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(VENICE COMMISSION)

OPINION

**ON THE COMPATIBILITY
OF THE LAWS “GASPARRI” AND “FRATTINI”
OF ITALY
WITH THE COUNCIL OF EUROPE STANDARDS
IN THE FIELD OF FREEDOM OF EXPRESSION
AND PLURALISM OF THE MEDIA**

**On the basis of comments by
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I. Introduction

1. By a letter dated 7 July 2004, Mr Peter Schieder, President of the Parliamentary Assembly of the Council of Europe, requested the Commission to prepare an opinion on “the compatibility of the Gasparri Law [“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”, hereinafter “the Gasparri Law”, CDL(2004)092] and the Frattini Bill¹ [“Rules for the resolution of conflicts of interest”, CDL(2004)093rev] with the standards of the Council of Europe in the field of freedom of expression and media pluralism, especially in the light of the case-law of the European Court of Human Rights”. The Assembly requested in particular the Commission’s opinion as to “how the Gasparri Law meets the Assembly concerns about media pluralism and independent public service broadcasting, and whether the Frattini Bill resolves the conflict of interest between media ownership and discharge of public office at the highest level”. This requests was based on PACE Resolution 1387(2004).

2. A working group, composed of Messrs Helgesen, Tuori, Grabenwarter and Paczolay, was set up. The group sought the technical assistance of two experts, Messrs Karol Jakubowicz and David Ward, who jointly submitted an analysis of the Gasparri Law and of the Frattini Law in September 2004 (see CDL(2005)010 and CDL(2005)011 respectively)².

3. Messrs Helgesen, Tuori, Grabenwarter and Paczolay, accompanied by Mr Gianni Buquicchio, Secretary of the Commission, and Ms Simona Granata-Menghini, Head of the Constitutional Co-operation Division of the Venice Commission, visited the Italian authorities on 13-14 January 2005. They met with members of the Chambers of Deputies, from both the majority and the opposition; with representatives of the Federazione Nazionale Stampa Italiana, a trade-union of journalists, and of the Ordine Nazionale dei Giornalisti; with Mr Giancarlo Innocenzi, Under-Secretary of State for Communications; with Ms Laura Aria, Director of the Department for Supervision and Control of the *Autorità per le Garanzie nelle Comunicazioni*; with Mr Giuseppe Tesauro, President of the *Autorità Garante della Concorrenza e del Mercato*, and with Mr Mauro Masi, the then Head of the Department of Information and Publishing of the Presidency of the Council of Ministers.

4. A preliminary discussion on this matter took place within the Commission at its 62nd Plenary Session (Venice, 11-12 March 2005). On this occasion, two representatives of the Italian Government, Ms Francesca Quadri, Head of the Legislative Office of the Ministry of Communications, and Ms Sabrina Bono, Deputy Head of the Legislative Office of the Presidency of the Council of Ministers, presented their arguments. They subsequently submitted these arguments in writing³.

¹ The bill was subsequently adopted by the Chamber of Deputies, on 13 July 2004.

² The Commission expresses its gratitude to Messrs Jakubowicz and Ward for their valuable assistance and co-operation.

³ Given that these submissions were made in Italian only, they have not been distributed to the Commission. Nevertheless, the main arguments contained therein have been incorporated in the pertinent parts of the text of the present opinion.

5. *The present opinion, which was prepared on the basis of comments by the members of the working group, was adopted by the Commission at its .. Plenary Session (Venice,). On this occasion, the representatives of the Italian Government, Ms Quadri and Ms Bono, submitted two documents (CDL(2005)050 and CDL(2005)051), in which they reiterated the arguments presented in March 2005.*

II. Preliminary remarks

6. The Parliamentary Assembly of the Council of Europe in its Resolution 1387 on Monopolisation of the electronic media and possible abuse of power in Italy (Article 13) asked the Venice Commission “to give an opinion on the compatibility of the Gasparri Law and the Frattini Bill with the standards of the Council of Europe in the field of freedom of expression and media pluralism, especially in the light of the case-law of the European Court of Human Rights”.

7. The concerns raised by the Parliamentary Assembly regarding the media situation in Italy may be summarised as follows:

- a. The Parliamentary Assembly is concerned by the concentration of political, commercial and media power in the hands of one person, Prime Minister Silvio Berlusconi. (Art. 1)
- b. The Assembly recalls that, in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights, states have a duty to protect and, when necessary, take positive measures to safeguard and promote media pluralism. (Art. 2.)
- c. It disagrees that the leading principle of the Frattini Bill – that only managers, not owners, should be held responsible – provides a genuine and comprehensive solution to the conflict of interest concerning Mr Berlusconi. (Art. 3.)
- d. The duopoly in the Italian television market is in itself an anomaly from an antitrust perspective. The status quo has been preserved even though legal provisions affecting media pluralism have twice been declared anti-constitutional and the competent authorities have established the dominant positions of RAI and the three television channels of Mediaset. (Art. 5.)
- e. The Assembly believes that the newly-adopted “Gasparri Law” on the reform of the broadcasting sector may not effectively guarantee greater pluralism simply through the multiplication of television channels in the course of digitalisation. At the same time, it manifestly allows Mediaset to expand even further, as it gives the market players the possibility to have a monopoly in a given sector without ever reaching the antitrust limit in the overall integrated system of communications (SIC). (Art. 6.)
- f. The Assembly is particularly concerned by the situation of RAI, which is contrary to the principles of independence laid down in Assembly Recommendation 1641 (2004) on public service broadcasting. (Art. 7.)

8. The Assembly called on the Italian Parliament to take the following measures (Art. 11.):

- a. to pass as a matter of urgency a law resolving the conflict of interest between ownership and control of companies and discharge of public office, and incorporating penalties for cases where there is a conflict of interest with the discharge of public office at the highest level;
- b. to ensure that legislation and other regulatory measures put an end to the long-standing practice of political interference in the media, taking into account in particular the

- Committee of Ministers' Declaration on freedom of political debate in the media, adopted on 12 February 2004; and
- c. to amend the Gasparri Law in line with the principles set out in Committee of Ministers' Recommendation No. R (99) 1 on measures to promote media pluralism, in particular:
 - i. by avoiding the emergence of dominant positions in the relevant markets within the SIC;
 - ii. by including specific measures to bring an end to the current RAI-Mediaset duopoly; and
 - iii. by including specific measures to ensure that digitalisation will guarantee pluralism of content.
9. Similarly, the Assembly called on the Italian Government (Art. 12.):
- i. to initiate measures to bring the functioning of RAI into line with Assembly Recommendation 1641 (2004) on public service broadcasting, with the declaration of the 4th European Ministerial Conference on Mass Media Policy in Prague and with Committee of Ministers' Recommendations No. R (96) 10 on the guarantee of the independence of public service broadcasting and Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting; and
 - ii. to give a positive international example by proposing and supporting initiatives within the Council of Europe and the European Union aimed at promoting greater media pluralism at European level.

III. Outline of the Italian broadcasting and daily newspaper sectors

1. The broadcasting sector

a. The television sector

10. There are 14 free-to-air national channels in Italy. There are three public channels (RAI 1, RAI 2 and RAI 3); three channels are provided for by the commercial operator Mediaset (CANALE 5, RETEQUATTRO and ITALIA 1). The other national networks are: LA 7 and MTV Italia, owned by Telecom Italia; Sport Italia (Europa TV) (formerly Tele+ 1) and DFREE (Prima TV) (formerly Tele+ 2), owned by Holland Coordinator- TF1; HSE (Home Shopping Europe) (formerly Rete Mia), owned by Fondo Convergenza; Rete A (formerly Gruppo Peruzzo Editore, now Gruppo Editoriale L'Espresso); Elefante TeleMarket (Telemarket); and Rete Capri (TBS)⁴.

11. The market structure of the Italian television sector is therefore highly concentrated, with the two main players – RAI Radiotelevisione Italiana and Mediaset – running six out of 14 national analogue terrestrial television channels, which in 2003 accounted for approx. 90% of audience share, roughly 80 % of net advertising revenues, and about 75% of the overall revenues collected in the sector⁵.

⁴ According to the Anti-trust Authority, in 2004 RAI had 45.8% of the analogue frequencies, Fininvest/Mediaset 35.5%; Telecom Italia 8.3 %; Holland Coordinator TF1 5.1 %; Fondo Convergenza 2.1 %; Gruppo Peruzzo Editore 1.3%; Telemarket 1.4 % and TBS 0.5%.

⁵ According to Auditel (data quoted in AGCOM, Indagine Conoscitiva sul Settore Televisivo: la raccolta pubblicitaria, pp. 58 and following), in 2003 the average audience shares in prime-time were as follows: RAI 44.7%; Fininvest 44.9 %, TMC/La7 2.1%, Other analogue Channels: 5.9% and Satellite TVs 2.4 %. The market

12. At the local level, there is an estimated 650 local television stations, mostly run by small operators or single entrepreneurs.

b. The radio sector

13. The Italian radio sector consists of four licences operated by RAI, 14 commercial radio stations and several syndicates. At the local level, the market is highly fragmented and is estimated to include approximately 1,000 stations with a minor listener share⁶.

2. The daily newspaper sector

14. The number of daily titles published in Italy (national, inter-regional, regional and local markets) in 2002 was slightly over 200. The ten largest newspapers (including Corriere della Sera and Repubblica) amount to slightly more than 60% of total national circulation.

15. The rates of newspaper circulation is relatively low: less than 5.9 million in 2002⁷.

16. On account of the low interest displayed by readers and of the particularly strong competition from television, the economic development of the daily press sector has been restrained. The share of advertising revenue for the daily press was slightly over 20% in 2002, while it was 53% for the television sector in the same year.

3. Television revenues

17. Advertising revenues represent an extremely high percentage of revenues in the overall financial structure of the Italian television system, as RAI's revenues are collected from a combination of licence (56%) and advertising revenues (44%)⁸.

18. In terms of revenue breakdown by broadcaster, RAI and Mediaset (through RTI, its subsidiary running its three national channels) are the major players and account for over three-quarters of overall revenues. The advertising revenues of RTI account for over 50% of the total television advertising income⁹. The local sector accounts for just 12% of net advertising revenues and 7.3 % of total revenues collected in the television sector.

share for advertising in 2003 was as follows: Fininvest/Mediaset: 64,7 %; RAI 28,5 %, Telecom Italia 3,3%, Sky 2% and others 1,5 %. See also David Ward with Oliver Carsten Fueg and Alessandro D'Armo, A mapping study of media concentration and ownership in ten European countries, 2004, pp. 93-110, at www.cvdm.nl, www.mediamonitor.nl.

⁶ "A mapping study of media concentration and ownership in ten European countries", 2004, pp. 103-104

⁷ "A mapping study of media concentration and ownership in ten European countries", pp. 93-97.

⁸ "A mapping study of media concentration and ownership in ten European countries", pp. 100-101.

⁹ The European Institute for the Media, "Final report on "the information of the citizen of the EU: obligations for the media and the institutions concerning the citizen's right to be fully and objectively informed, August 2004, p. 120, at: www.epra.org.

IV. The “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”¹⁰ (“The Gasparri Law”, CDL(2004)092)

1. Brief historical background

19. The roots of the present-day media regulation go back to the mid-seventies when a decision of the Constitutional Court (*Corte Costituzionale*) put an end to the period of RAI’s media monopoly, and to direct government interference.

20. Constitutional Court decision no. 225 of 1974 upheld the terrestrial monopoly of RAI by referring to public interest in Article 43 of the Constitution¹¹. The technical scarcity of frequencies legitimised the monopoly. However, the Court set the requirement of objectivity and impartiality for the public service. In the meantime, by decision no. 226 of 1974, the Court found that the broadcasting monopoly of RAI in respect to cable and foreign-based channels was not justified.¹² The Court interpreted Article 21 of the Constitution quite broadly.

21. Article 21 of the Italian Constitution provides the following:

“All have the right to express freely their own thought by word, in writing and by all other means of communication.

The press cannot be subjected to authorisation or censorship.

Seizure is permitted only by a detailed warrant from the judicial authority in the case of offences for which the law governing the press expressly authorises, or in the case of violation of the provisions prescribed by law for the disclosure of the responsible parties.

In such cases, when there is absolute urgency and when the timely intervention of the judicial authority is not possible, periodical publications may be seized by officers of the criminal police, who must immediately, and never after more than twenty-four hours, report the matter to the judicial authority. If the latter does not ratify the act in the twenty-four hours following, the seizure is understood to be withdrawn and null and void.

The law may establish, by means of general provisions, that the financial sources of the periodical press be disclosed.

Printed publications, shows and other displays contrary to morality are forbidden. The law establishes appropriate means for preventing and suppressing all violations.”

22. The effect of this turning point was reflected in the Broadcasting Act which was adopted the following year by the Parliament¹³. An important provision of the law transferred the power to control public service broadcasting from the executive branch to the legislature. A bicameral

¹⁰ The Commission’s analysis of the Gasparri Law will be limited to those provisions which are more directly called into question by the concerns of the Parliamentary Assembly. In addition, the Commission will not assess the provisions of the Gasparri Law in relation to the Italian constitution, but only by European criteria.

¹¹ Article 43: *For purposes of general utility the law can reserve from the beginning or transfer, by means of expropriation and payment of compensation, to the State, to public entities or to workers communities or users, specific enterprises or categories of enterprises which relate to essential public services or sources of energy or monopolistic situations and which have the nature of primary general interest.*

¹² Judgment of 9 July 1974, n. 226

¹³ Legge 14 aprile 1975, n. 103 (*Nuove norme in materia di diffusione radiofonica e televisiva*)

parliamentary commission was set up for the general direction and surveillance of radio-television services. Parliament appointed the Administrative Council of RAI. However, this law led to the so-called *lottizzazione* of the Italian media. It meant the partition of the two channels (Raiuno and Raidue) between political forces (the governing Christian Democrats and Socialists, respectively). The law formally set up two separate network directorates. A third RAI channel was initiated in 1979; its aim, among others, was to introduce regional programs – this goal has never been fully realised.

23. In 1976 the Constitutional Court declared that those provisions of the new law which provided for a monopoly or an oligopoly for local broadcasting were unconstitutional¹⁴. As an effect of the decision, permission was granted for commercial operators to run local television channels.

