Strasbourg, 7 March 2005

Restricted
CDL(2005)009
Engl. only

Opinion no. 309/2004

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)R

PRELIMINARY DRAFT 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

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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 bill[1] ["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 media 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).

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, Head of the Department of Information and Publishing of the Presidency of the Council of Ministers.

4. 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, ….).

II. Preliminary remarks

5. 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".

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

6. The concerns raised by the Parliamentary Assembly regarding the media situation in Italy can 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.)

7. 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;
   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;
      iii. by including specific measures to ensure that digitalisation will guarantee pluralism of content.

8. 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;

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

9. 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; Tele+ 1 and Tele+ 2, owned by Holland Coordinator-TF1; Rete Mia, owned by Fondo Convergenza; Rete A (Gruppo Peruzzo Editore), Elefante TeleMarket (Telemarket) and Rete Capri (TBS)[2].

10. The market structure of the Italian television sector is therefore highly concentrated, with the two dominant 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 sector[3].

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

b. The radio

12. 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 share[4].

[2] According to AGCOM, 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%.

[3] 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 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.

[4] A mapping study of media concentration and ownership in ten European countries, 2004, pp. 103-104

2. The daily newspaper sector

13. 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.

14. The rates of newspaper circulation is relatively low: less than 5.9 million in 2002[5].

15. 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 constrained. 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.

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"[6] ("The Gasparri Law", CDL(2004)092)

1. Brief historical background

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

17. Constitutional Court decision no. 225 of 1974 upheld the terrestrial monopoly of RAI by referring to public interest in Article 43 of the Constitution[7]. The technical scarcity of frequencies legitimised the monopoly. However, the Court set the requirement of the objectivity and impartiality for the public service. In the meantime, by decision no. 226 of 1974 the Court did not justify the broadcasting monopoly of RAI in respect to cable and foreign-based channels.[8] The Court interpreted Article 21 of the Constitution quite broadly. Article 21 states that

"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.

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[5] see "A mapping study of media concentration and ownership in ten European countries", pp. 93-97.

[6] 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 against the Italian constitution, but only by European criteria.

[7] 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.*

[8] Judgment of 9 July 1974, n. 226

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."

18. The effect of this turning point was reflected in the Broadcasting Act adopted the following year by the Parliament[9]. An important provision of the law transferred the power to control public service broadcasting from the executive branch to the legislature. A bicameral parliamentary commission was set up for 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 set up formally 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.

19. In 1976 the Constitutional Court declared that those provisions of the new law which provided for monopoly or oligopoly for local broadcasting were unconstitutional[10]. As an effect of the decision, it was granted permission for commercial operators to run local television channels.

20. The unregulated allocation and rather spontaneous redistribution of local frequencies[11] 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 and the channels owned by Berlusconi).

21. In 1990 the so-called Mammi Law on the public and private broadcasting system was adopted[12]. The appointment of the RAI Administrative Council was transferred from the Parliamentary Commission to the presidents of the Deputies' Chamber and the Senate, emphasizing their 'non-partisan' position[13]. Despite efforts to dismantle the political partition of

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

[10] Judgment of 15 July 1976, n. 202

[11] 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.

[12] Legge 6 agosto 1990, n. 223 (*Disciplina del sistema radiotelevisivo pubblico e privato).* Oscar Mammi was the telecoms minister at that time.

[13] Legge 25 giugno 1993, n. 206

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 were accused under all governments that they take politically biased decision in favour of the respective Cabinet.

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

23. 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 is widely acknowledged that there exists a RAI – Mediaset duopoly in the Italian media sector. This was affirmed by the Constitutional Court, too, [14] in a case concerning the constitutionality of the provision of the Mammi' 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 dominant position of 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 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 (mixed 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.

24. The declaration that the provision was unconstitutional required the legislator to use the 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.

