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# OPINION ON DRAFT PROVISIONS ON CONFLICT OF INTEREST

## Italy

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Based on an unofficial English translation of the Draft Provisions


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# EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

At the outset the Draft Provisions introduce potentially effective ways of dealing with some already identified conflicts of interest. At the same time, the Draft Provisions lack equally convincing methods of preventing conflicts of interest from occurring.

The scope of public officials and representatives covered by the Draft Provisions is not broad enough and effective oversight and investigation of the conflict of interest regime might be difficult in practice due to lack of procedural rules, suitability of the selected oversight authority and inconsistencies in the Draft Provisions.

At times, the Draft Provisions also lack clarity and offer overbroad formulations with respect to powers assigned to the Authorities, including in the process of investigation or collection of information. Some provisions lack necessary details with respect to the procedure to be applied in this process and the rights of all persons being subject of investigative proceedings. More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further enhance the Draft Provisions:

A. to either expand the applicability of the Draft Law to a broader range of public officials and representatives or to consolidate all relevant provisions on public of interest, if this already regulated in other laws of Italy, in order to avoid further fragmentation of the conflict of interest regime; [par 13]

B. to explicitly state that not only existing but also potential and apparent/perceived conflicts of interest are covered by the provision; [pars 15-16]

C. to review the roles of different authorities, especially Competition Authority and National Anti-Corruption Authority, in oversight and enforcement of this Draft Law; [pars 17-21]

D. to supplement the text of Article 4 with provisions on concrete investigative measures which can be taken by the Authority or in case such measures are already regulated in other legislation, make reference to it; [par 22] and

E. to ensure that incompatibilities and reporting obligations are not only regulated with regard to national government office holders but all type of public officials and representatives. [pars 31-32 and 37]

F. to increase from one to several years the period for a review of irregularities and violations of declaration obligations following the end of the term of office of the office holder; [par 42]

***These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.***

***As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.***

# TABLE OF CONTENT

I. INTRODUCTION ..... 5
II. SCOPE OF THE OPINION ..... 5
III. LEGAL ANALYSIS AND RECOMMENDATIONS ..... 6
1. Relevant International Human Rights Standards and Guidance Documents ..... 6
2. Analysis of the Draft Provisions ..... 7
*1.1 General Principles and Scope of Application (Articles 1 and 2 of the Draft Provisions) ..... 7*
*2.3 Definition of Conflict of Interest (Article 3 of the Draft Provisions) ..... 8*
*2.4 Supervisory and Enforcement Authorities (Articles 4, 11 17, 19 20 of the Draft Provisions) ..... 9*
*2.5 Data Protection (Article 4 of the Draft Provisions) ..... 11*
*2.6 General Incompatibilities (Article 5 of the Draft Provisions) ..... 12*
*2.6 Incompatibilities arising from Assets (Article 6 of the Draft Provisions) ..... 13*
*2.7 Reporting Obligations (Article 7 of the Draft Provisions) ..... 13*
*2.8 Obligation to Abstain (Article 8 of the Draft Provisions) ..... 14*
*2.9 Procedure for ascertaining the Existence of Grounds for General Incompatibility and Related Sanctions (Article 9 of the Draft Provisions) ..... 15*
*2.10 Procedure for ascertaining the Existence of Grounds for Incompatibility Linked to Assets and related Sanctions (Article 10 of the Draft Provisions) ..... 15*
*2.11 Rules governing the Trustee Mandate System (Article 11 of the Draft Provisions) 16*
*2.12 Sanctions (Article 13 of the Draft Provisions Article 7 par 11 of the Draft Provisions) ..... 16*
*2.13 Ineligibility of Members of Parliament (Article 14 of the Draft Provisions) ..... 17*
*2.15 Independent Authorities (Article 17 of the Draft Provisions) ..... 17*

ANNEX: DRAFT PROVISIONS ON CONFLICT OF INTEREST

# I. INTRODUCTION

1. By correspondence of 5 August 2021, the Chair of the Constitutional Affairs Committee requested the assistance of the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR"), inter alia, in providing a legal opinion on Draft Provisions on Conflict of Interest of Italy (hereinafter "Draft Provisions").
2. ODIHR responded to this request by letter of 6 August 2021 confirming the Office's readiness to prepare a legal analysis on the compliance of the Draft Provisions with international human rights standards and OSCE human dimension commitments.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its mandate to assist the OSCE participating States in the implementation of their OSCE commitments.

# II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the Draft Provisions submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating conflict of interest in Italy.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Draft Provisions. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.
6. This Opinion is based on an unofficial English translation of the Draft Act commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result. The Opinion is also available in Italian. However, the English version remains the only official version of the Opinion.
7. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in Italy in the future.