24. The unregulated allocation and rather spontaneous redistribution of local frequencies¹⁵ led to the rise of larger regional and even national operators, among them Silvio Berlusconi. Berlusconi started nation-wide transmission of Canale 5 in 1980, and after buying up other two channels (Italia Uno and Retequattro), by 1984 he established what commentators call the “duopoly system” of public and private operators (RAI on the one side, and the channels owned by Berlusconi on the other).

25. In 1990 the so-called Mammì Law on the public and private broadcasting system was adopted with a view *inter alia* to introducing antitrust provisions¹⁶. The appointment of the RAI Administrative Council was transferred from the Parliamentary Commission to the presidents of the Chamber of Deputies and the Senate, emphasising their ‘non-partisan’ position¹⁷. Despite efforts to dismantle the political partition of RAI, the general understanding remained that public service broadcasting remained under the influence of politics, and primarily of the ruling political force. Leaders of RAI have been accused under all governments of taking politically biased decisions in favour of the respective Cabinet.

26. The crisis of the old Italian political regime, as well as the disappearance of the DC and the PSI, obviously deeply affected RAI. The reform of public service broadcasting aimed at putting an end to the *lottizzazione* system, and create an independent and effective public service.

27. In the meantime, Mediaset was formally founded by Berlusconi in 1994, though he sold part of his stakes the following year. Nevertheless, since 1994 it has been widely acknowledged that a RAI – Mediaset duopoly exists in the Italian media sector. This has also been affirmed by the

¹⁴ Judgment of 15 July 1976, n. 202

¹⁵ The Italian Constitutional Court declared in November 2002 (Case 466/2002) that “*the present Italian private television system operating at national level and in analogue mode has grown out of situations of simple de facto occupation of frequencies (operation of installations without concessions and authorisations), and not in relation to any desire for greater pluralism in the distribution of frequencies and proper planning of broadcasting...*” Quoted by European Parliament resolution 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)), §62.

¹⁶ Legge 6 agosto 1990, n. 223 (*Disciplina del sistema radiotelevisivo pubblico e privato*). Oscar Mammì was the Minister of Telecommunications at that time.

¹⁷ Legge 25 giugno 1993, n. 206

Constitutional Court¹⁸ in a case concerning the constitutionality of the provision of the Mammì Law whereby a single operator was permitted to hold three nationwide television broadcasting licences, subject to a limit of 25% of the national channels laid down in the frequency band allocation plan. The Court declared unconstitutional the provisions allowing for the setting up of a dominant position by the three channels controlled by the Fininvest Group (Canale 5, Italia 1 and Retequattro), owned by Silvio Berlusconi. According to the Court, the provision which permits the same operator to hold several television broadcasting licences provided they do not account for more than 25% of the total number of national channels and do not account for more than three channels in all, is not sufficient to prevent the concentration of televised broadcasting and therefore conflicts with Article 21 of the Constitution since it fails to guarantee the plurality of sources of information. The basic condition for enabling the State to relinquish its monopoly on broadcasting is the existence of legislation capable of preventing the formation of dominant positions. Dominant positions in this sector, stated the Constitutional Court, would not only alter the rules of competition but also lead to an oligopoly, and thus threaten the fundamental value of the plurality of sources of information. The right to receive information from several competing sources is not ensured by the mere existence within the broadcasting system of a public licensed company alongside private licensed companies (*dual system*). As the Court stated previously in its Decision no. 826/1988, such a company cannot on its own offset a dominant position in the private sector.

28. The declaration that the provision was unconstitutional required the legislator to use discretionary power either to reduce the number of television networks allocated to a single operator, or to maintain the same number of channels while simultaneously increasing the number of wave bands for private operators, whichever seemed more appropriate.

29. However, on 11 June 1995, Italian voters legitimised the ownership of three channels by Mediaset when a referendum that aimed at forbidding a private entrepreneur from owning more than one TV channel was rejected by the majority of Italians (57%). Similarly, a referendum initiated the process of the privatisation of RAI that has been going on since then.

30. The ensuing Broadcasting Law, the so-called “Maccanico law”, adopted in 1997¹⁹, regulated the beginning of the privatisation process by dividing RAI into five divisions (separate sub-companies), and setting up a publicly owned holding company (RAI Holding) to govern them. It established the Communication Authority (AGCOM) as an autonomous and independent body. Under the Maccanico Law, a single subject could not cover more than 20 % of television or radio networks and digital television or radio programmes (Article 2 § 6); and national broadcasters could not overstep a revenue threshold of 30% of the resources of the relevant sector (radio or television) (Article 2 § 8 a) and b) .

31. In 2000 a law was adopted²⁰ providing for equal condition (*par condicio*) for accessing media during electoral campaigns and in political communication.

¹⁸ Judgment of 5 December 1994, n. 420

¹⁹ Legge 31 luglio 1997, n. 249 (*Istituzione dell’Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo*) named after Minister Antonio Maccanico

²⁰ Legge 22 febbraio 2000, n. 28 (*Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica*)

32. In July 2002 the President of the Republic, Carlo Azeglio Ciampi, warned the Parliament to draft and adopt legislation that would be appropriate for fostering pluralism of information. He referred to the decisions of the Constitutional Court, and to EU provisions too. He also called for respecting the rights and role of the Regions.²¹

33. In November 2002, the Constitutional Court²² declared Article 3(7) of the Maccanico Law unconstitutional, in that it did not set a precise deadline by which the programmes transmitted by broadcasters exceeding the limits set by the law should be transferred to satellite or cable television (the law made the deadline dependent on “the effective and significant increase of the audience” of the cable or satellite television). The Court noted that the situation which had been declared unconstitutional in the 1994 judgment had been aggravated, and called for a definitive deadline to ensure compatibility with constitutional rules. The Court concluded that “*the de facto situation does not guarantee respect for external pluralism of information*”. The Court itself, on the basis of a previous decision of the AGCOM²³, set a final deadline for December 31, 2003.

34. In order to comply with this deadline, and as a response to warnings of the Head of State, the Berlusconi government submitted a proposal to reform the entire communications system. The law – connected to Telecoms Minister Maurizio Gasparri – was passed by the Parliament in the autumn of 2003. However, President Ciampi refused to sign it and returned it to the Parliament for reconsideration. He had objections against the concept of “integrated system of communications”, and concerns about the risk of possible dominant positions. The Parliament finally adopted it in May 2004, after certain changes had been made, notably to the thresholds for dominant positions.

2. Freedom of expression and media pluralism : an outline

35. Freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress and the development of every individual²⁴. It is enshrined in Article 10 of the European Convention on Human Rights, which provides as follows:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

²¹ Message of the President of the Republic to the Chambers, forwarded to the Presidency on 23 July 2002 (XIV Legislatura – documenti Doc. I. N. 2)

²² Judgment 20 November 2002, n. 466

²³ See AGCOM, Delibera No. 346/01/Cons, “Termini e criteri di attuazione delle disposizioni di cui all’art. 3 commi 6,7,9,11 della Legge n. 249/2001”, in G.U. 27 Agosto 2001 n. 198.

²⁴ See, in particular, the Declaration on the freedom of expression and information, adopted by the Committee of Ministers on 29 April 1982, and the Declaration on freedom of political debate in the media, adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies. See also Venice Commission, Report on the revised constitution of the Republic of Armenia, CDL-INF(2001)14, § 26.

penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

36. Article 10 § 1 of the European Convention first and foremost guarantees the individual right to freedom of expression. As indicated in the second sentence of paragraph 1, this includes freedom to receive and impart information and ideas. However, no express mention is made to freedom of the media or to media plurality and diversity. Freedom of broadcasting and of the press as part of active and passive freedom of opinion is arrived at by an interpretation of the second sentence of paragraph 1. The European Court of Human Rights first construed Article 10 § 1 in terms of individual rights and regarded freedom of broadcasting as deriving from freedom of expression and as a form of freedom of enterprise, that is, freedom to pursue a private broadcasting activity. The concept of the purpose-serving function of the media as a means of promoting freedom of information has nevertheless been taken up and applied by the Court in connection with paragraph 2 of Article 10 of the European Convention²⁵.

37. Pluralism of the media may therefore be considered as one aspect of freedom of expression. Its importance, both in terms of the multiplicity of outlets and of open access where bottlenecks form, has been recognised by the Committee of Ministers of the Council of Europe in Recommendation No. R (99) 1 on measures to promote media pluralism²⁶ and by the Parliamentary Assembly in Recommendation 1506(2001) on Freedom of expression and information in the media in Europe”.

38. The European Convention on Transfrontier Television²⁷ also reaffirms in its preamble “the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties”. Article 10bis of the said Convention provides: “The Parties, in the spirit of co-operation and mutual assistance which underlies this Convention, shall endeavour to avoid that programme services transmitted or retransmitted by a broadcaster or any other legal or natural persons within their jurisdiction, within the meaning of Article 3, endanger media pluralism.”

39. The crucial nature of pluralism is also underlined in Article 11 § 2 of European Union Charter of Fundamental Rights, which provides: “the freedom and pluralism of the media shall be respected.”

40. Media pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views.

41. *External* or structural pluralism may be distinguished from *internal* pluralism.

²⁵ See AP-MD Report on Media Diversity in Europe, H/APMD (2003)001, pp. 4 and following

²⁶ Recommendation No. R(99)1 of the Committee of Ministers to Member States on measures to promote media pluralism, adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministries’ Deputies.

²⁷ European Convention on Transfrontier Television, Strasbourg, 5 May 1989, ETS 132.

42. External pluralism relates to the plurality of actors that are active on a specific market. It is achieved when there is diversity in the ownership of media outlets in a sector.

43. Internal pluralism refers to the obligation for the medias to provide for pluralism within their service. It is achieved when extensive coverage, high-quality of programmes and diversity of programming are provided by the undertakings.

44. While external pluralism relates particularly to the private sector, internal pluralism has increasingly become associated with the public sector²⁸. It can be said in fact that while the commercial sector is seen to provide a diversity of outlets, the public sector, even when the commercial sector is a concentrated one, is expected to provide the backbone of pluralism by providing a diversity of programmes that serve the whole of the public²⁹.

45. In the context of external pluralism, restrictions on media ownership can preserve diverse ownership and contribute to diversity in output as long as consolidation or sharing of editorial content between owners of rival products is discouraged.

46. In relation to internal pluralism, instead, ownership restrictions are not sufficient to guarantee diversity of output reflecting different political and cultural views. Other policy instruments need therefore be used, in addition to ownership restrictions, to encourage internal pluralism.

47. In the Commission's opinion, internal pluralism must be achieved in each media sector at the same time : it would not be acceptable, for example, if pluralism were guaranteed in the print media sector, but not in the television one.

48. Three basic models for delivering media plurality and diversity of media content can be distinguished³⁰.

49. The Pure Market Model is based on the premise that the free operation of supply and demand provides access to the media for all "voices" which can pay for it, as well as ensure a supply of content relevant to all consumers. This advertising-based pure market model is said to contribute to diversity by seeking to match the media content to the composition of the given consumer market. Under this model, diversity of content is provided by separate media, existing alongside with each other. This model naturally favours concentration of capital and ownership in the media.

50. The New Media Model is based on the view that the profusion of channels created by new technologies encourages senders to seek profitability by identifying media market niches and serving audiences neglected by other media. This abundance of thematic, narrow-case,

²⁸ See David Ward, "The European union democratic deficit and the public sphere: an evaluation of EU media policy", IOS press, 2004

²⁹ See David Ward, Media concentration and pluralism: regulation, realities and the Council of Europe's standards in the television sector, CDL-UDT (2005)005.

³⁰ See Karol Jakubowicz, Legislative guarantees of a plurality of information sources" in Implementation of constitutional provisions regarding mass media in a pluralist society, Science and Technique of Democracy No. 13, 1994, pp. 81-86.

specialised channels has been said to promote the birth of “personal media”, allowing viewers to select content precisely attuned to their needs, tastes and interests.

51. The Public-Policy Model assumes supplementing the market model by means of public intervention into its operation so as to promote pluralism. It is based on the recognition not only of freedom of speech, but also of the need and the right of all social groups to communicate. State intervention into the operation of the media is seen as necessary not only in a democratic society but also for the very functioning of democracy.

52. Public broadcasting is a public service. Public broadcasters have obligations ranging from the provision of a universal service, to some form of social representation, to the provision of a wide range of quality programmes³¹. In return, they enjoy a privileged access to resources and facilities.

53. Public service broadcasting is therefore expected to serve the public interest, to cater for the whole of the population on a universal and non-profit basis; it is a public duty and it should serve the democratic needs of contemporary societies.

54. Public service broadcasting must be free from the constraining forces of the state and, on the other hand, enjoy autonomy and independence from the market place. Its specific remit is essentially to operate independently of those holding economic and political power. Public service broadcasting “provides the whole of society with information, culture, education and entertainment; it enhances social, political and cultural citizenship and promotes social cohesion. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers a variety of programmes and services catering for the needs of all groups in society and is publicly accountable. These principles apply, whatever changes may have to be introduced to meet the requirements of the twenty-first century.³²” Forms of consultation of the public within the public service broadcasting organisations may be envisaged in order to reflect in their programming policy the needs and requirements of the different groups in society.

55. In Europe, the fundamental feature of the public-policy model in the area of broadcasting is the preservation of a *dual system*, combining commercial stations with legally mandated and protected public service broadcasting.

56. The political histories of the Southern European Countries has led to a large degree of state interference and the public broadcasters in the past have acted as an instrument of the state, which has undermined the idea that they should be free from state dominance.

57. In the last twenty years, there have been attempts to improve the independence of the public broadcaster. The central solution to this has usually focused on funding and encouraging less reliance on state provision. The systems have moved from one overt form of state dominance to

³¹ The commercial sector does not generally have such obligations imposed on them, with the exception of the UK and Norway, where the terrestrial commercial broadcasters have certain minimum thresholds for programme strands to adhere to, as part of their contracts to broadcast. In France, production obligations are imposed on the commercial broadcasters to ensure certain minimum requirements for national productions. See D. Ward, “The European union democratic deficit and the public sphere: an evaluation of EU media policy”, op. cit.

³² See Parliamentary Assembly Recommendation 1641 (2004) “on public service broadcasting”, § 2.

another based on a mixture of commercial and state dominance, in a situation where the broadcasters are continually squeezed between the interests of the two. In France, Italy and Spain, for example, chronic under-financing of the public sector has led the public channels to be permanently indebted to the state for their financial equilibrium and this has encouraged the old system to continue in reality³³.