25. However, on 11 June 1995 Italian voters legitimised the ownership of three channels by Mediaset when a referendum that aimed to forbid to a private entrepreneur to own more than one TV channel, was rejected by the majority of Italians (57%). Similarly, a referendum initiated the since then ongoing process of the privatisation of RAI.

26. The following Broadcasting Law, the so-called "Maccanico law", adopted in 1997[15], 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

[14] Judgment of 5 December 1994, n. 420

[15] 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

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); 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) .

27. In 2000 a law was adopted[16] providing for equal condition (*par condicio*) for accessing media during electoral campaigns and in political communication.

28. In July 2002 the President of the Republic, Carlo Azeglio Ciampi warned the Parliament to draft and adopt a proper legislation that could foster pluralism of information. He referred to the decisions of the Constitutional Court, and to EU provisions too. He also called on to respect the rights and role of the Regions.[17]

29. In November 2002 the Constitutional Court[18] declared unconstitutional Article 3(7) of the Maccanico Law as it did not set a deadline by which the programmes transmitted by broadcasters exceeding the limits set by the law should be transferred to satellite or cable television. The Court noted that the situation which had been declared unconstitutional in the 1994 judgement 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 set a final deadline for December 31, 2003.

30. 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 he returned the law to the Parliament for reconsideration. He had objections against the integrated system of communications, and concerns with the risk of the dominant position. The Parliament finally adopted it in May 2004, after certain changes had been made.

2. The standards of the Council of Europe[19] in the field of freedom of expression and media pluralism

a. The standards developed by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe

31. 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 individual[20]. It is enshrined in Article 10 of the European Convention on Human Rights, which provides as follows:

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[16] 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)*

[17] 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)

[18] Judgment 20 novembre 2002, n. 466

[19] In the present opinion, the Commission will only examine the Italian laws in question in respect of the standards set out by the Council of Europe, as requested by the Parliamentary Assembly.

(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 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."

32. The European Convention does not establish expressly a right to pluralism in the media, nor a right to pluralist information. The European Court of Human Rights, however, has acknowledged that the concern to safeguard media pluralism may legitimately justify that the State impose restrictions on the right to freedom of expression (see the analysis of the case-law of the ECtHR below, paras. 48-58).

33. 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 pluralism[21] and by the Parliamentary Assembly in Recommendation 1506(2001) on Freedom of expression and information in the media in Europe".

34. The European Convention on Transfrontier Television[22] 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 that "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".

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

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[20] See, in particular, 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

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

[22] European Convention on Transfrontier Television, Strasbourg, 5 May 1989, ETS 132.

36. Media pluralism is achieved when there exists 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.

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

38. External pluralism relates to the plurality of actors that are active on a specific market. It is achieved when there is a plurality of broadcasters and outlets in a sector.

39. Internal pluralism refers to the obligation for broadcasters 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.

40. While in the context of external pluralism restrictions on media ownership can preserve diverse ownership and will contribute to diversity in output as long as consolidation or sharing of editorial content between owners of rival products is discouraged, ownership restrictions are not sufficient to guarantee diversity of output reflecting different political and cultural views. Other policy instruments should therefore be used, in addition to ownership restrictions, to encourage internal pluralism.

41. The Council of Europe instruments[23] 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;

- 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;

[23] 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”.

- Self-regulatory instruments such as editorial guidelines and statutes setting out editorial independence.

42. Member States enjoy a margin of appreciation in establishing a system to protect pluralism and select a suitable range of instruments catering for the specificities of the national market.

43. 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.

44. One important factor, if not the most important one, is the institution of *Public Service Broadcasting*. Internal pluralism is crucial in this respect. Therefore, 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.[24]

45. 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 programmes. In return, they enjoy a privileged access to resources and facilities.

46. It can be said that while the commercial sector is seen to provide a diversity of outlets, the public sector, even when the commercial one is concentrated, is expected to provide the backbone of pluralism by providing a diversity of programmes that serve the whole of the public[25].