# III. LEGAL ANALYSIS AND RECOMMENDATIONS

## 1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND GUIDANCE DOCUMENTS

8. "Conflict of interest" as a concept is widely described in international and many national legal frameworks and thoroughly analysed, monitored and even sanctioned in many countries of the world. Even though there are differing descriptive definitions of the term, they all share similar core elements. For example, one definition of "conflict of interest" can be found in Article 8 par 1 of the Council of Europe's Model Code of Conduct for Public Officials which is annexed to Council of Europe Recommendation No. R (2000) 10 on codes of conduct for public officials[1] While Recommendation R (2000) 10 does not apply to publicly elected representatives, members of government and holders of judicial office, it still sets standards which are applicable in any conflict of interest situation.[2] Article 8 states that a public official should not allow for private interests to conflict with his/her official duties. According to the same provision, conflict of interest can be real, potential and apparent and the public official has to avoid all forms of conflict of interest. Pursuant to Article 8 par 2 of Recommendation (2000) 10, "the public official should never take undue advantage of his or her position for his or her private interest". These concepts are mirrored in Article 13 par 1 of the same Model Code which describes "[c]onflict 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." In Article 13 par 2 it is further clarified hat "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."

9. According to the UN Ethics Office, "[a] conflict of interest occurs when private interests, such as outside relationships or financial assets, interfere—or appear to interfere—with the interests of the UN, making it difficult to fulfil UN duties impartially."[3] The UN Convention against Corruption in Article 7 par 4 requires countries to "endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest" accordance with the fundamental principles of its domestic law.[4]

10. According to the OECD, conflict of interest "involves 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."[5] The OECD has published guidelines on the managing of conflict of interest in the public service describing some selected countries' experience[6]. While not a standard setting document in itself, the OSCE Handbook on Combating Corruption

[1] Appendix 2 (coe.int).

[2] See CoE European Commission for Democracy through Law (Venice Commission) Rules for the Resolution of Conflicts of Interests ("Frattini Law)" 8 February 2005 p 3.

[3] CONFLICTS OF INTEREST FACTSHEET 2020_03_24.pdf(un.org).

[4] UNGA Res 58/4, United Nations Convention against Corruption (hereinafter "UNCAC"), adopted 31 October 2003, entered into force 14 December 2005, GAOR 58th Session Supp 49 vol 1, 4. Italy ratified the UNCAC on 5 October 2009.

[5] OECD, Managing Conflict of Interest in the Public Service (oecd.org), 2003, p 15.

[6] OECD, Managing Conflict of Interest in the Public Service (oecd.org) 2003.

serves as a useful toolkit in the area of corruption prevention in general and on measures to identify and address conflicts of interests, in particular.[7]

11. While, in 2004, Italy adopted Law No 215/2004 on the Resolution of Conflicts of Interest,[8] GRECO highlighted, in its last evaluation of Italy, that the Law only covers "persons holding government office" (Section 1 of the Law No 215/2004).[9] The Council of Europe's Group of States against Corruption (hereinafter "GRECO") has issued several recommendations to Italy in the area of conflict of interest for members of Parliament, judges and prosecutors, including but not limited to adoption of clear and enforceable conflict of interest rules for parliamentarians, including through a systematisation of the currently dispersed ineligibility and incompatibility regime; further streamlining and thereby performing in an effective and timely manner the process of verification of ineligibility/incompatibility, establishment a robust set of restrictions concerning donations, gifts, hospitality, favours and other benefits for parliamentarians, and ensuring that the future system is properly understood and enforceable; carrying out a study in order to identify post-employment restrictions for members of Parliament which might be required to avert conflicts of interests; and introduction of post-employment restrictions in such cases be, as necessary; development of a deliberate policy for preventing and detecting corruption risks and conflicts of interests within the fiscal jurisdiction, etc.[10]

12. In its following compliance reports,[11] GRECO classified those recommendations as only partly implemented and stated that the biggest problem of Italian conflict of interest regime remains its significant fragmentation.[12] However, the Draft Provisions address these recommendations only marginally since their focus is not on specified groups, such as members of Parliament, although they are mentioned in the Draft Provisions, but on public officials in general, mainly holders of national government offices.

## 2. ANALYSIS OF THE DRAFT PROVISIONS

### 1.1 General Principles and Scope of Application (Articles 1 and 2 of the Draft Provisions)

13. Based on the wording of Article 1 and its definition on "political office holder" in Article 2, it is clear that the Draft Provisions only cover a very limited number of public officials in the country: "Holders of political office, as well as the president and the members of the independent guarantee, supervisory and regulatory authorities". In order to effectively deal with conflicts of interests, provisions need to apply to a broad range of public officials and State representatives in a country. If conflict of interest for public officials, others than mentioned in Article 1, is not regulated elsewhere in Italy, **it is recommended to consider expansion of the applicability of the current Draft to a broader range of public officials and representatives in Italy. If conflict of interest for public officials, others than mentioned in Article 1, is already regulated in Italy, it is recommended**

[7] OSCE, Handbook on Combating Corruption, 2016 Chapter 6: Conflict of Interest.

