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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS *

ON THE COMPATIBILITY OF THE GASPARRI LAW WITH THE COUNCIL OF EUROPE STANDARDS IN THE FIELD OF FREEDOM OF EXPRESSION AND PLURALISM OF THE MEDIA

By

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(*) *Non-official translation*

COMMENTS REGARDING THE "DRAFT OPINION" (No. 309/2004) OF THE VENICE COMMISSION REGARDING LAW No. 112/04 ON THE REFORM OF THE RADIO AND TELEVISION BROADCASTING SYSTEM

I have examined the new draft opinion of the Venice Commission on the compatibility of the "Gasparri Act" with the Council of Europe's standards in the field of freedom of expression and pluralism and the media, and further to my comments submitted on 23 March 2005, I am making these additionsl submissions.

The first point is that there still remains the ambiguity judgment in paragraph 79 regarding the 20% of the programmes that each national broadcaster may air.
In this connection, I can do no more than reiterate the arguments already put to the Commission.

We have to bear in mind that pluralism is protected by setting *ex ante* restrictions, while competition is protected through *ex post* measures. Furthermore, whereas competition law prohibits the abuse of a dominant position and agreements, acquisitions and mergers that are detrimental to competition, protecting pluralism entails the need to prevent the establishment of a dominant position to the detriment of pluralism.

It is within this framework and to this end that articles 14 and 15, and the transitional provisions of article 25(8) have to be read, quite clearly setting down the following restrictions:

The restriction preventing the same supplier of programme contents being the holder of permits to broadcast more than 20% of the television or radio programmes using terrestrial digital technology (s. 15(1)).

This restriction will come into force after "switch-off", that is to say, after the final switchover from the analogue to the terrestrial digital system (by the date provided by the law no. 66/2001 of 31.12.2006).

The restriction preventing a national television broadcaster (using analogue technology) which is also supplier of programme contents broadcast with terrestrial digital technology from airing more than 20% of the television programmes, calculated on the basis of all the programmes transmitted using analogue and digital technology combined.

The digital broadcasts must cover at least 50% of the population in order to be included in this calculation, and must not be simultaneous repeats of programmes previously broadcast using analogue technology.

This restriction applies (following the report of the Communications Regulatory Authority under Law No. 43/2004, on the terrestrial digital television programme offering) during the "switch-over" period, which is to say the period when analogue and terrestrial digital broadcasting technologies are used simultaneously, beginning on 31 December 2003 and ending on 31 December 2006.

It should also be understood that the 20% threshold, identified as being the ideal upper limit for guaranteeing pluralism, was chosen as a result of the comparison which was made by the Constitutional Court in judgment no. 420 of 1994 with the parallel legislation governing publishing (article 3(a) of law no. 67 of 25 February 1985, according to which, a dominant

position is created when a publisher of daily newspapers has a circulation in any one calendar year in excess of 20% of the total circulation of all daily newspapers.

In addition to the 20% programme threshold, article 15 of law no. 112 provides a second *ex ante* threshold as the upper income limit of 20% of the aggregate revenues of the "Integrated Communications System" (SIC) applicable to companies operating in the media as a whole.

The Integrated Communications System (SIC) comprises all the main media business sectors, and may be considered to be the result of the multimedia convergence process in which apparently heterogeneous media (radio, television, newspapers, the Internet, cinema) are gradually drawing closer together and becoming integrated.

This convergence and successful marketing linking heterogeneous media products (for example the sale of CDs or books jointly with newspapers) requires the legislator to consider the position of a company working in the communications industry within an economic system that comprises all the main media. Moreover, precedents to the SIC existed in earlier legislation (article 15(5) of law no. 223/90, and article 2(1) of law no. 249/97) prohibiting the constitution of a dominant position in the fields of audio and television communications, multimedia, and publishing, including electronic publishing. The SIC is simply the outcome of the developments in older sectors governed by earlier legislation, necessarily bound up with the innovation brought about by technologies that have subsequently become current.

It is useful to point out once again that in addition to the *ex ante* thresholds examined above, law no. 12 places the further threshold for guaranteeing pluralism by prohibiting the constitution of a dominant position on any individual market comprising the integrated communications system (article 14 and article 15(2), first indent). This means that a company operating in the communications industry is not only required to comply with the 20% upper limit on the SIC revenues, and in the case of radio or television broadcasting companies, the 20% upper limit on programmes, but is also prohibited from creating a dominant position on any individual market as these are identified by the Communications Regulatory Authority. It is the responsibility of the Communications Regulatory Authority to identify these markets, and to do so by applying the principles set out in articles 15 and 16 of the European Parliament and the European Council directive 2002/21/EC of 7 March 2002 (the framework directive), considering not only revenues but also levels of competition within the system, entry barriers, the economic efficiency of the company concerned, the audiences for the radio and television programmes, and the quantities of published products, and cinematographic or audio recording works.

I cannot agree with the opinion that audiences are ignored in law no. 112 and that the 22% ceiling on SIC revenues does not take individual markets into consideration. On the contrary, the SIC ceiling is in addition to, and further strengthens the restriction on acquiring a dominant position on individual markets, which are also appraised in terms of their audiences. Furthermore, the opinion does not take into account the important fact that it was precisely on the basis of the provisions of law no. 112 that AGCOM issued resolution no. 136/05/CONS at the end of the procedure to ascertain whether or not a dominant position existed, even if not actually classified as dominant, to justify action to be taken by the Authority to protect pluralism, in the form of seven pro-competition measures adopted against Italy's two largest operators in the television industry, RAI and RTI.