58. Broadcasters that rely heavily on commercial funding³⁴ and have thus entered into direct competition with the commercial sector have become highly susceptible to the demands of advertisers and sponsors and their programme strategies are guided by the needs of advertisers and audience share, rather than the requirements of their obligations.

3. The standards of the Council of Europe³⁵ in the field of freedom of expression and media pluralism

a. The recommendations of the Council of Europe organs

59. The Council of Europe instruments³⁶ set out certain tools for promoting media pluralism (both external and internal) which include:

- a legislative framework establishing limits for media concentration; the instruments for achieving this include permissible thresholds (to be measured on the basis of one or of a combination of elements such as the audience share or the capital share or revenue limits) which a single media company is allowed to control in one or more relevant markets;
- specific media regulatory authorities with powers to act against concentration;
- specific measures against vertical integration (control of key elements of production, broadcasting, distribution and related activities by a single company or group);
- independence of regulatory authorities;
- transparency of the media;

³³ Conseil Supérieur de l'Audiovisuel, 1998, p. 46, quoted in David Ward, "The European union democratic deficit and the public sphere: an evaluation of EU media policy", op.cit.

³⁴ In Italy, France and Spain, according to the report of the Conseil Supérieur de l'Audiovisuel cited above, public broadcasters have suffered the full force of commercial competition as they have been drawn into vicious competition for advertising revenue, which has destabilised the sector permanently.

³⁵ In the present opinion, the Commission will only examine the Italian laws in question in relation to the standards set out by the Council of Europe, as requested by the Parliamentary Assembly, and not in relation to the standards set out by the European Union. As a consequence, it will only examine some aspects of the law.

³⁶ Committee of Ministers' Recommendations R(99) 1 on measures to promote pluralism; R(96) 10 on the guarantee of the independence of public service broadcasting; Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector; R (94)13 on measures to promote media transparency; Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting. Parliamentary Assembly Recommendation 1589 (2003) on freedom of expression in the media in Europe; Recommendation 1506 (2001) on Freedom of expression and information in the media in Europe.

- pro-active measures to promote the production and broadcasting of diverse content;
- granting, on the basis of objective and non-partisan criteria, within the framework of transparent procedures and subject to independent control, direct or indirect financial support to increase pluralism;
- self-regulatory instruments such as editorial guidelines and statutes setting out editorial independence.

60. Developments in the area of new communication services may lead to the creation of dominant market positions. In respect of digital broadcasting, states are called upon to introduce rules on fair, transparent and non-discriminatory access to systems and services. The Committee of Ministers' Recommendation (2003) 9³⁷ requests the Member States to "create adequate legal and economic conditions for the development of digital broadcasting that guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes" and to "protect and, if necessary, take positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in the sector".

b. The principles developed by the European Court of Human Rights

61. The following is a brief analysis of some pertinent principles which may be found in the case-law of the Strasbourg Court with respect to i.) pluralism and freedom of broadcasting and ii.) freedom of advertising.

i. Pluralism and freedom of broadcasting

62. In the years between 1990 and 1993 the ECtHR ruled on three cases dealing with restrictions on broadcasting, more precisely with systems of licensing³⁸. One case, Informationsverein Lentia and Others v. Austria³⁹, became the leading case for the compatibility of a public monopoly with the requirements of Article 10 of the Convention and in particular in relation to the requirements of paragraph 2 of that Article.

63. According to the Court, the purpose of Article 10 para. 1 is to make it clear that States are permitted to regulate by way of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects⁴⁰. While such aspects are undeniably important, the grant or refusal of a licence may, in the Court's view, also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though

³⁷ Recommendation of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting, adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies.

³⁸ Groppera Radio AG and Others v. Switzerland, judgment of 28 March 1990, Series A no. 173; the Autronic AG v. Switzerland judgment of 22 May 1990, Series A no. 178

³⁹ Informationsverein Lentia and others v. Austria judgment of 24 November 1993, Series A no. 276

⁴⁰ See the Groppera judgment, § 61

they do not correspond to any of the aims set out in paragraph 2⁴¹. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.

64. The assessment by the Court of the former Austrian broadcasting system shows some basic lines of argument that should also be reflected on, when a specific public-private duopoly is at stake, as is the case in Italy. At the outset, the Court acknowledged that the monopoly system in operation in Austria was consistent with the third sentence of paragraph 1 and pursued a legitimate aim, as it was capable of contributing to the quality and balance of programmes through the supervisory powers over the media thereby conferred on the authorities. However, the necessity test under Article 10, paragraph 2 led the Court to a negative conclusion. In cases concerning the press and broadcasting, the supervision had to be strict because of the importance of the rights in question. The necessity for any restriction ought thus to have been convincingly established⁴².

65. The Court reiterated its established case-law about the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive⁴³. In this context, the Court gave particular weight to the protection of pluralism: “Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.⁴⁴” The Court found that the monopoly was not necessary for a number reasons⁴⁵.

66. The Court’s answer to an additional argument submitted by the respondent Government is of particular interest in the context under consideration. The Government put forward the economic argument that the Austrian market was too small to sustain a sufficient number of stations and to avoid regroupings and the constitution of “private monopolies”. The Court replied that these assertions were “contradicted by the experience of several European States, of a comparable size to Austria, in which the coexistence of private and public stations, according to rules which vary from country to country and accompanied by measures preventing the development of private monopolies, shows the fears expressed to be groundless.” The reference to “measures preventing the development of private monopolies” may be taken as an indication that the Court proceeded from the assumption that there exists a positive obligation of the State to ensure pluralism in the field of broadcasting. This assumption is confirmed by the case-law on limits for restrictions on advertising on television.

ii. Limits on advertising in public broadcasting and pluralism in the media

⁴¹ See the Informationsverein Lentia judgment, para. 31

⁴² See the Autronic judgment, § 61

⁴³ See, for example, *mutatis mutandis*, the Observer and Guardian v. the United Kingdom judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59

⁴⁴ para. 38

⁴⁵ para. 39

67. Limits for advertising on television and on radio may pursue the aim of safeguarding the independence of broadcasting. In a recent case the Court had to assess whether the ban on political advertising on Swiss television was compatible with the freedom of advertising, which is also protected under Article 10 of the Convention⁴⁶. The applicant association, aiming at the protection of animals, complained that the refusal to broadcast its commercial which was directed against industrial animal production, constituted a violation of their rights under Article 10 of the Convention. When describing the legitimacy of the aim pursued by the ban, the Court found that the prohibition of political advertising served to prevent financially powerful groups from obtaining a competitive political advantage and, in addition, to ensure the independence of broadcasters, spare the political process from undue commercial influence, provide for a degree of equality of opportunity among the different forces of society and to support the press, which remained free to publish political advertisements. Those aims were – in the Court’s view – legitimate. However, in the circumstances of the case the prohibition was not necessary in a democratic society, the States’ margin of appreciation being reduced, because the Court found, among other arguments, that the applicant association’s film advertisement fell outside the regular commercial context inciting the public to purchase a particular product. Rather, it reflected controversial opinions pertaining to modern society in general and moreover, because in many European societies there was, and is, an ongoing general debate on the protection of animals and the manner in which they are reared⁴⁷.

68. The Court came to that conclusion after a thorough examination of the interests involved: “In that regard, it must balance the applicant association’s freedom of expression, on the one hand, with the reasons adduced by the Swiss authorities for the prohibition of political advertising, on the other, namely to protect public opinion from the pressures of powerful financial groups and from undue commercial influence; to provide for a certain equality of opportunity among the different forces of society; to ensure the independence of broadcasters in editorial matters from powerful sponsors; and to support the press.”⁴⁸

69. The Court acknowledged that “powerful financial groups can obtain competitive advantages in the area of commercial advertising and may thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials.” It continued. “Such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely (see *Informationsverein Lentia and Others v. Austria* (no. 1), judgment of 24 November 1993, Series A no. 276, p. 16, § 38).”⁴⁹

70. While these arguments refer only to the legitimacy of State acts that aim at ensuring pluralism and absence of influence of powerful groups on television, the wording used by the

⁴⁶ See *VgT Verein gegen Tierfabriken v. Switzerland* judgment of 28 June 2001

⁴⁷ para. 63

⁴⁸ para. 72

⁴⁹ para. 73

Court may suggest that it would be prepared under certain circumstances to assume a positive obligation in this respect.

71. The European Commission of Human Rights had mentioned the duty of a State to protect against excessive press-concentrations in the case *De Geillusteerde Pers N.V. v. The Netherlands*⁵⁰.

4. Gasparri Law : the provisions protecting media pluralism

72. Many of the provisions in the Gasparri Law are already provided for pursuant to Law 66/2001 and AGCOM's Regulation of November 2001, Title 5 (Articles 24-29), which contains provisions aimed at safeguarding pluralism and transparency in the digital television market. The present Law therefore seeks to adopt these instruments as well as to introduce a new element into the regulations pertaining to media concentration (discussed below). The following measures are set out in AGCOM's regulation:

- One-third of digital terrestrial transmission capacity is reserved for local content providers (Article 24(1a));
- no subject is allowed to hold authorisations as content provider that enable that subject to broadcast more than 20 percent of the total number of television channels (free-to-air or pay-TV) available via DTT at national level (Article 24(1b));
- no subject can be holder of authorisations as content provider at national and local level at the same time (Article 24(2));
- transparency requirements for content providers include a requirement to maintain separate accounting systems for holders of more than one authorisation as content provider for each authorisation they hold, which also applies to holders of an authorisation as content and as service provider (Article 25); and
- transparency requirements for the network operators include a requirement for local network operators who are also content providers to maintain separate accounting systems, a requirement which is also applicable to companies that qualify as a national network operator which are also content providers (Article 27).

73. In reference to media pluralism, the Law's objectives are principally set out in Articles 3, 4 and 5, which establish the fundamental principles of the Law.

74. Article 4 (a) also guarantees access to a "number of national and local operators ... in conditions of pluralism and free competition". Article 5 (1a) also guarantees competition in media markets and furthermore guarantees that either the creation or maintenance of dominant positions that are damaging to pluralism will not be allowed.

75. A number of articles are dedicated to the question of media pluralism and concentration of ownership. The general principles are established in Articles 3(1), 4(1a), 5, 12(3), 24(1b), 25(1), 25(11) and extend the concept set out in Articles 3, 4 and 5 to the digital terrestrial platform on national and local levels. The provisions also cover radio and cross-media ownership.

76. As regards internal pluralism, Article 5 paragraph 1 e requires network operators to guarantee equal treatment for content providers who are not referable to linked and controlled

⁵⁰ Report of 6 July 1976, D.R. 8, p14, § 88.

companies, by making available to them the same technical information that is available to content providers who are referable to linked and controlled companies. In addition, network operators must avoid discrimination between independent content providers and those who are referable to linked and controlled companies as regards the conditions of access to the network.

77. The Law proposes two major changes affecting external pluralism:

- the introduction of a maximum threshold of 20 percent of national channels that a broadcaster is allowed to operate, pursuant to Article 15 (1); and
- the introduction of the concept of an “integrated communications system” (SIC) used to establish financial thresholds across electronic and print media sectors, pursuant to Article 15(2).

78. Article 15 (1) establishes limits on market share for national radio and television broadcasters once the frequency plan for digital terrestrial television has become operational.

79. The framework for establishing the 20 percent limit of market share is (in the translation that we have used) ambiguous. Article 15(1) sets out that a content provider may not hold authorisations allowing it to broadcast more than 20 percent of all television programmes or more than 20 percent of radio programmes that may be broadcast on terrestrial frequencies at the national level through the networks provided for in the plan. Article 25(8), which covers the transitional period, affirms that until the complete implementation of the plan for the assignment of digital television frequencies, the overall number of programmes for each subject is limited to 20 percent and is calculated on the overall number of television programmes authorised or aired at the national level on either analogue or digital terrestrial frequencies, as under Article 23 (1). On the basis of Article 15(1), the most likely interpretation is that the 20 percent limit is calculated on the basis of the total number of channels that it is possible to broadcast via DTT at national level, according to the technical plan, whereas, on the basis of Article 25(8), the 20 percent limit is calculated on the overall number of television programmes available (aired or authorised) at the national level. This seems to be more logical and also in line with what is ruled by Article 24(1b) of AGCOM’s DTT regulation of 2001. Here it is ruled that no subject is allowed to hold authorisations as content provider that enable that subject to broadcast more than 20 percent of the total number of television channels (free-to-air or pay-TV) available via DTT at the national level. Also in this case, therefore, the 20 percent limit is calculated on the basis of the overall number of television programmes aired at the national level.

80. Article 15(2) complements Article 15(1) and sets out the concept of the integrated communications system that establishes a threshold for market share based on revenue share.

81. The umbrella term “integrated communications system” (SIC) was coined to establish a revenue threshold and is considered to include a wide range of media pursuant to Article 15 (3): 1) national and local broadcasting including broadcasters funded by pay-per-view, advertising, licence fees, sponsorship and teleshopping revenue streams; 2) any type of publishing (newspapers, magazines, books, electronic publishing); 3) cinema, television and music production and distribution; and 4) any form of advertising (including outdoor advertising) as well as revenues from the Internet.

82. Pursuant to Article 15 (2), any one company may not earn more than 20 percent of the revenues of the whole media sector that is included in the concept of integrated communications system.

83. Local broadcasting has been granted a significant place in the television sector and one-third of spectrum capacity allocated to television is reserved for local television. Significantly, the ban on national broadcasters owning a local broadcaster pursuant to Article 5 (d) has remained. The measures that affect local television broadcasters are stricter than the ones that have been devised for national broadcasters and they are set out in Article 7 (2), (3) and (4).

84. Pursuant to Article 15 (1) the national radio sector falls under the same rules as the television sector in that national radio broadcasters are restricted to 20 percent of the number of national channels, and pursuant to Article 15 (2), 20 percent of the overall revenues of the integrated communications system.

85. Cross-media provisions are contained in Article 5 (g1) and (g2) and Article 15 (4) and (6). Pursuant to Article 15 (6) television broadcasters who operate more than one national network may not own shares of newspaper companies until the end of 2010. Newspaper publishers will be allowed to enter the television market with the introduction of the Law.