[8] Norme in materia di risoluzione dei conflitti di interessi, 20 July 2004.

[9] See CoE European Commission for Democracy through Law (Venice Commission) Rules for the Resolution of Conflicts of Interests ("Frattini Law)" 8 February 2005 p 6.

[10] GRECO Fourth Evaluation Round on Italy, October 2016, FOURTH EVALUATION ROUND (coe.int).

[11] From December 2018 and March 2021.

[12] Paragraph 18 of the Second Compliance Report, March 2021 (GRECO (coe.int): »GRECO recalls that the existing rules on conflicts of interest and incompatibility are contained in a high number of dispersed laws (and corresponding amendments), and that this lack of consolidation and rationalisation creates difficulties when it comes to their practical comprehension and application."

**to consolidate all relevant provisions on conflict of interest of public officials in the country to avoid further fragmentation of its conflict of interest regime.**

**RECOMMENDATION A.**

To either expand the applicability of the Draft Law to a broader range of public officials and representatives or to consolidate all relevant provisions on public of interest, if this already regulated in other laws of Italy, in order to avoid further fragmentation of the conflict of interest regime.

14. Article 2 par 1 of the Draft Provisions contains a list of holders of political office covered by a Draft Provisions. In addition to the comment above relating to Article 1, Article 2 par 1 e) further narrows the applicability of the Draft Provisions. Article 2 par 1 (e) defines "holders of local office" as "the president of the province and the members of the provincial council, the metropolitan mayor and the members of the metropolitan councils, the mayor and the members of the municipal council of municipalities with more than 100,000 inhabitants". The threshold of 100,000 inhabitants does not seem to be an appropriate one in order to effectively deal with conflict of interest situations. These situations may in fact occur more easily in councils of smaller entities, where people normally know each other well and chances for a potential conflict of interests and undue influence which can cause considerable damage might often be bigger than in larger entities. **It is recommended to reconsider and eliminate the threshold of 100,000 inhabitants.**

### 2.3 Definition of Conflict of Interest (Article 3 of the Draft Provisions)

15. At the outset, it is welcomed that Italy seeks to introduce a definition of what the term "conflict of interest" describes as this was one of the initial remarks of GRECO[13] which put forward the recommendation to adopt "clear and enforceable conflict of interest rules" (for parliamentarians).[14]

16. In **Article 3 par 1 of the Draft Provisions**, conflict of interest cases are defined as "cases where the holder of one of the posts referred to in Article 2 has a private interest capable of jeopardising the impartiality necessary for the fulfilment of the specific tasks of the office holder or of altering the market rules relating to free competition." The law should also aim to prevent occurrence of a conflict of interest, addressing a situation, which may result in actual or perceived lack of impartiality. In line with international guidance, **it is important to ensure that not only existing but also potential and apparent/perceived conflicts of interest are also covered by the provision**.[15]

[13] CoE GRECO Evaluation Report Italy Fourth Evaluation Round 21 October 2016, par 47.

[14] CoE GRECO Evaluation Report Italy Fourth Evaluation Round 21 October 2016, pars 47-51; CoE GRECO Compliance Report Italy Fourth Evaluation Round, 7 December 2018, pars 13-15; CoE GRECO Second Compliance Report Italy, Fourth Evaluation Round, 25 March 2021 par 14-19.

[15] See Council of Europe, Project against Economic Crime in Kosovo, Toolkit for Managing Conflict of Interest in the Public Service, Chapter 3.2-3.5.

**RECOMMENDATION B.**

In Article 3: to explicitly state that not only existing but also potential and apparent/perceived conflicts of interest are covered by the provision.

### 2.4 Supervisory and Enforcement Authorities (Articles 4, 11 17, 19 20 of the Draft Provisions)

17. According to Article 4 par 1 of the Draft Provisions, the competent authority for the implementation of this Law is the Competition Authority. Article 4 par 3 stipulates further that the Competition Authority can undertake "investigations, verifications and assessments it deems appropriate" and can resort to broad obligations to provide information and cooperation by individuals and other institutions. It is highly unusual that the public institution dealing with competition would be tasked to deal with implementation of the legislation on conflict of interest. Usually, this is a task assigned to anti-corruption bodies, with conflict of interest management functions seen as part of the corruption prevention mechanism. This was most often the case in countries where specific anti-corruption and conflict of interest laws had been adopted. [16]

18. Although the legislator is free to decide which national institution should deal with conflicts of interests in the public sector, the issue of conflict of interest is more closely linked to anti-corruption. It could therefore be reconsidered what role National Anti-Corruption Authority (hereafter referred as ANAC) should play in the supervision and enforcement of the Draft Provisions.

