in itself. The Italian law admits the possibility that cabinet members are in conflict of interests. It only pays attention – with a useless provision, as I have noticed – to the hypothesis in which a cabinet member, being in a conflict of interests, takes advantage of it and lets the private interest prevail over the public one.

The statute also disregards the third approach, as it does not provide for any transparency. The statements that cabinet members must submit to the antitrust Authority within thirty days from inauguration, are clearly not a transparency device: it is not required that they be made public and they actually are not (although the antitrust Authority could publish them). The report that the same Authority has to transmit to the Presidents of the Parliament Houses, in the very unlikely hypothesis in which it ascertains a violation and inflicts a penalty to a business, is not public either: such report does not even have to be forwarded to the members of Parliament.

The statute, thus, uses only the second approach, based on disqualification. But, as I have already noticed, establishing the grounds for disqualification and proving a violation is practically impossible.

3.4. Checks and penalties.

The enforcement body is the antitrust Authority. It may inflict fines both to the cabinet member performing a "conflict of

interests" (in the sense of the law), and to the business favoured by his decision.

As for the business, the law states that the antitrust Authority inhibits the business from putting in place any conduct intended to take advantage of the decision or orders it to put in place adequate actions in order to stop the violation or, if possible, remedial measures. If the business does not comply with the inhibition or order within the fixed delay, the Authority inflicts it a fine. The amount of the fine depends on the culpability of the business's conduct, but cannot exceed the financial advantage gained by the business. It is, of course, a minor penalty, unable to discourage infringements: for the business, the balance can be positive or nought, but it can never be negative.

As for the cabinet member, the penalty is even more modest: the only punishment is the mentioned report of the antitrust Authority to the Presidents of the Parliament Houses, who are normally elected by the same parliamentary majority which supports the cabinet. The statute does not provide for any transparency of this report, nor has the Authority autonomously established any.

Finally, the statute does not even impose financial liability neither on the cabinet member nor on the business, although – as I have mentioned – the damage to the public interest is one of the grounds for the antitrust Authority's action and one of the elements of the statutory definition of conflict of interests. In the "Italian conflict of interests", there is tort but there is no compensation.

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