5. Analysis of those provisions

86. The Commission notes that the Italian authorities seem to rely on the principle that media pluralism can be measured through a quantitative assessment of total channels. The representatives of the ruling coalition which met with the Commission Delegation argued that given that the digital plan foresees a significant growth of channels and outlets on the national level (according to the National Frequency Plan, the DTT platform is planned to carry 12 multiplexes for national broadcasting, each of them carrying from four to six channels – but some of these channels are /will be used for radio broadcasting and interactive applications), it will be possible and open for new broadcasters to have access to the media market. In this context, the threshold of 20% of the channels (or programme output) will be capable of avoiding concentrations. The reason for widening of the definition of the media market is the fact that all the different markets which are connected to television are gradually converging to form a single one. The SIC is therefore designed to allow the expansion of these markets, particularly in view of digitalisation.

87. In the opinion of representatives of the opposition, the new permissible thresholds of number of channels or output and of revenue are not going to put an end to the duopoly RAI/Mediaset, but instead they will strengthen it. It is true that more channels will be available; however, the primary beneficiary of this will be Mediaset, which will expand even further while the widening of the SIC will make it virtually impossible for it to fall within the concept of “dominant position”. The main effect of the widening of the media market is the widening of the publicity share, which has resulted in Mediaset being allowed to continue to use the frequencies occupied by Retequattro, thus frustrating the effects of the relevant judgments of the Constitutional Court.

88. The Commission agrees with the Italian authorities that digitalisation will lead to an increase in the number of channels; examples in other European countries of digitalisation indeed suggest that many more channels will come on stream⁵¹.

89. In addition, the Commission stresses that many of the newly available channels are likely to have very small audience shares, but with similar amounts of output. The Commission finds therefore that the threshold protecting media pluralism, as measured by 20 percent of channels, is not in itself a clear indicator of market share.

90. Neither is this threshold an unambiguous indicator of balance and pluralism in the television and radio market as a whole. Larger companies will enjoy greater purchasing power in a wide range of activities such as programme acquisitions, and will enjoy significant advantages over other national content providers. They can also enjoy an unlimited share of the audience, if this scheme is put in place.

91. Ultimately, the measure of concentration based on share of channels or programme output cannot account for market power or be useful for assessing the position of a company in the national radio and television markets.

92. In respect of the possibility of new competitors entering the media market, the Commission notes that the fundamental issues of economies of scale and high costs of television production will, like in other countries, work in favour of the incumbents.

93. As regards the concept of the integrated communications system (SIC) defined in Article 2 (g), and set out in Articles 15 (2) and (3), the Commission notes that it is unique in terms of the collapse of hitherto separate media markets for the purposes of media concentration measures. The very broad definition of the media market appears to be unprecedented in Europe⁵².

94. The Italian representatives contended that this concept takes into due account the technological development as well as the increasingly common commercial practice to associate, for example, the sale of daily newspapers with that of books or music CDs. It allows for the development of sectors, such as the printed press, which have so far been constrained into tight limits. In fact, Article 15 of the Gasparri Law allows the press to enter the television market, while it prevents the opposite until 2010. Indeed, the Gruppo l'Espresso has purchased a television.

95. The Commission agrees with the Italian government that the concept of the SIC reflects a current trend: different media markets are indeed likely to converge someday to form a single market. Some probably already do converge to a certain extent.

96. The Commission considers nevertheless that it is highly unlikely that this convergence will happen entirely in the foreseeable future and it is unlikely that it will have any significant impact in the current situation. It therefore considers that the SIC should not be used to replace, already at this stage, the "relevant market" criterion.

⁵¹ although Sky Italia has signed an agreement with the EC not to move to the DTT platform as a condition of its clearance.

⁵² Ms Quadri pointed out that Article 15 § 5 of Law 223/90 and Article 2 § 1 of Law 249/97 already contained the concept of an "integrated" communication system.

97. In fact, the concept of an integrated communications system as an economic indicator of market share considerably dilutes the effectiveness of instruments used to protect external pluralism based on share of revenues “on individual markets” (see Rec. (99) 1, point I of the Appendix). An individual company could have extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20 percent threshold for the whole sector.

98. In addition, the Commission notes that the convergence of the different markets in the Italian media sector for the purposes of anti-concentration measures through the introduction of the concept of an integrated communications system also appears to be at odds with the definition of media markets that the European Commission has employed in its competition-related decisions involving the television sector⁵³. In a number of competition cases involving the media sector, the European Commission has distinguished between different markets (including Pay-TV and free-to air television markets) based on different kinds of revenue streams and types of services supplied by operators.

99. The “relevant markets” have been abandoned to some extent in the new law. It is true, as the Italian representatives have pointed out, that Article 14 § 2 of the Gasparri Law requires AGCOM to assess concentration in the media sector to ensure that dominant positions are not *constituted* (the question of whether the AGCOM has any power in respect of *already existing* dominant positions remains open). This provision, however, might be difficult to apply in practice, in particular on account of the redefinition of “relevant markets”, or, more accurately perhaps, the lack of a “relevant market” definition. The application of Article 14 § 2 appears to be seriously hindered by the framework set out by the concept of the integrated communications system. A dominant position (presumably) will only occur in situations whereby the maximum levels set out in Article 15 of the Gasparri Law are exceeded by a company or related companies. In fact, AGCOM seems only competent to intervene in such case. This does not adequately provide for pluralism in the individual media sectors themselves, which, both in terms of markets and services, even when digitalisation is achieved, may not converge to the extent suggested by the framework set out by these thresholds.

100. It is to be noted furthermore that general anti-trust measures will remain applicable. However, while these protect against the *abuse* of dominant positions, in the media sector dominant positions are forbidden *as such*.

101. The application of SIC is likely to allow for the transferral, to a large extent, of the current levels of concentration in the national television market to digital platforms. As a consequence, the duopoly of Mediaset and RAI will continue in the digital television sector: in addition, with the changes brought about in this Law, this will be within the legal parameters set by.

102. Indeed, with the relaxation of cross-ownership rules Mediaset could (after 2010) expand into other sectors to increase its presence across different media markets. Cross-ownership rules are in fact considerably liberalised under the Gasparri Law. This may be viewed with concern, because of the dominant position of television in the Italian media market overall. The radio

⁵³ *Inter alia* Commission of the European Communities. (2000). Case No. COMP/ JV.37-BskyB/ Kirch Pay TV. Regulation (EEC) No. 4064/ 89 Merger Procedure 21/03/2000. Commission of the European Communities. (2003). Case No. COMP/ M.2876-NEWSCORP/TELEPIU. Regulation (EEC) No. 4064/ 89 Merger Procedure 2/04/2003.

sector is highly fragmented and thus vulnerable to consolidation and concentration. The press sector also performs below the average similar-sized markets in Europe and the readership rates are considerably lower than other EU countries.

103. The Commission refers to the Council of Europe standards on external media pluralism, as outlined above and as contained in the instruments of the Committee of Ministers and of the Parliamentary Assembly. The Commission is certainly cognizant of the lack of preciseness of those standards insofar as financial ceilings for market share that a broadcaster is allowed are concerned. Nevertheless, the Commission considers that there is no doubt about the aim of these ceilings: protecting the individual sectors from a dominant position by one individual actor. Now, the Commission doubts that the Article 15 §§ 1 and 2 of the Gasparri Law are suitable for achieving this aim.

104. In addition, the Commission notes that indeed the combined effect of the new framework set out in Article 15 (1) and (2) provides for liberalising the previous anti-concentration rules whose maximum permissible levels had been exceeded by both Mediaset and RAI⁵⁴. Under these new provisions, therefore, Retequattro was allowed to continue to occupy frequencies. In this respect, the Commission recalls that the “Companies which have reached the permissible thresholds in a relevant market should not be awarded additional broadcasting licences for that market” (Point I of Appendix to Committee of Ministers’ Recommendation (99)1)⁵⁵.

105. Finally, as regards local and digital broadcasting, the Commission notes that it is protected due to the generous threshold of the frequency allocated to local and regional channels and the fact that there is a disqualification placed on national broadcasters operating local and regional channels. This might encourage newspapers to invest in the local television sector.

106. In conclusion, the Commission considers that without other indicators such an audience share threshold⁵⁶ and a “relevant market” indicator, the thresholds provided in Article 15 §§ 1 and 2 are largely redundant as indicators of diversity.

107. As regards internal pluralism, the Commission notes that Article 5 e) explicitly prohibits discrimination between independent content providers and content providers referable to linked and controlled companies.

108. The Commission notes in addition that pursuant to AGCOM Decision 253 of 2004⁵⁷, access to networks for independent content providers of particular value is guaranteed to a certain extent.

⁵⁴ Under the Maccanico Law, the market television amounted to 12 billion euros, and the threshold, then of 30%, amounted to approx. 4 billion euros. Under the Gasparri Law, the SIC amounts to 26 billion euros: the threshold has thus become 5.2 billions euros.

⁵⁵ Instead, Centro Europa 7, which won the tender, has still not been granted any frequencies.

⁵⁶ The Commission notes that the Advisory Panel to the Council of Europe’s Steering Committee on the Mass Media (CDMM) on media concentrations, pluralism and diversity questions has concluded that, although it would be “unrealistic to consider that a common European regulatory approach in the area of Media Ownership Regulations would be feasible”, “the audience share approach is a widely used model, which presents the advantage of reflecting the real influence of a broadcaster in a given market and which, at the same time, is neutral on the number of licences which the broadcaster can hold and allows its international development.” See the Report prepared by the AP-MD on Media Diversity in Europe, H/APMD(2003)001, p. 10.

109. Although the Commission has not seen the criteria set out by AGCOM, it considers that the due application in practice of this principle may indeed contribute to internal pluralism.

6. Provisions on digital switch over

110. Section V of the Gasparri Law covers the transitional phase between analogue and digital terrestrial distribution. It aims to provide a legal framework for the gradual move of existing and, where relevant, new network operators and radio and television broadcasters to digital terrestrial delivery. The essential provisions are contained in Law n.66 of 20 March 2001, AGCOM Resolution n.435/01/CONS of 15 November 2001 (Regulation on terrestrial television broadcasting by digital technology) and Law n.112 of 3 May 2004.

111. Prior to analogue switch off, Law 66/2001 provides (Article 2-bis (1)) for a transitory phase during which “in order to promote the roll out of the DTT market, subjects who legitimately operate as broadcasters (via analogue terrestrial, cable and satellite) are qualified to experiment with television transmissions and Information Society services by digital technology.” This “authorisation for the experimentation of digital terrestrial broadcasts” is valid only for network operators as content providers are awarded authorisation directly without intermediary passages. Law 66/2001, as interpreted and implemented by AGCOM’s Regulation of November 2001, thus envisages gradual implementation of the dual regime based on licences for network operators and authorisations for content providers, by introducing a transitory qualification (“authorisation for the experimentation of digital terrestrial broadcasts”) valid for future licensed network operators.

112. Articles 22, 23, 24 and 25 are concerned with the roll out of digital terrestrial television broadcasting and switch off of analogue frequencies to establish full conversion of the current system.

113. Article 22 (1) obliges AGCOM to “prepare a programme for the implementation of the national plan for the allocation of digital frequencies”. This plan was approved by AGCOM on 29 of January 2003 (resolution n. 15/03/CONS). This is the so-called “first Level Plan” (it has allocated frequencies for national channels and regional channels). On 12 of November 2003 AGCOM approved the so-called “Integrated Plan” (Resolution. 399/03/CONS), which integrates the “First Level Plan” with a “Second Level Plan” (which allocates frequencies for local channels). Previously, on 15 of November 2001, AGCOM approved the regulation (Regolamento) for awarding licences and authorisations to digital terrestrial operators (Resolution n. 435/01/CONS). In this plan AGCOM must encourage experimentation and safeguard existing services. At the current time, as we understand the situation, there are five digital multiplexes covering over 50 percent of the population.

114. Until the implementation of the plan, content providers (national and local) that qualify for authorisation can experiment (either run an existing service on digital or apply for a licence to operate a digital channel) pursuant to Article 23 (1) until full switch off, which is planned for December 2006. This provision basically extends the previous provisions established in Law 66/2001 and in AGCOM’s Regulation that state the current regime for experimentation of digital terrestrial broadcasting ended 25 July 2005.

⁵⁷ Delibera AGCOM 253/04/CONS, “Norme a garanzia dell’accesso dei fornitori di contenuti di particolare valore alle reti per la televisione digitale terrestre”, published on 23 August 2004.

115. Article 23(1) also provides that subjects who qualify to experiment with digital terrestrial broadcasting can apply for a licence or authorisation to launch digital terrestrial broadcasting services as of the date the Law comes into force. Article 35 of AGCOM Regulation of November 2001 also stated that starting from 31 March 2004 and, in any case, subsequent to the adoption by AGCOM of the measures prescribed by Article 29 of that Regulation (not yet adopted), subjects who qualify for digital experimentation could apply to the Ministry of Communications for a licence as a network operator for the service area with which they are qualified to experiment.

116. Article 23 (3) also extends the practice of “spectrum trading”, which is a central innovation introduced in Law 66/2001 (Article 2-bis (2)). The system was introduced in order to promote the roll out of the market, given the lack of terrestrial frequencies available to transmit via digital technology. The “frequency trading” system was allowed for a period of three years, starting from the coming into force of Law 66/2001 (i.e. until March 2004). However, the Gasparri Law reaffirms the validity of this system without, apparently, time-frame for expiry (Article 23(3)). From the second half of 2003, RAI and Mediaset have been acquiring frequencies from local television broadcasters. The system allows entities that are legitimately undertaking television activities to transfer transmitters or company branches in order to set up digital networks, provided that the acquisitions are used for digital broadcasting.

117. Under Article 23 (5), a network operator licence is issued, on request, to subjects that legitimately exercise television broadcasting activities, provided they cover an area of no less than 50 percent of the population or of the local service area they serve. There is a temporary exemption for local operators (Article 25(11)) who are also allowed to apply for a national network operator licence, provided they satisfy certain requirements and commit to certain targets in terms of coverage (Article 23 (7)).

118. Under Article 23 (7), applications for a national network operator licence can also be made by subjects legitimately operating at local level that can prove they satisfy all the requirements for a national operator licence and declare their intention to cover, within six months of the application, an area of no less than 50 percent of the population, renouncing any rights they may hold for local television broadcasting .