19. Similarly, throughout Article 11, which deals with the trustee mandate system in reference to incompatible assets, two authorities are mentioned and authorised for different tasks: the Competition Authority (in paragraphs 3 and 9) and the ANAC (in paragraphs 4, 6, 8, 10, 11 and 12). Detailed analysis of their powers points at the fact that they are so interwoven in their function related to the trustee mandate that it is hard to understand why there should be two authorities dealing with the issue. Having two authorities in charge does not only risk creating overlapping responsibilities and duplication of work, it can also create oversight and enforcement loopholes and collisions. In addition, it creates confusion among the objects of the scrutiny, where proper information about each institution role in this process would have to be outlined. At a minimum, their mandates have to be carefully outlined and information-sharing and coordination have to be ensured. **Therefore, it is recommended to review and clarify the powers of the Competition Authority and the National Anti-Corruption Authority when performing tasks mandated by Article 11. It is generally advisable to designate one agency as the primary one in charge of oversight and enforcement. It is vital to ensure that the mandates and tasks of the relevant bodies do not overlap and that collaboration and cooperation between them is effective.** [17]

20. Article 17 par 8 of the Draft Provisions designates the authority responsible for enforcing the provisions of this law in respect of the members of the Competition Authority to be

[16] See UNODC, Conference of State Parties to the United Nations Convention against Corruption, Preventing and Managing Conflict of Interest, Para 59, V1804122_E.pdf (unodc.org)

[17] This needs to be ensured for any kind of oversight body, be it financial, political finance or anti-corruption oversight, see eg OECD Verifying Asset Declarations in Greece: Guidelines for Standard Procedures of Oversight Bodies par 2.5.3; ODIHR-Venice Commission Joint Opinion on the Draft Amendments to Some Legislative Acts concerning Prevention of and Fight against Political Corruption of Ukraine, 26 October 2015, par 13.

the National Anti-Corruption Authority. Similarly, Article 19 of the Draft Provisions extends the powers of ANAC in the area of conflict of interest and its prevention for many other public officials and again raises the question on how to ensure effective division of responsibilities between different bodies.

21. Lastly, while it is welcome that Article 20 of the Draft Provisions contains a specific provision enabling the responsible bodies to recruit new staff to fulfil their mandates, additional resources other than staff need to be made available to supervisory and enforcement bodies to efficiently operate. Highly specialised knowledge and software is going to be required by these bodies, **hence it is recommended to amend the Draft Provisions and explicitly state that resources for training and equipment will be made available.**

**RECOMMENDATION C.**

Throughout the Draft Law and, in particular, in Articles 4, 11, 17 and 19, 20 it is recommended to review the roles of different authorities, especially Competition Authority and National Anti-Corruption Authority, in oversight and enforcement of this Draft Law.

22. Article 4 par 3 of the Draft Provisions, states that the Authority is free in deciding, in how many and in which cases it deems appropriate to launch the investigation, verification and assessment. While the Authority should be independent in its decision, **it is recommended to add clear criteria for the Authority to start the investigation, verification and assessment in order to render the Authority's decisions transparent.** In addition, concrete investigative measures that can be taken by the Authority are not outlined in Article 4 or elsewhere in the Draft Provisions.[18] Without such mandate, it will be extremely hard for the Authority to detect conflicts of interest and fulfil its mandate. Unless regulated elsewhere in the legislation, it is recommended to spell out in the Draft Provisions specific investigative measures.

**RECOMMENDATION D.**

In Article 4: to supplement the text of Article 4 with provisions on concrete investigative measures which can be taken by the Authority or in case such measures are already regulated in other legislation, make reference to it.

23. In Article 4 par 4 of the Draft Provisions**,** a Decree of the President of the Republic, on the proposal of the Minister of the Interior and the Minister for Public Administration, after consulting the Minister for the Economy and Finance and the Competition Authority, after due deliberation of the Council of Ministers, is mentioned. The Decree would define procedural rights of the individuals while being subject of investigation of the Authority.

24. Rights of "defendants" and other persons in procedures led by state authorities should be defined by the law or another legal act with the force of a law. It **is therefore recommended to define the rights of government office holders and all other persons being subject of investigative proceedings of the Authority and of the proceedings for the assessment and application of any sanctions by a law.**

[18] Despite the fact that the OECD Guidelines (OECD Managing Conflict of Interest in the Public Service, 2003) in Para 1.2.1.d require from organisations to ensure that their administrative process assists full disclosure, and that the information disclosed is properly assessed..