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

48. 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.

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[24] See Parliamentary Assembly Recommendation 1641 (2004) "on Public Service Broadcasting", § 2.

[25] See David Ward, Media concentration and pluralism: regulation, realities and the Council of Europe's standards in the television sector, report for the UniDem Campus Seminar of November 2004.

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

49. Certain pertinent principles may be derived from the case-law of the European Court of Human Rights (ECtHR) with respect to i.) pluralism and freedom of broadcasting and ii.) freedom of advertising.

i. Pluralism and Freedom of broadcasting

50. In the years between 1990 and 1993 the ECtHR ruled on three cases dealing with restrictions on broadcasting, more precisely with systems of licensing[26]. One case, Informationsverein Lentia and Others v. Austria[27], 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 Article.

51. According to the Court, the purpose of art. 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 aspects[28]. 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 they do not correspond to any of the aims set out in paragraph 2[29]. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.

52. The assessment by the Court of the former Austrian broadcasting system shows some basic lines of argument that should also be reflected when a specific public-private duopoly is at stake, like is the case of 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 art. 10 para. 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 established[30].

53. The Court repeated 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

[26] 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

[27] Series A no. 276

[28] See the Groppera judgment, § 61

[29] See the Informationsverein Lentia judgment, para. 31

[30] See the Autronic judgment, § 61

information and ideas of general interest, which the public is moreover entitled to receive[31]. 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."[32]. The Court found that the monopoly was not necessary for a number reasons[33].

54. The Court's answer to an additional argument submitted by the respondent Government is of particular interest in the context under consideration. The Government adduced 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

55. 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 also protected under art. 10 of the Convention[34]. 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 art. 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´ the 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 reared[35].

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[31] 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

[32] para. 38

[33] para. 39

[34] See VgT Verein gegen Tierfabriken v. Switzerland judgment of 28 June 2001

[35] para. 63

56. 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.”

57. 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 continues. “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).”

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

59. The European Commission of Human Rights had mentioned the duty of a State to protect against excessive press-concentrations in the case De Geillusrteerde Pers N.V. v. The Netherlands[36].

3. The Provisions protecting Media Pluralism

60. 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 to 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 a content provider that enable them 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 for content provider at national and local level at the same time (Article 24(2));

[36] Report of 6 July 1976, D.R. 8, p14, § 88.

- 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 which is also applicable to companies that qualify as a national network operator who are also content providers (Article 27).

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

62. 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.

63. 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.

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

65. 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).

66. 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.

67. The framework for establishing the 20 percent limit of market share is (in the translation that we have used) ambiguous. Article 15(1) rules that a content provider may not hold authorisations allowing them 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 rules for the transitory 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 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 a content provider that enable them 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. Also in this case, therefore, the 20 percent limit is calculated on the overall number of television programmes aired at the national level.

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

69. The umbrella term "integrated communications system" (SIC) has been devised to establish a revenue threshold and is calculated 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.

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

71. 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 (2,3,4).

72. Pursuant to Article 15 (1) the national radio sector comes 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.

73. Cross media provisions are contained in Article 5 (g1 and g2) and Article 15 (4 and 6). Pursuant to Article 15 (6) there is a restriction on television broadcasters who operate more than one national network owning 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.

4. Analysis of those provisions

74. 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 widening of the definition of the media market was motivated by the circumstance 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 the digitalisation.

75. 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; the primary beneficiary of this, however, 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 notion 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.

76. 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 stream[37].

77. However, many of these 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 a clear indicator of market share.

78. 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.

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

80. As regards the concept of the integrated communications system 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 Europe.

81. The Commission considers that at some future point in time these markets may converge to form a single market, but that it is highly unlikely this will happen entirely in the foreseeable future. In this respect, therefore, the SIC seems more likely to preserve the current dominance of the television market by the Mediaset/RAI channels, rather than radically change it.