119. Article 24 deals with the introduction of digital radio services and AGCOM is obliged to provide a national strategy to manage the migration of radio analogue broadcasters to digital delivery. The plan, in parallel to the television plan, has already been approved by AGCOM and in this sense Article 24 refers to the draft of AGCOM’s regulation. The plan is based on, *inter alia*, the following principles of development from analogue to digital: Article 24 (b) defines pluralism of programmes and services and a balance between national and local; Article 24 (c) defines the phases of development and the role of RAI in supporting roll out; Article 24 (g) sets out the limits of frequency assignment and radio programmes owned by individual companies; and, Article 24 (2) establishes the right for a support plan to be put in place after an industry hearing to assist the roll out of digital radio services.

120. Article 25 (1) establishes that digital terrestrial television has been introduced to promote pluralism in the television sector.

121. The law adopts a two-step approach for the migration from analogue to digital frequencies, with a special set of obligations for RAI. The two initial phases are envisaged as:

- DTT should cover 50 percent of the population by 1st January 2004.
- DTT should cover 70 percent of the population by 1st January 2005.

122. During the transitional period there are therefore certain obligations placed on “the company holding the general public broadcasting licence” (RAI) to achieve strategic thresholds in its DTT services coverage set out in Article 25 (2). These are coverage of: 50 percent of the population from 1 January 2004, and 70 % of the population by 1 January 2005. AGCOM is (was) required by the law to assess the development of digital terrestrial television based on three principles pursuant to Article 25 (3) based on:

- DTT coverage of at least 50 percent of the population.
- Affordable availability of decoders.
- Satisfactory range of programmes different from those broadcast on analogue.

123. In May 2004 AGCOM provided a positive assessment that these goals had been fulfilled with the caveat that the high degree of concentration of financial resources in the sector might act as a threat to media pluralism. This allowed the gradual migration process to continue and existing analogue broadcasters to continue transmissions. AGCOM did not draw upon the provisions indicated in Article 2 (7) of Law no 249 of 31 July 1997 based on Article 25 (4) as the conditions had been met.

124. Article 25 (5) obliges RAI to consult with the Ministry of Communications to identify either an area or areas which have problems receiving analogue signals in order to begin a process of full migration to digital by January 2005. Regardless of the provisions of Article 25 (5) RAI must ensure, under the provisions of Article 25 (6), that there exist three free-to-air analogue television channels and three digital television channels (Article 25 (6)) on the basis of the coverage set out in Article 25 (2) during the switch over period.

125. There are also provisions in the Law to encourage the purchase of set top boxes that include financial subsidies for households set out in Article 25 (7). There is a clause stating that this should only be introduced after the proceeds of the privatisation of RAI are collected pursuant to Article 21 (3). Public subsidies for DTT receivers have also been approved by the Annual Budget Law 2003 (“Legge Finanziaria”).

126. As the conditions set out in Article 25 (3 and 4) have been fulfilled (coverage and conditions of the assessment), a provisional transitional measure is established according to Article 25 (8) that restricts market share based on the number of national terrestrial channels (analogue and digital) during the transitional phase. Each broadcaster is limited to a maximum of 20 percent share of channels based on the total number of television channels until the digitalisation of networks, according to the plan, is fully implemented. This includes national channels of an experimental nature and/or simultaneous/repeat programming (under Article 23 (1)) regardless of whether the delivery form is analogue or digital. However, pursuant to Article 25 (9) these conditions are only applicable to broadcasters that have coverage of over 50 percent of the population (companies with a national multiplex). RAI is excluded from the threshold, except for purposes of calculating the limit of 20 percent. In this respect, RAI channels contribute to the total number of channels available (this was also the system adopted by Law 259 / 1997 for analogue terrestrial television).

127. With the positive evaluation of AGCOM of the conditions set out in Article 25 (1 and 3) according to Article 25 (11) the licences for analogue transmissions are extended on request to the date of final switch over. A request may be submitted either by an incumbent transmitting in digital or a national digital broadcaster (with services to over 50 percent of the population). A request can also be submitted by broadcasters who are transmitting on digital frequencies. In the case of national digital broadcasters, they must reach over 50 percent of the population. Local broadcasters who intend to apply for a local network operator licence (for DTT), as an exception to the provisions of 23 (5), can request one if they reach just 20 percent (instead of 50 percent) of the analogue coverage. Therefore if a network operator (until the frequency plan is fulfilled) can demonstrate that it has coverage of 20 percent through digital frequencies, it can apply to operate as a local digital operator on the condition that it commits itself to invest, within a five-year period, a minimum sum of €1 million in each region covered by that said licence. Furthermore, there is a reduction to € 500,000 where licences are restricted to areas smaller than the region (and for cases where an “additional licence for further broadcasting activities” are carried out within that said region, the sum is reduced to € 250,000).

7. Analysis of those provisions

128. The provisions set down in Section V for the migration of radio and television broadcasters from analogue to digital frequencies establishes an extraordinary rate of migration according to the deadlines set for switch off and full migration.

129. Many of the central provisions of Section V support and extend the provisions of Law 66/2001 and act to extend deadlines and therefore the continuation of the present conditions for the migration of broadcasters between frequencies. The main tools are a mix of: 1) state subsidies to promote the diffusion of hardware into households as well as indirect subsidies in terms of the allocation of a minimum amount of the state advertising budget to the print sector; 2) public policy deadlines that oblige RAI to meet coverage deadlines and thresholds set for operators to apply for licences and authorisations on local, national and regional levels; and 3) free market mechanisms i.e. spectrum trading between operators. There is also a reconfiguration of the categories for licensing purposes and transitional limits on channel share established to protect a degree of pluralism in the migration period. Many of these features were previously established in Law 66/2001 and AGCOM’s Regulation.

130. In accordance with Law 66/2001, AGCOM’s Regulation contemplates a transitional phase during which the licence regime for network operators does not apply and it sets out the steps in order to complete the transition from the regime for individual permits valid for analogue broadcasting to the dual regime (authorisations for content providers and licences for network operators) envisaged by Law 66/2001 in a fully digitalised television environment.

131. The Commission recalls that the Committee of Ministers’ Recommendation (2003) 9 requests the Member States to “create adequate legal and economic conditions for the development of digital broadcasting that guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes” and to “protect and, if necessary, take positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in this sector”.

132. The Commission notes that according to the Appendix to Recommendation (2003) 9, “given that for consumers the changeover to digital broadcasting means acquiring new equipment to decode and decrypt digital signals and, therefore, a certain amount of expense, and

in order to avoid any form of material discrimination and any risk of “digital divide” between different social categories, member states should pay particular attention to ways of reducing the cost of such equipment” and “should facilitate the public’s change over to digital broadcasting.” In this respect, the provision of financial subsidies for households for the purchase of set top boxes should be welcomed⁵⁸, although these subsidies remain on the exclusive charge of the Government notwithstanding that Mediaset is certainly equally benefiting from them.

133. On the whole, however, the Commission has the impression that the Gasparri Law does not deal with the question of concentration today in a satisfactory manner. The approach is one of attempting to hold back on finding a real solution to the problem of media concentration in the television market to some future point in time and it relies heavily on the point in time when digitalisation will come to full fruition. This approach does not seem satisfactory, as, if the *status quo* is maintained, it is likely that Mediaset and RAI will remain the dominant actors in Italian television.

8. Provisions on a public broadcasting service

134. Article 2 (1h) of the Gasparri Law defines “general public television⁵⁹ broadcasting service” as a “public service performed under franchise [licence⁶⁰] in the television broadcasting sector” (see also Article 6(4)). Article 17 adds that “the general public television broadcasting service shall be entrusted by franchise to a joint-stock company [public limited company], which shall perform the service on the basis of a national service contract signed with the Ministry of Communications, regional service contracts and, in the case of the autonomous provinces of Trento and Bolzano, provincial service contracts, which shall define the rights and obligations of the company holding the franchise. The contracts shall be renewed every three years”. Article 20 names RAI-Radiotelevisione italiana Spa as the company to which “the general public television broadcasting service franchise shall be granted to for a period of 12 years” – i.e. until 2016.

135. Article 19 entrusts AGCOM with the task of “verifying that the general public television broadcasting service is effectively provided in accordance with the provisions contained in the present law, the national service contract and the specific service contracts [...], with due regard also to the parameters of service quality and indications of user satisfaction”. It lays down requisite procedures of verification and gives AGCOM the powers needed for execution of this task, including that of imposing fines for non-compliance with the remit and programme obligations. In the event of repeated failure to comply, AGCOM may order the holder of the general public broadcasting service franchise to cease trading for up to 90 days.

136. Under the Gasparri Law, the performance of a public broadcasting service remains formally dissociated from any specific broadcasting organisation. The public broadcasting franchise may be awarded to any broadcasting organisation (which, however, has to have the legal form of a joint-stock company). It will perform it on the basis of the provisions of the law

⁵⁸ The Commission has not looked in detail into the implications of these financial grants, in terms of, for instance, possible discriminatory effects, or into their compatibility with EC law.

⁵⁹ This reference to “public television broadcasting” (in this article and in all other articles) is a mistranslation. The original Italian text refers to “public radio and television broadcasting”. Thus, the law covers a public broadcasting service provided via both radio and television.

⁶⁰ Additions in square brackets provide alternative translations of terms used in the law.

itself, as well as of national, provincial and regional public service contracts, renewable every three years. However, the law does not address the issue of what would happen if no broadcaster applied for the franchise after the expiry of the current one (and the expiry of the convention between RAI and the Italian Government).

137. RAI has so far been the sole public service licensee by virtue of a series of conventions with the Italian Government. The latest convention of 1994 has a duration of 20 years, i.e. it will expire in 2014, two years before the expiry of the new franchise. It is unclear whether this state of affairs is affected by the present law.

138. Article 2 of the Law no 223 of 6 August 1990 (“Mammi’ Law”) specified that the franchise may be awarded only to a wholly publicly-owned company, which in reality meant RAI. This provision has now been removed, meaning that – formally speaking – the franchise may be awarded to any broadcasting joint-stock company. Indeed, RAI is to be – at least in part – privatised.

139. As already noted, RAI has had a series of conventions with the government. It also has to conclude a national service contract with the Ministry of Communications, regional service contracts and, in the case of the autonomous provinces of Trento and Bolzano, provincial service contracts. The national service contract has to be approved by the President of the Republic. The Director General of RAI is appointed by the Chairman of the Board and the Minister of Economic Affairs.

140. In addition, the public broadcaster is subject to control by a parliamentary commission for the general direction and surveillance of radio-television services. The commission has, and appears that it will retain, extensive powers and competencies vis-à-vis RAI, including some decision-making powers concerning programming and finance⁶¹.

141. Pursuant to Article 17 (4), guidelines on the content of obligations incumbent on the general public television broadcasting service “shall be laid down by decision to be adopted in agreement with AGCOM and the Minister for Communications prior to each renewal for three years of the national service contract”. These guidelines are to be “defined in relation to market developments, technological advances and changes in local and national cultural requirements”.

142. Law no. 249 of 31 July 1997 on AGCOM and the regulations for telecommunications and radio and television broadcasting systems provides in Article 1 (6.b.10) that AGCOM “proposes arrangements to the Ministry of Communications to be introduced for the agreement on the concession [franchise, licence] of the public radio-television service”. This can be taken to mean that AGCOM mediates between the broadcaster holding the general public broadcasting service franchise and the Ministry of Communications in the conclusion of the service contract. As noted above, it is also involved in adopting the guidelines for the content of such a contract.

⁶¹ Under Article 4 of Law no. 103 of 14 April 1975 (as amended), the parliamentary commission “formulates the general directions for the execution of the principles mentioned in Article 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 that they are observed; establishes the regulations to guarantee access to radio-television; 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 [...]”.

143. The remit and programme obligations of the public broadcasting service are defined in Article 17 of the Law and, more extensively in the public service contracts.

144. The Ministry of Communications participates, together with AGCOM, in the definition of the guidelines for the service contract (Article 17, paragraph 4) and then negotiates it and signs it on behalf of the government (paragraph 1).

145. The public broadcasting service is called to provide “access to programming [...] for parties and groups represented in Parliament and in regional assemblies and councils, organisations associated with local authorities, national trade unions, religious denominations, political movements, political and cultural bodies and associations, legally recognised national associations of the cooperative movement, social welfare associations entered in the national and regional registers, ethnic and language groups and such other groups of substantial social interest as may request access”(para. 1d).

146. It also has to provide “free broadcasts of messages of social utility or public interest, requested by the Presidency of the Council of Ministers”(para. 1 g).

9. Analysis of those provisions

147. In Recommendation No. R (96) 10 on the Guarantee of the Independence of Public Service Broadcasting, the Council of Europe Committee of Ministers recommended that Member States “include in their domestic law or in instruments governing public service broadcasting organisations provisions guaranteeing their independence”.

148. An Appendix to this recommendation adds that “the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy”. The Appendix stresses that this is especially important “in areas such as: the definition of programme schedules; the conception and production of programmes; the editing and presentation of news and current affairs programmes; the organisation of the activities of the service; recruitment, employment and staff management within the service; the purchase, hire, sale and use of goods and services; the management of financial resources; the preparation and execution of the budget; the negotiation, preparation and signature of legal acts relating to the operation of the service; the representation of the service in legal proceedings as well as with respect to third parties.”

149. The Commission notes that Article 16 (2f) of the Gasparri Law provides, in the context of the public broadcasting licensee’s service contracts at the regional and provincial level, that due regard should be given in such contracts to “the right of the company holding the franchise to take economic decisions, including decisions as to the organisation of the firm”. Presumably, the same applies in the case of the national service contracts. This does not seem to guarantee the full institutional independence and autonomy of the public service broadcasting organisation.

150. The role of the parliamentary commission in programme matters (this commission was referred to as the guarantor of internal pluralism in the Italian media, as opposed to AGCOM which is the guarantor of external pluralism) and the manner of developing the service contracts, with strong government participation (see para. 93 above) might also be problematic in this respect. The Commission recalls that the Appendix to Committee of Ministers’ Rec. (2000)23 “on the independence and functions of regulatory authorities for the broadcasting sector”

provides that in order to preserve the editorial independence of the public broadcasting service, regulatory authorities should not exercise *a priori* control over programming.

151. In this respect, the Commission wishes to stress that a supervisory role of parliament on the national broadcaster is certainly acceptable and compatible with the democratic functions of parliament. It often reflects the political culture prevailing in the states concerned.

152. Indeed, the Commission notes that a parliamentary component in the public broadcasters' boards of directors exists not only in Italy, but also in other European countries⁶². In Finland, for example, the Administrative Council of YLE is made up primarily of members of parliament. In France, two members of parliament sit in the Administrative Council of France Télévision. In Spain, the Council of Administrators of Television Espanola is composed of twelve members of all parliamentary political parties⁶³.