25. Pursuant to Article 4 par 6 of the Draft Provisions, it is stated that "the measures adopted pursuant to this law shall be made public and easily accessible" on the Authority's website. Although transparency and accessibility are important aspects of ensuring that the fight against conflict of interest is part of a wider attempt to increase trust-worthiness of public administration, it is not clear which are the measures the Draft Provisions are referring to in Article 4 par 6. Additionally, the mere publication of the measures does not seem sufficient for the Draft Provisions to be known both by the wider public and the officials that need to adhere to them and enforce them. **Therefore, it is recommended to supplement the text of the Law with provisions on measures, which should be taken by the Authority as well as include a number of awareness-raising and capacity-building measures, such as trainings.**[19]

26. Similarly, pursuant to **Article 4 par 7 of the Draft Provisions**, an appeal to the administrative judge with exclusive jurisdiction may be lodged against the Authority's investigations and measures, but the investigations and measures are not further defined. Therefore, once again, **it is recommended to supplement the text of the Law with provisions on the investigative and sanctioning measures, which can be taken by the Authority, or refer to procedural norms defined in relevant legislation.**

27. Article 4 paragraphs 9 – 14 deal with communication companies' infringements of several Laws while providing a preferential support to a government office holder.[20] Procedures against the companies are conducted by the Communication Authority, which also has to report to the Parliament on the contents of the privileged support and how it was provided to the government office holder in the exercise of his/her functions, on corrective measures imposed, on consequences of the privilege and on any sanctions imposed.

28. In principle, these paragraphs deal with a situation of incompatibility, which more consistently dealt with by Articles 5 and 6 of the Draft Provisions. In addition, the term "preferential support" is vague and paragraphs 9 – 14 are not clear and comprehensive enough. These paragraphs do not fit well into the Draft Law under consideration. Although owing or controlling a communication undertaking might be a case of incompatibility and "providing preferential support" might also cause a conflict of interest situation, those are all situations covered by other articles of the Draft Law already. Since it does not make sense to specifically regulate only one possible form of incompatibility and one potential conflict of interest area (as important they might be[21]), **it is recommended to delete paragraphs 9 to 14 or – as a minimum – move paragraphs 9 – 14 into a separate article of this Draft Law and clarify their links with other provisions of the Draft Law, especially Article 9.**

### 2.5 Data Protection (Article 4 of the Draft Provisions)

29. According to **Article 4 par 2 of the Draft Provisions,** the Authority may request data and information on conflict of interest from any public administration body or from any

[19] See e.g. OSCE/ODIHR Urgent Opinion on Draft Rules Governing the Activity of Representation of Interests (21 September 2021) Recommendation B and par 17.

[20] Law no. 287 of 10 October 1990 (Competition and Fair Trading Act), No. 223 of 6 August 1990 (Law on the Discipline of Public & Private Broadcasting System), Law No 249 of 31 July 1997 (Law Establishing a Communications Regulatory Authority), Law No 28 of 22 February 2000 (Law on Equal Access to the Media..), Law No 112 of 3 May 2004 (Law on Regulations and Principles Governing the Set-up of the Broadcasting System and the RAI-……")

[21] Since they appear in the area of »integrated communication systems« (electronic media).

other public or private entity in Italy. Without further specifications on possible forms of request and on forms, origin and confidentiality level of requested data and information, such a broad power will not be very helpful for the Authority and might also pose questions with regard to data protection.[22] This is also recognised by the Draft Law in the same provision, adding a condition that the Authority can request data and information "within the limits allowed by the relevant rules". This addition could potentially limit the otherwise overly broad provision to a degree which would make access to data and information for the fulfilment of its mandate practically impossible for the Authority. **Therefore, it is recommended to specify all the necessary details of the Authority's right to request data and information (on which substantive grounds, in which form, in what time the request has to be complied with, etc). It also should be clear that the Authority can ask for data only if it has a justifiable reason to do so. Additionally the cases in which addressed entities might be exempted from their duty to grant access to the requested data and information should be specified.**

30. The Authority is also provided with the power to enter not only public but also private databases, whereby the only limitation to that power is the legislation and guidelines (issued by the Guarantor for the protection of personal data) for the protection of personal data. Private databases, which are databases held by citizens, private sector companies and NGOs, can also contain other protected data – business secrecy, copyrights, etc – and only limitations in the area of personal data are not enough to protect the right of privacy of all private entities. If such provision will be adopted, this might raise legal issues and fall short of international standards. **Therefore, it is recommended to supplement the existing provision with necessary safeguards against excessive interference with rights and legitimate interests of individuals and entities and to specify the power of the Authority to enter different private databases in full compliance with constitutional rights of citizens, private sector entities and civil society organisations.**