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

82. The concept of an integrated communications system as an economic indicator of market share considerably dilutes the effectiveness of instruments 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 enjoy extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20 percent threshold for the whole sector.

83. 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 sector[38]. 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. The "relevant markets" have been abandoned to some extent in the new law. General anti-trust measures will remain applicable, despite the redefinition of "relevant markets", or more accurately perhaps the lack of a "relevant market" definition. It is to be noted however that while general anti-trust provisions protect against the *abuse* of dominant positions, in the media sector dominant positions are forbidden as such.

84. 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.

85. 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 that were surpassed both by Mediaset and RAI[39]. Under these new provisions, therefore, Retequattro was allowed to continue to occupy the frequencies which should have been given to Europa 7. 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' Rec (99)1).

86. 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.

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[38] 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.

[39] Under the Maccanico law, the market television amounted to 12 billion euros, and the threshold, then of 30%, amounted to approx. 4 billions euros. Under the Gasparri law, the SIC amounts to 26 billion euros: the threshold has thus become 5,2 billions euros.

87. In conclusion, the Commission considers that without an audience share threshold and a "relevant market" indicator, the threshold provided in Article 15 § 1 is largely redundant as an indicator of diversity.

88. 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. During its visit to the Italian authorities, the Commission was informed that network operators must reserve 40% of the programming to independent content providers according to the rules set out by AGCOM. Although the Commission has not seen the criteria elaborated by the AGCOM, it considers that the due application in practice of this principle may indeed contribute to internal pluralism.

5. Provisions on a Public Broadcasting Service

89. Article 2 (1h) of the Gasparri Law defines "general public television [40] broadcasting service" as a "public service performed under franchise [licence[41]] 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.

90. 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, the AGCOM may order the holder of the general public broadcasting service franchise to cease trading for up to 90 days.

91. Under the Gasparri law, 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 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).

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[40] 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.

[41] Additions in square brackets provide alternative translations of terms used in the law.

92. 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.

93. 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.

94. 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.

95. In addition, the public broadcaster is subject to control by a parliamentary commission for the general direction and surveillance of radio-TV services. The commission has, and looks set to retain, extensive powers and competencies vis-à-vis RAI, including some decision-making powers concerning programming and finance[42].

96. 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 the Autorità per le garanzie nelle comunicazioni and the Minister for Communications prior to each 3-yearly renewal 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".

97. Law No. 249 of July 31st 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.

98. 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.

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[42] 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 direction 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 […].

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

100. 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).

101. 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).

6. Analysis of those provisions

102. 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".

103. 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."

104. 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 full institutional independence and autonomy of the public service broadcasting organisation.

105. 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 and footnote 40 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. This should also be considered in terms of Article 10 of ECHR, whereby "the right to freedom of expression (...) shall include freedom to hold opinions and to receive and

impart information and ideas without interference by public authority and regardless of frontiers".

106. As regards access to airtime, para. 1 d of Article 17 provides for a democratic solution, in conformity with the Council of Europe standards, provided of course that the allocation is granted in an appropriate manner.

107. Para 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.".

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

108. 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.

109. 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

b. 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 on which they were purchased). 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.

110. 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 percent[43] of RAI's capital.

111. Prior to privatisation, seven members of the Board will be designated by the parliamentary commission for the general direction and surveillance of radio-TV services and two (including the chairman) by the majority shareholder, i.e. the Minister of Economic Affairs. The

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

appointment of the chairman must be endorsed by a two-thirds majority in the parliamentary commission.

112. 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-thirds majority in the parliamentary commission. The Board of Governors [Directors] has a three-year term of office.

113. 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.

8. Analysis of those provisions

114. The Commission recalls that one of the most typical features of the public broadcasting service is that it operates 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.

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

116. The prospected privatisation should lead to a lesser degree of politicisation of RAI.

117. 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 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 designate 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.

118. As to the effects of the privatisation, in the opinion of the majority, 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*.