153. This parliamentary role, however, should mainly concern the establishment of guidelines and the solution to certain problems of public opinion, and should not be extended to interfere with the editorial work of the broadcaster or even with the appointment and dismissal of journalists.

154. As regards access to airtime, paragraph 1 d of Article 17 provides for a democratic solution, in conformity with the Council of Europe standards, provided of course that the allocation take place in an appropriate manner.

155. Paragraph 1 g of Article 17 appears to be formulated in too vague terms, which seems insufficient to rule out potential abuse by the government of the right to obtain free air time. The duty to provide free air time simply "on request" of the Presidency of the Council of Ministers could turn the public broadcaster into a mouthpiece of the government. In this respect, the Commission recalls that Rec. (99) 1 of the Committee of Ministers states that "The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations."

10. Provisions on the legal form, governance and funding of RAI

156. RAI has so far been a publicly-owned company, governed by a five member board, appointed by the Speakers of the Chamber of Deputies and of the Senate (three from the governing coalition and two from the opposition). As noted above, the Director General of RAI is now appointed by the Chairman of the Board and the Minister of Economic Affairs.

157. Article 21 of the present law provides for:

- a. the incorporation of RAI-Radiotelevisione italiana Spa in RAI-Holding Spa (the licences, authorisations and franchises held by RAI-Radiotelevisione italiana Spa have been transferred automatically to the incorporating company), and

⁶² See David Ward, The Composition, election and competencies of the boards of public broadcasters

⁶³ A reform of the Spanish Radio and Television System is currently underway.

- b. the sale of state shares in the company. A proportion of the shares is to be reserved for persons attending the sale who produce evidence that they have paid the licence fee (without the right to sell them within 18 months of the date of purchase). An upper limit of one percent on shareholdings carrying voting rights has been imposed. Voting pacts between syndicates or block votes are prohibited, as are agreements made through controlled, controlling or linked persons, between persons whose total holdings exceed the limit of two percent on shareholding, with respect to shares carrying voting rights, or joint presentation of lists by persons in that position.

158. The Law provides for two methods of appointing the nine member RAI Board of Governors [Directors], to be applied before and after the sale of at least 10 percent⁶⁴ of RAI's capital.

159. Prior to privatisation, seven members of the Board will be designated by the Parliamentary Commission for the general direction and surveillance of radio-television services and two (including the chairman) by the majority shareholder, i.e. the Minister of Economic Affairs. The appointment of the chairman must be endorsed by a two-third majority in the Parliamentary Commission.

160. After privatisation, the Board will be elected by the general meeting of shareholders, with each shareholder holding at least 0.5 percent of shares entitled to present a list of candidates. Until the State has sold all its shares, the Minister of Economic Affairs will continue to present a list of candidates (drawn up by the Parliamentary Commission) indicating the maximum number of candidates in proportion to the number of shares held by the State. The voting method is designed to some extent to favour, in some cases, candidates proposed by shareholders holding fewer shares. Election of the chairman will still have to be endorsed by a two-third majority in the Parliamentary Commission. The Board of Governors [Directors] has a three-year term of office.

161. Pursuant to Article 18, the holder of the general public broadcasting franchise is funded by, *inter alia*, licence fees whose amount is set so as to enable the company to cover the costs associated with the public broadcasting service. Pursuant to Article 6 (5), the company may sign contracts or agreements with public authorities for paid services, but may not receive any other form of public funding. Article 17 (5) authorises the company to pursue commercial activities, provided that they are not detrimental to its public service remit. This includes advertising, sponsorship and teleshopping, which are regulated elsewhere. An official auditor appointed by RAI and approved by AGCOM will supervise the yearly budget.

11. Analysis of those provisions

162. The Commission recalls that one of the most typical features of the public broadcasting service is that it should operate independently of those holding economic and political power. The independence of the public broadcaster is essential in order for it to be capable of ensuring a real internal pluralism.

⁶⁴ It is currently foreseen to privatise 20/25% or 30% of RAI's capital.

163. RAI has traditionally been governed by the political forces on the basis of shared control of the three public networks. This anomaly has been aggravated by the circumstance that the current Prime Minister is also the owner of Mediaset, which owns three major national channels.

164. The prospective privatisation should lead to a lesser degree of politicisation of RAI.

165. Whether the privatisation will be successful in this respect will depend on its attractiveness for potential shareholders, given that no single entity may hold more than one percent of the shares. In the meantime, that is to say until the sale of at least 10 percent of RAI shares, the change of rules on RAI governance means that the effect of the reform law of 1975, placing RAI under the control of parliament, and not of government (as before), is partly reversed. The Parliamentary Commission will continue to appoint seven of the nine members of the Board of Directors, but the system appears to be designed to give the governing party/coalition a built-in majority.

166. As to the effects of the privatisation, in the opinion of the ruling coalition, private investors will have a genuine opportunity of becoming shareholders of RAI. The Board of Governors will be partly composed of private individuals, which will put an end to the logic of *lottizzazione*.

167. According to representatives of the opposition, interest in the purchase of shares will be low. It will be more interesting to purchase small private networks, as the publishing group l'Espresso has recently done. In addition, the likely investors will be entrepreneurs belonging to the political area of the Prime Minister. Their representatives on the Board of Governors will, in the view of the representatives of the opposition, therefore be in line with the current majority.

168. The Commission observes that, should the interest in the purchase of RAI shares be indeed low, the Minister of Economy will retain some control of the Board of Governors. There is also the possibility that the Governors representing the private shareholders will belong to the political parties of the majority. This, however, cannot be predicted at this stage. It may well be that this is not the case.

169. It does appear nonetheless that the Minister of Economic Affairs may continue to maintain a powerful position in the general meeting for a considerable time as the largest shareholder, whereas all other shareholders will have only 1 percent of the shares and cannot, formally speaking, combine their voting power. Even when all the shares have been sold, the appointment of the chairman of the Board of Directors will still have to be approved by a two-thirds majority of the parliamentary commission, giving the ruling party/coalition an effective veto over his/her election. Even if shares are sold quickly, the first Board of Directors with a government majority will finish serving its term of three years.

170. Methods of funding RAI (setting the level of the licence fee for only a year; possible contracts with public authorities for paid services) are not fully consistent with Recommendation No. R(96) 10 on the Guarantee of the Independence of Public Service Broadcasting, which states in its Appendix that:

- the decision-making power of authorities regarding funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the PSB organisation; [...]

- payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning; and
- the use of the contribution or licence fee by the public service broadcasting organisation should respect the principle of independence and autonomy.

171. In more general terms, with reference to the privatisation of RAI, the Commission recalls the dilemma between the pure market model and the public-policy model.

172. The Commission also wishes to refer to the warning which AGCOM has recently issued⁶⁵ with reference to the circumstance that RAI, as a stock company, will be under great pressure to maximise the advertising income, which will interfere with the achievement of the public-policy aims. According to AGCOM, the mere auditing separation does not seem a sufficient or appropriate guarantee and privatisation does not appear suitable to ensure that RAI will efficiently carry out its public-policy tasks and at the same time efficiently compete with other operators (including Mediaset) in the area of advertising revenues.

173. AGCOM has indeed pointed to the solution in force in the UK, where the Public Broadcasting Service is publicly owned and financed by licence fees, while commercial operators, including public ones, are financed through advertising.

174. Indeed, the BBC is funded through a licence fee, which is supplemented with a marginal amount of income from commercial sources. The BBC also receives revenues from commercial activities and to this end it has established a commercial arm operated by two subsidiaries, BBC Worldwide Ltd. and BBC Resources Ltd. These subsidiaries have separate Boards and provide separate accounts and annual reports. The commercial services include a number of thematic channels: the global news channel BBC World, BBC Prime (entertainment) and BBC America (drama, news and entertainment). Today the BBC derives commercial revenues from channels, the rental of studios as well as the sale of programmes. However, commercial activities must meet certain criteria and essentially promote, and be supportive of, the BBC's activities as a public service broadcaster. In order to comply with the European Union's Transparency Directive and national competition policy rules, the BBC is obliged to maintain separate and transparent accounting systems for its public and commercial activities, to ensure that it does not distort competition by using the licence fee to cross-subsidise its commercial services.

175. In conclusion, the Commission notes that change at RAI will allow for government control over the Public Broadcaster for an unforeseeable period of time. For as long as the present government stays in office, this will mean that, in addition to being in control of its own three national television channels, the Prime Minister will have some control on the three public national television channels. The Commission expresses concern over the risk that this atypical situation may even strengthen the threat of monopolisation, which might constitute, in terms of the case-law of the European Court of Human Rights, an unjustified interference with freedom of expression.

⁶⁵ AGCOM, Indagine conoscitiva sul settore televisivo: La raccolta pubblicitaria, pp. 158 and following.

12. Protection of the printed press

176. Plurality of the media does not only mean the existence of a plurality of actors and outlets, it also means the existence of a wide range of media, i.e. different *kinds* of media. It is so because each medium has a particular target audience, which would not easily or automatically replace one medium with a different one. The manner in which ideas are disseminated through each medium also varies considerably from one medium to another. Television's immense reach for example means that daily newspapers are now suppliers not so much of news but rather of editorials and background features.

177. The development of television and its attractiveness to the advertising industry have started a financial crisis of the printed press almost everywhere in Europe. Advertising revenues for the daily press have dramatically declined.

178. Several governments have introduced financial subsidies for newspapers⁶⁶, in the form of either direct subsidies, such as telecommunications, postal rate and carrier advantages, or establishment grants, or indirect subsidies in the form of value-added tax concessions, limitations on advertising on state television, exemption from corporation tax for printers, publishers and press agencies. Several European states levy a tax on advertising, and some of them link it to funding a press subsidy scheme.

179. In Sweden, for example, under the Press Subsidies Act, numerous measures in favour of the printed press are in force, which include preferential tax rates with regard to advertising revenue, government communications and advertisements published in all newspapers and prohibition or limitation on advertising on radio and television in order to protect the printed press.

180. The Dutch government also took, at a certain stage, specific measures in order to re-channel part of the advertising revenues into the printed press. The Netherlands Press Industry Fund is financed by income from a levy on both public service advertising and commercial television advertising.

181. In France, subsidies are granted to safeguard the survival of newspapers with a low advertising revenue.

182. In Norway, several measures in support of the printed press are in force. A Public Press Fund grants cheap loans and state loan guarantees to allow newspapers to modernise and re-equip.

183. In Austria, the new Press Subsidies Act of 2004 provides for a system of direct subsidies based on three pillars. The first pillar is the promotion of the printed press-distribution, the second the promotion of the preservation of the regional pluralism of newspapers, and the third one is to promote the quality of daily and weekly papers by supporting, *inter alia*, training of journalists or research projects. In addition to that, there exist various forms of indirect subsidies.

⁶⁶ See Evan Ruth, Media Subsidies, at www.article19.org; Paul Murschetz, State support for the press – Theory and Practice, Mediafact, October 1997.

184. The Italian government takes certain measures in support of the printed press. Financial subsidies are granted, upon request, to those newspapers which declare to be the official papers of a political party. These subsidies allow certain newspapers with low advertising resources to survive⁶⁷.

185. Support for the press industry is also set out in Article 25 (6) of the Gasparri Law , which provides that “at least 60 percent of the overall budget set aside by a public administration office or public body or public limited company for the purchase of advertising space for institutional communication on means of mass communication, each financial year, must be used for daily newspapers and magazines”.

186. The Commission finds that these measures are undoubtedly positive and constitute a good contribution to media pluralism.

187. The Commission is not aware of whether further measures are in force in Italy in order to reduce the negative impact of television competition on the advertising revenues of the press. It is would indeed seem necessary to provide the broadest possible support to the press, in particular in the light of the extremely concentrated market of advertising revenues in Italy.

V. “Rules for the resolution of conflicts of interest” (“the Frattini Law”, CDL(2004)93rev)

1. Background

188. When Silvio Berlusconi was first elected and became Prime Minister in 1994, the question of the potential conflicts of interest between his private interests and his public functions arose.

189. Neither his first government nor the subsequent government of the left-wing coalition enacted the relevant piece of legislation.

190. Mr Berlusconi was again elected in 2001. Upon his election, he committed himself to solving the issue within one hundred days.

191. The “rules for the resolution of conflicts of interest” were finally adopted by the Chamber of Deputies on 13 July 2004, and published in the Official Gazette on 18 August 2004.

192. Minor amendments were made to them by Law Decree no. 233 of 6 September 2004.

⁶⁷ In his report on civil and political rights, including the question of freedom of expression (Addendum, Mission to Italy) of 3 March 2005, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion pointed out that he had received information that allocation of subsidies to newspapers in Italy is contingent on their sponsorship by members of parliament. This, in his opinion, may lead to the exclusion of certain newspapers and impede the development of a fully independent press, an essential element of a dynamic democracy. The Venice Commission has not received any information on any practice of politicisation in the granting of financial assistance to the print media.

2. Conflict of interest : outline of comparative analysis

193. The Commission observes at the outset that a clear distinction should be made between general incompatibility on the one hand, and specific situations of conflict of interest on the other hand.

194. The general incompatibility of members of government, which is connected to issues such as general confidence in the political system, is, in several European countries, spelled out at the constitutional level.

195. It is the case in Albania⁶⁸, the Czech Republic⁶⁹, Estonia⁷⁰, Finland⁷¹, France⁷², Georgia⁷³, Greece⁷⁴, Moldova⁷⁵, Poland⁷⁶, Romania⁷⁷, Slovakia⁷⁸, Spain⁷⁹, Sweden⁸⁰ and Ukraine⁸¹.

⁶⁸ Pursuant to Article 103 of the Albanian Constitution, a minister may not exercise any other state activity or be a director or member of the organs of profit-making companies.

⁶⁹ Pursuant to Article 70 of the Constitution of the Czech Republic, "Members of the government may not engage in activities which are by their nature incompatible with the performance of a minister's duties. Detailed provisions shall be set down in a statute"

⁷⁰ Pursuant to Article 99 of the Estonian Constitution, "Members of the Government of the Republic may not hold any other public office or belong to the leadership or council of a commercial enterprise."