These remedies mainly consisted of requiring the two leading operators to invest in the complete changeover to terrestrial digital broadcasting, while at the same time earmarking 40% of the frequency bands to independent programme content suppliers. This facilitates a low-cost market entry by new operators, because of the abatement of the infrastructure investment costs.

The Authority also set lower advertising ceilings and imposed greater transparency in the sale of advertisements, and requested the general radio and television franchisee to submit an editorial plan to create a new general interest programme.

These are obviously measures designed to foster pluralism, which has been made possible precisely thanks to the entry into force of law no. 112, demonstrating the effectiveness of the new law in moving towards the abolition of the so-called "RAI/Mediaset duopoly".

THE GENERAL RADIO/TELEVISION PUBLIC BROADCASTING SERVICE

Contrary to the statements made in paragraph 149, the reform introduced by law no. 112 has actually given greater independence and organisational autonomy to the public radio and television broadcasting service franchisee than it had in the past. For the law has now placed RAI (which was previously classified as a "Company of national interest" and therefore governed by special laws) on an equal footing with all other joint stock companies, also in terms of their organisation and management (article 20(1)). The new RAI Articles of Association adopted following the merger of RAI and RAI-Holding, which initiated the privatisation of the franchisee company, make provision for the main statutory innovations in this regard.

To further distance the RAI franchisee from government policies, law no. 112 did away with the previous statutory provisions that gave the government the sole responsibility for deciding on the substance of the service contracts concluded with the franchisee, and for overseeing compliance with its obligations, and has given the Regulatory Authority, acting jointly with the Minister of Communications, the power to lay down guidelines regarding the substance of any further obligations in addition to those laid down by the law, monitoring compliance, and imposing penalties in the event of non-compliance.

Law no. 112 has therefore strengthened the tasks of Agcom while at the same time weakening those of the government.

As for the governance of RAI, the system used for appointing the members of the Board of Directors strengthens the powers of the Parliamentary Oversight and Policy Committee by empowering the Ministry of the Economy, as the shareholder, to appoint only one of the Directors, while the Chairman - whose appointment must be approved by the Oversight Committee with a two thirds majority - acts as guarantor.

It is therefore not the case, as paragraph 168 would have it, that the Ministry of the Economy controls the Board of Directors. The Ministry of the Economy is the shareholder (whose equity interest in RAI will be reduced as a result of privatisation) but its influence is exercised over one single director (out of 9).

The remarks made in paragraph 175, regarding a certain control exercised by the Prime Minister over three public channels, in addition to his own three channels, continues to be unacceptable and is in sharp contrast to the technical and legal, but not the political, basis of the opinion which the Commission was asked to provide. The Commission's own statements in that opinion regarding the powers of the Oversight Committee, the Communications Regulatory Authority, the procedures for appointing the Board of Directors, and the imminent entry of new private shareholders into the corporation, totally belie even the slightest suggestion of any such control over the public television service.

Even talk about a monopoly of the Italian television industry – which has 14 national free-to-air television channels and 650 local television stations – is anachronistic and fails to reflect a situation in which the number of different opinions, which is already high, is bound to increase still further with the development of terrestrial digital broadcasting.

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Bearing all this in mind, the conclusions of the opinion cannot be accepted, for the following reasons:

- the startup of terrestrial digital broadcasting as a result of law no. 112 has increased the number of channels by between fourfold and sixfold, and has consequently increased the television offering and enhanced pluralism;

- the 20% programme and revenue thresholds in the SIC is additional to the ban on a dominant position on individual markets, which are identified by the Communications Regulatory Authority using criteria laid down by European law, and taking into account other elements such as audiences;

- the SIC takes account of the convergence of the media, adjusting the criterion that already existed in Italian law (the Mammì Act and the Maccanico Act) to keep pace with technological and market developments; no one company can ever acquire a dominant position on any one market. The whole purpose of the SIC is to enable companies, particularly press publishers, to accede to the television market while at the same time, under skewed statutory provisions in their favour, it places a limit on television companies which are prohibited, until 2011, from acquiring equity interests in newspaper publishing companies, and on companies with revenues in excess of 40% from the telecommunications market, by prohibiting them from exceeding 10% of the aggregate SIC revenues;

- as far as RAI is concerned, the role given to the Oversight Committee emphasises the detachment of the public television service from government, giving more room to the opposition;

- the provisions governing the broadcasting of public notices by the franchisee Corporation at the request of the Prime Minister's Office – Publishing Department (and not by the Prime Minister himself) – are related to the duties of the Prime Minister's office to issue public notices of social relevance, in its capacity as a government department, and refer to the function of the Prime Minister and not his/her person (being in office temporarily, it being the case that is governed by a democratic system);

- as for the question of government control over the franchisee corporation, a distinction has to be drawn between the Ministry of the Economy's shareholding, which is at the moment virtually total, but is going to be reduced as a result of privatisation, and the power to influence the governance of the company, which is limited to the right of the Minister of the Economy to appoint one of the nine members of the Board of Directors, it is the case that the Prime Minister has no kind of control over the public channels, and does not therefore interfere in any way with the work of the franchisee Corporation.