119. 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 in the Board of Governors will, in their view, therefore be in line with the current majority.

120. The Commission observes that, should the interest in the purchase of RAI shares be indeed low, the Minister of Economy will remain in 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.

121. 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 serve out its term of three years.

122. 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 says 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.
- The use of the contribution or licence fee by the public service broadcasting organisation should respect the principle of independence and autonomy.

123. In conclusion, the Commission considers that change at RAI could be described as amounting to its partial re-nationalisation for an unforeseeable period of time. For as long as the present government stays in office, the Prime Minister will directly or indirectly control all major national television channels. The European Court of Human Rights has ruled that a state monopoly on broadcasting constitutes an unnecessary interference with freedom of expression. The Italian situation is not, strictly speaking, a monopoly, but there is sufficient evidence to suggest that both commercial and public national television channels (and in RAI's case, also radio channels) are controlled by one person to such an extent that a real threat of monopolisation clearly exists. The present Law may change this eventually, but only gradually and potentially only after a considerable period of time.

V. "Rules for the resolution of conflicts of interest" ("the Frattini law", CDL(2004)93rev)

1. Background

124. 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.

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

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

127. 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.

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

2. 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

129. In 2003, the Committee of Ministers adopted a Recommendation (No. R(2000)10) "on Codes of Conduct for Public Officials".

130. 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;
> - 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".

131. According to para. 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

132. 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.

133. 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.

134. 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

135. 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 press[44].

136. 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 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

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

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."

137. In the following sentences it was stated that: "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."

138. 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."

139. The Court found that the injunction granted against that article amounted to a violation of Art. 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. [...]"

140. 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.

141. 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."

142. 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 Art. 10 para. 2 of the Convention.

3. Provisions on conflicts of interest

143. 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.

144. 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;
- performing any type of public- or private-sector job.

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

146. 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.

147. 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.

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

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

150. 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.

151. 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);

- 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).

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

153. 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.

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

4. Analysis of those provisions

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

155. The Commission notes at the outset that the Code of Conduct for Public Officials elaborated 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).

156. 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.

157. In this respect, the Commission has analysed the Explanatory Memorandum to Recommendation Rec(2000)10[45], 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 rules[46].

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[45] 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)*

[46] "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."

158. The drafters of the code of conduct underlined that “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.”

159. 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.”

160. 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.

161. 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*.”

162. In the light of the explanatory memorandum, and of common sense too, the Commission considers that the standards on the conduct to be taken by public officials in situation of conflict of interest are applicable, *mutatis mutandis,* to publicly elected representatives and members of government.

b. Analysis

163. This law is deemed to provide an adequate solution to the situation of potential conflict of interest in which the current Prime Ministers 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.

164. The Italian Public Service Broadcaster is, as explained above (see in particular paras. 94 and 95 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.

165. The description of the two situations in which conflict of interest arises within the meaning of this law 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 just public interest in mind, as is the case in Article 13 of the Code of conduct for public officials of the Council of Europe.

166. The law only declares incompatibility between the management of a company and public office, not between ownership and public office.

167. It is true that Section 3 para. 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”. The need for such effect to be “specific” and “to the detriment of the public interest”, however, makes the burden of proof very hard.

168. In the case of a conflict of interest, no sanctions are envisaged for owners, only for the company managers.

169. 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 “preventive” measures for solving a potential conflict of interest. Instead, the Anti-trust and Broadcasting Authorities have to investigate abuses on a case-by-case basis when a government act is considered to be in violation of the law. This might entail the necessity of investigating a great number of individual acts, which would burden the relevant authority and weaken its action.

170. Government officials 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.

171. 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 their public office.

172. Circumstances when the Anti-trust and Broadcasting Authorities are authorised to act to resolve conflicts of interest are very carefully and narrowly defined. This refers to cases when companies under the authority of government officials act improperly, but not when the government 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.

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

174. 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.