⁷¹ Section 63 of the Finnish Constitution provides as follows: "Ministers' personal interests. § 1 While holding the office of a Minister, a member of the Government shall not hold any other public office or undertake any other task which may obstruct the performance of his or her ministerial duties or compromise the credibility of his or her actions as a Minister. § 2 A Minister shall, without delay after being appointed, present to the Parliament an account of his or her commercial activities, shareholdings and other significant assets, as well as of any duties outside the official duties of a Minister and of other interests which may be of relevance when his or her performance as a member of the Government is being evaluated."

⁷² Article 23 of the French Constitution provides: "The duties of member of the Government shall be incompatible with the exercise of any parliamentary office, any position of occupational representation at national level, any public employment or any occupational activity".

⁷³ Article 81.2 § 4 of the Georgian Constitution provides that "A member of the Government shall not have the right to hold any position, except for a party position, or establish an enterprise, engage in entrepreneurial activity or receive a salary from any other activity, with the exception of scientific and pedagogical activity."

⁷⁴ Article 81 § 3-4 of the Greek Constitution reads: "Any professional activity whatsoever of members of the Government, Under-Secretaries and the Speaker of Parliament shall be in abeyance during the discharge of their duties. The incompatibility of the Office of Minister and Under-Secretary with other activities may be established by statute.

⁷⁵ Article 99 of the Moldovan Constitution provides: "Incompatibilities . (1) The office of government member is incompatible with the holding of another remunerated position. (2) Other incompatibilities will be specified by organic law."

⁷⁶ Article 150 of the Polish Constitution reads : "A member of the Council of Ministers shall not perform any activity inconsistent with his public duties."

⁷⁷ Pursuant to Article 105 of the Romanian Constitution (Incompatibilities), "(1) Membership of the Government shall be incompatible with the exercise of any other public office in authority, except that of a Deputy or Senator. Likewise, it shall be incompatible with the exercise of any office of professional representation paid by a trading organization. (2) Other incompatibilities shall be established by an organic law."

196. Specific situations of conflict of interests are, in many countries, addressed in ordinary legislation, be it in organic or other laws on incompatibility, or else by administrative law provisions on legal incompetence in concrete matters.

3. The standards of the Council of Europe in the field of freedom of the press and conflicts of interest.

- a. The standards developed by the Committee of Ministers of the Council of Europe

197. In 2000, the Committee of Ministers adopted Recommendation (No. R(2000)10) “on Codes of Conduct for Public Officials”.

198. Under Article 13 of the Code of Conduct,

“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.

3. Since the public official is usually the only person who knows whether he or she is in that situation, the public official has a personal responsibility to:

- be alert to any actual or potential conflict of interest;
- take steps to avoid such conflict;
- disclose to his or her supervisor any such conflict as soon as he or she becomes aware of it;

⁷⁸ In accordance with Article 109 § 2 of the Slovak Constitution, “the discharge of the post of a member of the Government shall be incompatible with discharge of a Member of Parliament’s mandate, with discharge of a post in another public authority, with public service relationship, with employment or with a similar labour relation, with an entrepreneurial activity, with membership in governing or control body of a legal person, which pursues an entrepreneurial activity or with another economic or gainful activities apart from the administration of his or her own property and scientific, pedagogical, literary or artistic activity.”

⁷⁹ Article 98 §§ 3-4 of the Spanish Constitution states: “members of the Government may not perform representative functions other than those derived from their Parliamentary mandate, nor any other public function not derived from their office, nor engage in any professional or commercial activity whatsoever. 4. The status and disabilities of the members of the Government shall be regulated by law.”

⁸⁰ Chapter 6, Article 9 § 2 of the Swedish Constitution reads: “A minister may not have any other public or private employment. Neither may he hold any appointment or carry on any activity likely to impair public confidence in him.”

⁸¹ Article 120 of the Ukrainian Constitution provides: “Members of the Cabinet of Ministers of Ukraine and chief officers of central and local bodies of executive power do not have the right to combine their official activity with other work, except teaching, scholarly and creative activity outside of working hours, or to be members of an administrative body or board of supervisors of an enterprise that is aimed at making profit.”

- comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict.

4. Whenever required to do so, the public official should declare whether or not he or she has a conflict of interest.

5. Any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment”.

199. According to paragraph 4 of Article 1, “the provisions of [the] Code do not apply to publicly elected representatives, members of government and holders of judicial office.”

- b. The Recommendations of the OECD Council on Guidelines for Managing Conflict of Interest in the Public Service

200. In 2003, the Council of the Organisation for Economic Co-operation and Development adopted some Guidelines for Managing Conflict of Interest in the Public Service.

201. They provided the following definition of “conflict of interest”:

“A ‘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.”

202. They also contained the following non-exhaustive list of “strategies for positive resolution or management of a continuing or pervasive conflict”:

“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.
Resignation of the public official from the conflicting private-capacity function, and/or
Resignation of the public official from their public office.”

- c. The case-law of the European Court of Human Rights

203. As regards the conflict of interest, the European Court of Human Rights has so far not adjudicated on the relation between the incompatibility of holding certain public offices on the one hand and the interests in the field of mass media. However, the Court had the opportunity to assess the problem of the incompatibility between the legislative functions and the representation of the interests of a publisher, in a judgment in the context of freedom of the press⁸².

204. The applicants alleged that an injunction prohibiting them from repeating certain statements they had published in a periodical (“Neue Kronen-Zeitung”), and ordering them to

⁸² Dichand a.o. v. Austria, judgment of 26 February 2002, Application No. 29271/95.

retract these statements violated their right to freedom of expression, contrary to Article 10 of the Convention. The applicants in that case belonged to a large Austrian media group which at the relevant time was in strong competition with another media group represented by a lawyer who at the same time was secretary general of the Austrian People's Party, the Chairman of the Parliament's Legislative Committee. In his latter capacity, the lawyer had to negotiate acts that were directly relevant for the newspaper company represented by him. Years later an article was published criticising the double-role of the lawyer. The first paragraph of the article was – according to the Court - illustrating a general moral principle with a concrete example, in casu that of a French lawyer and later Minister, Roland Dumas, who was said to have behaved in an exemplary manner when “he took it for granted that he had to give up his law firm when he became a member of the [French] government.”

205. The article went on to state: “In every democracy of the world this course of action is followed. Only Mr M.G., who is obviously thick-skinned, does not intend to comply with this moral concept.”

206. The following paragraph describes in detail and accurately, with reference to the lawyer's public function, the factual background for the concluding remark about him in the last sentence of the first paragraph. It reads: “It so happened that at the time when M.G. was presiding Parliament's Legislative Committee, a law was amended which brought about big advantages for the newspaper publishers whom M.G. represented as a lawyer. In order to ensure that in such cases no suspicion, not even one that has no objective justification can arise, there exists the wise rule of incompatibility; a lawyer is not allowed to take part in the adoption of laws which lead to advantages for his clients.”

207. The Court found that the injunction granted against that article amounted to a violation of Article 10 of the Convention. The crucial part of the reasoning reads as follows: “As regards [...] the statement that Mr Graff had, as chairman of the Legislative Committee, participated in the passing of an amendment which had brought about big advantages for one of his clients, the Court notes that the test applied by the Commercial Court in the domestic proceedings that the applicants had to prove that the amendment to the Enforcement Act exclusively served the interests of Mr Graff's clients imposed an excessive burden on the applicant. The impugned statements did not imply that the amendment served the interests of Mr Graff's clients exclusively, only that it brought about considerable advantages for them. In these circumstances, the Court finds that there was sufficient factual basis for the value judgment (the second element) in the article. The latter represents, in the Court's opinion, a fair comment on an issue of general public interest. [...]”

208. The Court admitted that the applicants – on a slim factual basis – published harsh criticism in strong, polemical language. On balance, the Court found that the Austrian courts had overstepped the margin of appreciation afforded to Member States and, in this respect, the measure at issue was disproportionate to the aim pursued.

209. A decisive argument for the Court was that the person in question was a politician of importance, “and the fact that a politician is in a situation where his business and political activities overlap may give rise to public discussion, even where, strictly speaking, no problem of incompatibility of office under domestic law arises.”

210. Again the Court did not express its opinion on an obligation by the State to tackle the problem of pluralism and independence of the press. However, it can be said that under certain

circumstances, non-observance of principles of incompatibility may impinge on the independence of the printed press and the electronic media. Restrictions on the press in this field are usually not necessary for the purpose of Article 10 paragraph 2 of the Convention.

4. Provisions on conflicts of interest

211. The Frattini Law addresses the issue of conflict of interest between public officials and professional and entrepreneurial activities⁸³.

212. Section 1 of the Law 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 situation where there is a conflict of interest.

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

- holding specific 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 other duties in professional societies or associations; and
- performing any type of public- or private-sector job.

214. Section 2(2) provides that individual entrepreneurs must arrange to appoint one or more authorised managers.

215. Section 3 defines conflicts of interests as the occurrence of one of two situations:

- An act of commission (introduction of a measure, or the act of proposing a measure) or omission (failure to take a measure that should have 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.

216. Government officials are put under an obligation to declare, within thirty days of taking office, to the Anti-Trust Authority (and, when appropriate, to the Broadcasting Authority) disqualification situations covered by Section 2 (1), as well as, within sixty days of taking office, their own assets, including shareholdings. They must also declare any subsequent change in the information concerning their assets as previously supplied, within twenty days of the events giving rise to those changes.

217. Under transitional provisions, also incumbents holding offices when the Law enters into effect are under an obligation to make such reports.

⁸³ The Commission however will only examine this law from the point of view of media pluralism.

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

219. The Anti-Trust Authority and the Broadcasting authority must remove conflicts of interests, when they occur. This means in the first instance ensuring that a government official loses the posts, offices or jobs listed in Section 2(1) as incompatible with government office.

220. In the second instance, the obligation of the Authorities is 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 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)); or
- companies operating in the sectors referred to in Section 2(1) of Law 249/97 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)).

221. Where such circumstances arise, the two authorities are authorised 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 impose a fine proportional to the seriousness of the conduct, the maximum amount of which shall be proportional to the pecuniary advantage actually obtained by the company or the seriousness of the violation.

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

223. The Anti-trust Authority and the Broadcasting Authority must submit to parliament a report every six months on the progress of the monitoring and supervisory activities referred to herein.

5. Analysis of those provisions

- a. The applicability of the Council of Europe standards to the situation under consideration

224. The Commission notes at the outset that the Code of Conduct for Public Officials drafted by the Multidisciplinary Group on Corruption (GMC) set up by the Council of Europe's Committee of Ministers is "not applicable" to publicly elected representatives and members of government (see paragraph 4 of Article 1 of the Code).

225. The question arises therefore of whether publicly elected representatives and members of government may not be expected to comply with the principles pertaining to the conduct of a public official in a situation of conflict of interest as defined in the code.

226. In this respect, the Commission has analysed the Explanatory Memorandum to Recommendation Rec(2000)10⁸⁴, which points out that the reason for excluding in general the applicability of the code to elected representatives and members of government is that those categories, as well as judges, present certain specific characteristics which do not pertain to civil service as such, so that they may require special rules⁸⁵.

227. The drafters of the code of conduct underlined: “Elected representatives are usually responsible to their electorate and/or to their party. At the same time, the public interest requires from them accountability, transparency and integrity. Tradition plays a great role in the evolution of the situation in member states. In the context of combating corruption, special attention needs to be given to questions of immunity, relations with the party, sanctions and conflicts of interest. Changes to the current situation require careful consideration.”

228. The drafters considered that it was “necessary to draw a clear distinction between public officials who exercise functions within public administration or a public sector entity on the one hand, and ministers and elected representatives who are political figures responsible before parliament and ultimately to the voters on the other. Thus, for instance, the principle of political neutrality recognised in paragraph 2 of Article 4 could not be applied to the latter.”

229. The Commission understands from the above that the code of conduct was designed for the general public service, and would have required specific rules in relation to certain categories of persons, such as the elected representatives or governmental ministries. Given that these specific rules had not been elaborated and were therefore not ready to be included in the code, the relevant categories were excluded from the scope of application of the latter code.

230. The drafters further considered, however, that, this exclusion notwithstanding, “it would be desirable for states to adopt ethical standards appropriate for the functions performed by these persons. With this in mind, states can decide to *draw inspiration from the present code*.”

231. In the light of the explanatory memorandum, and of common sense too, the Commission considers that the circumstance that the application of the code of conduct is limited to public officials does not exclude that these standards may be applicable, *mutatis mutandis*, to publicly elected representatives and members of government.

232. The Commission is nevertheless well aware of the differences which undoubtedly exist between civil servants and elected representatives. In particular, the Commission is of course cognizant that elected representatives and members of government, as politicians, are even expected to have certain kinds of commitments vis-à-vis civil society, for example, which would be problematic for civil servants. In addition, elected representatives and government members are subject to specific procedures of political responsibility.

⁸⁴ Explanatory Memorandum to Recommendation Rec(2000)10 on Codes of conduct for public officials (Adopted by the Committee of Ministers on 11 May 2000, at the 106th session)

⁸⁵ “Special consideration needs to be given to the senior civil service and to members of the government who may be at the same time elected representatives. These categories may require special rules.”

b. Analysis

233. The Frattini Law concerns conflict of interest between government office and professional and entrepreneurial activities. It is deemed in particular to provide an adequate solution to the situation of potential conflict of interest in which the current Prime Minister finds himself, he being the owner (but not the manager) of extensive media interests (including Mediaset with three major national commercial television channels), operating alongside the Public Service Broadcaster, which operates the three major national television channels.

234. The Italian Public Service Broadcaster is, as explained above (see in particular para. 25 above), significantly exposed to political influence by the leading party. There is therefore considerable and direct involvement of various state authorities, including those directly subordinated to the Prime Minister and leader of the ruling party, in the affairs of the public service broadcaster.

235. In the Frattini Law, the description of the two situations in which conflict of interest arises refers to very specific situations (particular kinds of jobs or activities are defined as being incompatible with government office) as opposed to referring in more general terms to situations in which public officials have personal or financial interests that would make it difficult for them to fulfil their duties with only the public interest in mind, as is the case in Article 13 of the Code of Conduct for Public Officials of the Council of Europe.

236. In particular, the Law is silent about conflicts of interest which may arise in connection with legislative measures affecting a specific category of individuals to which the member of government belongs or a category of business in which the government member has a proprietary interest. Given that Section 3 requires the measure or omission to have “a specific, preferential effect on the assets of the office-holder”, it may not have the effect of making the office-holder abstain from intervening in matters which generally and indirectly, though surely, affect his or her proprietary interests.