### 2.6 General Incompatibilities (Article 5 of the Draft Provisions)

31. Article 5 of the Draft Provisions outlines general incompatibilities and, in general, contains welcomed provisions which, effectively employed, could provide solutions for managing potential conflict of interest situations. However, two general issues need to be clarified:

32. Article 5 of the Draft Provisions in all its paragraphs refers to "national government office holders", which means that other categories of officials mentioned in Article 2 (holders of regional government office; members of Parliament; regional councillors; holders of local office, members of independent authorities) are not covered with incompatibilities from Article 5. **If incompatibilities of those officials are covered with other legislative acts, it is recommended to ensure coordinated and consolidated approach in the area of incompatibilities between those legislative acts and this Draft Law. If incompatibilities of those officials are not covered with other legislative acts, it is recommended to consider expanding provisions of Article 5 in an appropriate manner also to other holders of political office from Article 2.**

[22] As requested by priciples a, b and c related to processing of personal data in Article 5 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)), General Data Protection Regulation (GDPR) – Official Legal Text (gdpr-info.eu).

**RECOMMENDATION E.**

Throughout the Draft Provisions and in other legislation: ensure that incompatibilities and reporting obligations (see par 37 below) are not only regulated with regard to national government office holders but all type of public officials and representatives.

33. Article 5 of the Draft Provisions also lacks details on how breaches, especially breaches of paragraphs 1, 3 and 7, will be identified. It **is recommended to introduce a list of the national government office holders, maintained by the Authority, which will enable identification of potential breaches of Article 5 in the moment when those office holders will be taking the office, during their tenure and in years following the termination of their office.** If the same prohibitions will also be expanded to other holders of political offices, it is recommended to introduce a list of all holders of political offices, maintained by the Authority.

34. Article 5 par 1 c of the Draft Provisions states the position of a national government office holder is incompatible with "exercising any professional activity or self-employment of any kind, even if free of charge, in associate or corporate form, as a consultant or arbitrator, in favour of public or private." While, in general, this provision is necessary and welcome, **it is recommended to clarify and exempt the type of charitable work government office holders do as part of their core duties, including patronages for charitable events etc and possibly academic activities.**

### 2.6 Incompatibilities arising from Assets (Article 6 of the Draft Provisions)

35. Article 6 par 1c of the Draft Provisions introduces a prohibition with regard to ownership of, control of and access to undertakings in the national fields of defence, credit, energy, communications, publishing, advertising or public works or carrying out other activities of national interest. The legislator is introducing a very broad concept of "activities of national interest". If there is no general and formal definition in Italy yet on the list of "activities of national interest**", it is recommended to review the list of activities in paragraph 1c, devoting special attention to fields of communications, publishing and advertising**[23]**.**

36. Certain prohibited areas of activity are again dealt with in par 5, prohibiting national government office holders and their relatives to conclude public procurement and other contracts in "areas falling within the field of competence of the office held or in related areas." This is a very vague definition and might lead to considerable uncertainty might have serious consequences for the office holders but also for the authority, having to deal with contracts in the areas, which might or might not be related to competencies of the office.

### 2.7 Reporting Obligations (Article 7 of the Draft Provisions)

37. Article 7 par 1 of the Draft Provisions again only mentions national government positions. Comments under par 32 above also apply here.

[23] Which in many countries do not enjoy special protection.

38. In par 1 c, office holders are required to also report on "all data relating to movable and immovable property entered in public registers and to assets which are owned…". If the term "assets" also covers property which is not entered in public registers, the provision is fine. **If this is not the case, it is recommended to delete the words "entered in public registers".**

39. In par 8 there is a provision according to which declarations have to have an attachment with a list of real estate and movable property entered in public registers. However, some properties might not be registered and the provision might not cover all the property of office holders, **it is recommended to adapt the provision to also include real estate and movable assets not entered in public registers. Additionally, it might be advisable to clearly state which public registers are referred to and which public registered supervisory bodies should have access to.**[24]

40. According to Article 7 par 9 of the Draft Provisions, the Authority will have to verify the truthfulness and completeness of the declarations in thirty days after receiving them. This deadline appears to be short, as even with extremely developed e-infrastructure it appears difficult to verify submitted declarations in 30 days. Introducing such a short deadline might in fact have the contradictory effect of disabling the system of verifications. **It is advisable to introduce a longer maximum period for the review or consider a possibility of extending 30 days limit when absolutely necessary**