237. The Law only declares a general incompatibility between the management of a company and public office, not between ownership as such and public office.

238. Yet, in Italy this appears to be the most important aspect of conflict of interest, the one which has in fact made it necessary to adopt a law. The Frattini Law, therefore, should offer an adequate solution to this problem.

239. It is true that Section 3 paragraph 2 refers to “a specific, preferential effect on the assets of the office holder or of his spouse or relatives up to the second degree, or of companies or other undertakings controlled by them to the detriment of the public interest”.

240. However, the need for such effect to be “specific” and “to the detriment of the public interest” makes the burden of proof a very heavy one, and renders this provision difficult to apply in practice.

241. The solution provided by the Frattini Law to the issue of conflicts of interest consists of 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 sufficient “preventive” measures for resolving 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 might entail the necessity of investigating a great number of individual acts, a process which would burden the relevant authority and weaken its action.

242. Government members who find themselves in a situation of conflict of interest must inform the competent Authorities, but are put under no other obligation to remove such conflict of interest.

243. The Commission recalls that in similar situations, the OECD Council Recommendation foresees a wide range of obligations, including: 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; assignment of the conflicting interest in a genuinely “blind trust” arrangement; resignation of the public official from the conflicting private-capacity function and/or resignation of the public official from the public office in question.

244. None of the kind is foreseen in the Frattini Law .

245. In their submissions before the Venice Commission, the Italian representatives argued that if the law were to make provision for incompatibility between government office and ownership, it would necessarily have to foresee the obligation for the government member to sell his assets or stock. This would be irreversible, unlike the obligation for a private practitioner to set aside his business for the duration of the mandate, and would therefore, in their view, be in clear breach of the provision in the Italian Constitution of the protection of private property and the free access to public office. That obligation to sell one’s property would in fact entail discrimination in respect of private practitioners on those very same grounds.

246. The Frattini Law, in the view of the Italian representatives, duly protects the constitutionally guaranteed right of free private economic initiative, which cannot be seen as a “shameful label” (*marchio infamante*) to be removed in order to be able to have access to public office, as well as the constitutional right to protection of private property, which under the Italian Constitution can only be expropriated on grounds of general interest: the interest of the opposition in preventing an individual from having access to public office cannot amount to “general interest”.

247. The Italian representatives contended that compulsory sale would be at variance with the Italian Constitution on yet another ground : it would be effected outside the free market conditions, so that the owner’s position would be weakened and he would certainly suffer a financial loss. Furthermore, such compulsory sale would not fall within the framework of an expropriation, as the assets in question would not pass into public hands but merely into another individual’s hands. This would be “blatantly unconstitutional”.

248. In addition, the Italian representatives claim that conferring the managing of the assets to a trustee company (*società fiduciaria*) would not be appropriate, as a trustee would instead need to act transparently in the interests of the owner. The institution of the blind trust, instead, does not exist in the Italian legal order and would only allow for the management of movable assets or assets easily converted into moveable assets, and not also of a specific business situation. At any rate, on account of the vast dimensions of Mr Berlusconi’s business, it would be unthinkable that he would not be aware of the management of the blind trust of his business. Nor would it be constitutionally acceptable to divide Mr Berlusconi’s business and set up different blind trusts.

249. The Commission recalls at the outset that its task is certainly not to tell the Italian authorities what solution should be chosen in respect of the contingent problems of conflict of interest in Italy. Rather, it is called upon to give an opinion on whether the chosen solution respects the indications given by the international standards.

250. The Commission cannot but note that none of the solutions offered by the European standards is used to deal with this specific aspect of the problem in the Frattini Law. The Italian representatives have attempted to provide explanations for this omission. The Commission notes however that compulsory sale, assuming that it would have to be carried out in an unconstitutional manner, is certainly not an automatic consequence of the provision of incompatibility between public office and certain business activities. Independent professionals who set aside their business for a few years may also incur financial losses. The circumstance that the blind trust does not nowadays exist in the Italian legal order does not, as such, prevent its introduction into it. Acceptable formulas of partial blind trusts could possibly be found. Against this background, the Commission is not persuaded that no solution – not even a compromise one – could be found.

251. The Commission considers that entering the political arena is the free choice of each individual. It entails prerogatives and duties. Public office carries with it some incompatibilities and limitations. Provided that these are reasonable, clear, foreseeable and do not undermine the very possibility of access to public office, it is open for each individual to decide whether or not to accept them. The mere possibility of suffering some financial loss should not be, in itself, a reason to exclude an activity from the list of activities incompatible with public office.

252. The Commission notes that the sanctions provided in the Frattini Law for breaches of the rules on conflict of interest do not seem adequate to effectively prevent illegitimate conducts. Pecuniary fines of a limited extent imposed on the company manager and not on the owner do not suffice (although, as the Italian representatives have pointed out, these pecuniary sanctions obviously affect the assets of the company, thus the owner).

253. It is true that both the Anti-Trust Authority and AGCOM must inform the Speakers of the houses of parliament of their actions to ascertain the existence of conflicts of interest and of any action to remedy the situation and must submit to parliament a report every six months on the progress of their monitoring and supervisory activities. This allows for a political sanction, which, in the Italian representatives' view, constitutes an extremely severe form of sanction, which is also pointed out in Committee of Ministers' Recommendation (2000)10. In addition, the Italian representatives argue that any further measure by the competent Authorities in respect of a government official would amount to an unconstitutional interference in the relation of trust between parliament and the government.

254. The Commission agrees that a political sanction may prove effective. It considers nonetheless that its likelihood or impact in a situation of predominance in parliament of the political party of the government officer in cause would risk being limited.

255. Furthermore, in the Frattini Law, circumstances under which 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 government officials act improperly, e.g. by 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.

256. In all, the situations of conflict of interest defined in the Law and to which the Law attempts to find a remedy do not appear relevant to the specific issue of the political control of RAI by the owner of Mediaset, for example.

257. In the light of the above, the Commission is of the opinion that the Frattini Law is unlikely to have any meaningful impact on the present situation in Italy. The Commission considers therefore that the Italian authorities should pursue their reflection on this matter, drawing perhaps inspiration from the examples of legislative acts or provisions adopted in other European countries.

VI. Conclusions

258. The Parliamentary Assembly of the Council of Europe has requested the Venice Commission to give an opinion on whether or not the two Italian laws on the broadcasting system (“the Gasparri Law”) and on the conflict of interest (“the Frattini Law”) are in conformity with the Council of Europe standards in the fields of freedom of expression and pluralism of the media.

259. The Venice Commission has carried out this assessment. It has confined itself to identifying the pertinent standards and to analysing these laws against the background of such standards. Accordingly, it has examined only certain aspects of these laws, that is to say those which relate to existing standards. Where no sufficiently clear or defined standards exist, the Commission has also had recourse to some comparative analysis of the constitutional and legislative provisions of the member states of the Council of Europe.

260. While the case-law of the European Court on Human Rights does not offer specific guidance on the matter, certain pertinent principles may nonetheless be derived from that case-law: *in primis* that freedom of expression has a fundamental role in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive, and that the State is the ultimate guarantor of pluralism, especially in relation to audio-visual media, whose programmes are often broadcast very widely.

261. The applicable standards identified by the Commission are essentially resolutions and recommendations of the Council of Europe’s Committee of Ministers and Parliamentary Assembly. These do not, as such, impose legally-binding obligations on States, and only constitute so-called “*soft law*”. The Commission underlines nevertheless that they represent an important indication of the trends of the member states of the Council of Europe in respect of these very real concerns of modern society.

262. Media pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views. In the Commission’s opinion, internal pluralism must be achieved in each media sector at the same time: it would not be acceptable, for example, if pluralism were guaranteed in the print media sector, but not in the television one. Plurality of the media does not only mean, in the Commission’s view, the existence of a plurality of actors and

outlets, it also means the existence of a wide range of media, that is to say different *kinds* of media.

263. The Council of Europe instruments set out certain tools for promoting media pluralism, which include:

- a legislative framework establishing limits for media concentration; the instruments for achieving this include permissible thresholds (to be measured on the basis of one or of a combination of elements such as the audience share or the capital share or revenue limits) which a single media company is allowed to control in one or more relevant markets;
- specific media regulatory authorities with powers to act against concentration;
- specific measures against vertical integration (control of key elements of production, broadcasting, distribution and related activities by a single company or group);
- independence of regulatory authorities;
- transparency of the media;
- pro-active measures to promote the production and broadcasting of diverse content;
- granting, on the basis of objective and non-partisan criteria, within the framework of transparent procedures and subject to independent control, direct or indirect financial support to increase pluralism;
- self-regulatory instruments such as editorial guidelines and statutes setting out editorial independence.

264. In respect of the provisions in the Gasparri Law aiming at protecting media pluralism, the Commission considers at the outset that the mere increase in the number of channels which will be brought about by digital television is not sufficient in itself to guarantee media pluralism. Newly available channels may have very small audiences but with similar amounts of output. Finally, larger companies will enjoy greater purchasing power in a wide range of activities such as programme acquisitions, and will thus enjoy significant advantages over other national content providers.

265. The Commission considers therefore that the threshold of 20% of the channels is not a clear indicator of market share. It should be combined, for instance, with an audience share indicator.

266. As regards the second threshold set out in the Gasparri Law, that is 20% of the revenue in the Integrated Communications Systems (SIC), the Commission considers that SIC certainly reflects a modern trend but should not, at least in this very broad definition, be used already at this stage instead of the “relevant market” criterion, as its effect is to dilute the effectiveness of the instruments aimed at protecting pluralism. Indeed, it may allow an individual company to enjoy extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20% threshold for the whole sector.

267. Indeed, the Commission notes that the combined effect of the new framework set out in the Gasparri Law has relaxed the previous anti-concentration rules whose maximum permissible levels had been exceeded by Mediaset and RAI. Retequattro has accordingly been allowed to continue to occupy analogue frequencies.

268. The Commission considers therefore that the SIC criterion should be replaced by the previously used “relevant market” criterion, as is the case in the other European countries.

269. The Commission considers that the provisions on prohibition of discrimination between independent content providers and those content providers which are referable to either linked or controlled companies and the Broadcasting Authority (AGCOM) decisions guaranteeing to a certain extent access to networks for independent content providers are, if duly applied, good contributions to internal pluralism.

270. As regards the provisions on migration of radio and television broadcasters from analogue to digital frequencies, the Commission has the impression that the Gasparri Law has taken the approach of attempting to hold back on finding a real solution to the problem of media concentration in the television market until some future point in time and it relies heavily on the point when digitalisation will come into full effect. In the Commission’s view, this approach is not satisfactory, as, if the *status quo* is maintained, it is likely that Mediaset and RAI will remain the dominant actors in Italian television. In this respect, the Commission recalls that while general anti-trust measures against the *abuse* of dominant positions, in the media sector dominant positions are forbidden *as such*.

271. As regards the provisions in the Gasparri Law on the Public Broadcasting Service, the Commission considers that the role of the Parliamentary Commission on Radio and Television should not be extended to programme matters and the manner of developing service contracts.

272. Access to airtime seems to be regulated in a democratic manner. However, the entitlement of the Presidency of the Council of Ministers to obtain free air time “on request” appears to be formulated in too vague terms.

273. In respect of the privatisation of RAI, which should lead to a lesser degree of politicisation of the public broadcaster, the Commission notes that change at RAI will allow for government control over the public broadcaster for an unforeseeable period of time. For as long as the present government stays in office, this will mean that, in addition to being in control of its own three national television channels, the Prime Minister will have some control of the three public national television channels. The Commission expresses concern over the risk that this atypical situation may even strengthen the threat of monopolisation, which might constitute, in terms of the case-law of the European Court of Human Rights, an unjustified interference with freedom of expression.

274. The printed press is protected in Italy through allocation of subsidies to political newspapers and through a provision in the Gasparri Law that part of the public budget for the purchase of advertising space for institutional communication by means of mass communication must be used for daily newspapers and magazines. This is to be welcomed. In the Commission’s view, the broadest possible support should be provided to the press, in particular in the light of the extremely concentrated market of advertising revenues in Italy.

275. As regards conflict of interest, the Commission notes that the Frattini Law does not refer in general terms to situations in which public officials have personal or financial interests that would make it difficult for them to fulfil their duties with just the public interest in mind. It is also silent about conflicts of interest which may arise in connection with legislative measures affecting a specific category of individuals to which a government member belongs or a category of business in which a government member has a proprietary interest.

276. The solution provided by the Frattini Law to the issue of conflicts of interest consists of 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 sufficient “preventive” measures for resolving 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 might entail the necessity of investigating a great number of individual acts, a process which would burden the relevant authority and weaken its action.

277. Government members who find themselves in a situation of conflict of interest must inform the competent Authorities, but are put under no other obligation to remove such conflict of interest. None of the solutions envisaged *mutatis mutandis* for civil servants is contained in the Frattini Law. The Commission is not persuaded that no solution – not even a compromise one – could be found.

278. The Frattini Law only declares a general incompatibility between the management of a company and public office, not between ownership as such and public office. Yet, in Italy this appears to be the most important aspect of conflict of interest, the one which has, in fact, made it necessary to adopt a law. The Frattini Law, therefore, should offer an adequate solution to this problem.

279. The Frattini Law offers a solution in respect of acts or omissions of a government member which have “a specific, preferential effect on the assets of the office holder or of his spouse or relatives up to the second degree, or of companies or other undertakings controlled by them to the detriment of the public interest”. However, the need for such effect to be “specific” and “to the detriment of the public interest” makes the burden of proof a very heavy one, and in the Commission’s view renders this provision difficult to apply in practice.

280. The sanctions foreseen in the Frattini Law do not seem entirely adequate. In particular, the impact of a political sanction may in principle prove effective, but risks having little impact in a situation of predominance in parliament of the political party of the government member concerned.

281. The Commission considers that entering the political arena is the free choice of each individual. It entails prerogatives and duties. Public office carries with it some incompatibilities and limitations. Provided that these are reasonable, clear, foreseeable and do not undermine the very possibility of access to public office, it is open for each individual to decide whether or not to accept them. The mere possibility of suffering some financial loss should not, in itself, be a reason to exclude an activity from the list of activities incompatible with public office.

282. The Commission is of the opinion that the Frattini Law is unlikely to have any meaningful impact on the present situation in Italy. It therefore encourages the Italian authorities to continue to study this matter with a view to finding an appropriate solution.