41. In principle, Article 7 par 10b of the Draft Provisions contains effective solutions for cases when the office holders do not submit their declarations. However, it is not entirely clear if the phrase "the interested party shall automatically cease to hold any public office, position or activity as per article 5, paragraphs 1 and 2" also covers the basic function of the national office holder or only the functions which are incompatible with the basic one. **Therefore, it is recommended to clarify the text of Article 7 par 10b accordingly.**

42. Pursuant to Article 7 par 12 the Authority can only react to irregularities in the process of declarations, react if the violations of declarations obligations come to light in one year after the end of the term of office of the office holder. This is a rather short period, especially as some of the breaches are serious enough to be punished by an imprisonment for up to five years. In one year after the end of the term of office irregularities might not be visible yet. **Therefore, in order to ensure efficiency of this preventive measure, it is recommended to increase the period in Article 7 par 12 from one to several years. Office holders should also be required to submit their declarations for the same increased period after the end of a term of their office.**

**RECOMMENDATION F.**

**To increase from one to several years the period for a review of irregularities and violations of declaration obligations following the end of the term of office of the office holder.**

## 2.8 Obligation to Abstain (Article 8 of the Draft Provisions)

43. At the outset par 5 is introducing a comprehensive and effective system of administering obligations to abstain when conflicts of interest occur. Similarly to Article 7 par 10b, it

[24] See as an example OECD Verifying Asset Declarations in Greece: Guidelines for Standard Procedures of Oversight Bodies par 2.5.4.

is not entirely clear if the phrase "the interested party shall automatically cease to hold any public office, position or activity as per article 5, paragraphs 1 and 2" also covers the basic function of the office holder or only functions incompatible with the basic one. Similar as above, **it is recommended to draft the text of Paragraph 5 of Article 8 in a way, which will allow no doubts on the range of functions covered by sanctions listed there.**

### 2.9 Procedure for ascertaining the Existence of Grounds for General Incompatibility and Related Sanctions (Article 9 of the Draft Provisions)

44. In Article 9 par 4 of the Draft Provisions, similar to Article 7 par 10b and Article 8 par 5 it is not entirely clear if the phrase "the interested party shall cease to hold any public office, position or activity as per article 5, paragraphs 1 and 2" also covers the basic function of the office holder or only functions incompatible with the basic one (see pars 41 and 43 above). Therefore, and similar as above, **it is recommended to clarify the text of Article 9 par 4 of the Draft Provisions accordingly.**

45. In Article 9 **par 6,** a possibility for the Council of Ministers is introduced, according to which in the general interest it can validate individual acts performed in the situation of incompatibility (which – according to Paragraph 2 of Article 3 above – is only a specific form of a conflict of interest). This is the same solution as applied in Paragraph 13 of Article 8 for acts performed in a conflict of interest situation (according to which the Council of Ministers may revoke an Act if the national government office holder participated in the adoption of an act in breach of the duty to abstain). However, in Paragraph 13 of Article 8 there is also a provision, according to which the Council of Ministers may revoke the (non-individual) acts where national government office holders have taken part in breach of the duty to abstain. Since both cases – the one from Paragraph 13 of Article 8 and the one from Paragraph 6 of Article 9 – appear to be the same in principle, it is a question, why also the possibilities for action of the Council of Ministers are not the same – the option of revoking an (non-individual) act is missing in Paragraph 6 of Article 9. **Therefore, it is recommended to compare and review options for the Council of Minister's actions in Paragraph 13 of Article 8 and Paragraph 6 of Article 9.**

### 2.10 Procedure for ascertaining the Existence of Grounds for Incompatibility Linked to Assets and related Sanctions (Article 10 of the Draft Provisions)

46. According to Article 10 par 1 of the Draft Provisions, the Authority will have to ascertain whether there are grounds for incompatibilities in thirty days after receiving the office holders' declaration. Similarly to what has been mentioned above (see par 40) this deadline should be extended to make sure an effective oversight of conflicts of interest can take place.

47. Also, pursuant to Article 10 par 2 of the Draft Provisions, the Authority shall issue a final decision on how to prevent or solve a conflict of interest within 60 days after receipt of the national office holder's declaration. Having in mind the above considerations it would be preferable if the mentioned deadline of 30 days would start running when the Authority will collect all necessary information for its decision. **Therefore, it is suggested to replace the wording of the Draft Provisions accordingly.**

48. **Article 10 pars 5 and 6 of the Draft Provisions** repeat the provisions of Article 8 pars 12 and 13 and Article 9 pars 5 and 6 of Article 9 on consequences of the office holders acting in the situation of conflict of interest. Since all instances on acting in conflict of

interest, of which incompatibility is just one form, are already covered by measures from Article 8 pars 12 and 13, which are not limited in time and in form, it seems unnecessary to repeat these provisions also in Article 10. **Therefore, it is recommended to consider deleting Article 10 pars 5 and 6.**

### 2.11 Rules governing the Trustee Mandate System (Article 11 of the Draft Provisions)

49. According to **Article 11 par 2 a of the draft Provisions,** the duration of the trustee mandate shall not exceed that of the government office. However, if the aim of trustee's engagement is to take over the administration of the office holder's assets, it would seem appropriate that the mandate of trustee would surpass or be at least equal to the mandate of the office holder. Such an understanding is also confirmed by the provision of par 12 of the same article which outlines the consequences of termination of office for assets administered by the trustee.[25] There is also no reason why the trustee's mandate would not extent longer than the one from the office holder if the latter would wish so. **Therefore, it is recommended to replace the words "exceed that" from Paragraph 2a of Article 11 with words "be shorter than duration".**

### 2.12 Sanctions (Article 13 of the Draft Provisions Article 7 par 11 of the Draft Provisions)

50. Pursuant to Article 13 par 1 of the Draft Provisions, a breach of obligations or prohibitions under the Draft Law, which has resulted in an advantage or generated discretional behaviour aimed at taking advantage of acts approved in conflict of interest, can also be sanctioned by a "fine not lower than double and not higher than four times the advantage actually gained". Since discretional behaviour aimed at taking advantage does not mean that the planned advantage will always materialize in practice, **it is recommended to amend the Draft Provisions to ensure that also the envisaged advantage can be used as the basis for calculation of the sanction even if no actual damage occurs, by adding words "planned or "before the words "actually gained"**.

51. According to Article 7 par 11, failure to submit the required declarations by the national office holder's family members and some other categories of persons is punishable by imprisonment from two to five years. This provision is rather disproportionate since the basic reporting individuals, the national office holders, which are the reason for their family members' reporting duties, will not be punished by the imprisonment in the case of failure to submit the required declaration but will (only) lose some positions. While family members cannot be sanctioned by the loss of functions and that specific circumstances in Italy might require harsh treatment of office holders' family members, sanctions for both categories of reporting individuals – national office holders and their family members – should be comparable and proportionate to the offence. **Therefore, it is recommended to reconsider the range of sanctions for national office holders and**

[25] Article 11 par 12 reads "In the event of termination of the government office for any reason, the interested party shall automatically regain management of the assets and activities, unless otherwise agreed between the parties. Within thirty days after the date of termination of office, the trust company shall submit a detailed statement of its management to the government office holder and send a copy thereof to the National Anti-Corruption Authority."

**their spouses, relatives up to the second degree of kinship and persons living with them on a stable basis, for breaches of their reporting obligations from Article 7. In general, it is recommended to include a catalogue of escalating sanctions which are primarily of an administrative or disciplinary nature, with criminal sanctions reserved for the most severe cases of non-compliance.**[26]

### 2.13 Ineligibility of Members of Parliament (Article 14 of the Draft Provisions)

52. This Article is suggesting amendments to the consolidated text of the laws on the election of the Chamber of Deputies, laid down by Presidential Decree No 361 of 30 March 1957.

53. The first two suggested changes refer to Articles 7 and 8 of the consolidated text of the laws on election of the Chamber of Deputies, containing the list of Italian public officials generally ineligible for elections for the Chamber of Deputies. The next suggested changes introduce (in form of a new Article 8bis) new bans concerning editors and deputy editors of national newspapers and changes in the current Article 10 of the laws on the election of the Chamber of Deputies.

54. While discussion of the substance of the proposed changes would go beyond the scope of this Opinion, the lawmakers could consider discussing the **proposed changes of provisions on in/eligibilities from Article 14, which might raise fundamental issues with view to Article 25 ICCPR in the framework of a possible revision of the laws on the election of the Chamber of Deputies as organic laws on elections to the Chamber of Deputies and not here, in a Draft Law exclusively dealing with conflict of interest situations.**

### 2.15 Independent Authorities (Article 17 of the Draft Provisions)

55. According to Article 17 par 7 of the Draft Provisions, a decree of the President of the Council of Ministers after Draft Law entered into force and after acquiring the opinion of the European Central Bank should extend the application the Draft Law also to the members of the governing bodies of the Bank of Italy as well as to the members of the Insurance Supervisory Authority. In other words, the head of the executive branch of power should decide on the range of personal application of the Law and is advised to be reconsidered. **It would be preferable to not leave this to the discretion of the President of the Council of Ministers and decide on the Draft Law's application for members of the governing bodies of the Bank of Italy and members of the Insurance Supervisory Authority with its adoption.**

*[END OF TEXT]*

[26] See eg OSCE, Handbook on Combating Corruption, 2016, 6.4.4. Disciplinary and criminal sanctions.