

Television across Europe:
regulation, policy and independence
Italy

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List of Abbreviations

AGCOM	Communications Guarantee Authority, <i>Autorità per le Garanzie nelle Comunicazioni</i>
RAI	Radiotelevisione Italiana S.p.A.
SIC	Integrated communication system, <i>Il sistema integrato delle comunicazioni</i>

1. EXECUTIVE SUMMARY

The Italian broadcasting system is distinguished by controversial involvement of politicians, especially in the State-owned broadcaster, RAI, which has always been strictly controlled by the Government and political parties. When commercial television began in the 1970s, in a totally unregulated marketplace, it changed the media scene and the advertising market, as well as the political stakes. In the mid-1990s, commercial television played a significant role in the rise to political stardom and power of Prime Minister Silvio Berlusconi, a northern entrepreneur with a formidable media arsenal.

The principal players in the present broadcasting market are RAI and Mediaset, which, thanks to the duopoly created by the alliance between politics and the media, divide up most of the audience and advertising resources. Other competitors have recently tried to enter the market, but they still lag far behind the two dominant players in terms of available infrastructure and ratings.

The super-concentration that characterises Italy's broadcast sector, the confusion created by the collusion between the media and the political establishment, and the excessive attention of the executive to the management of the public networks are not just "Italian anomalies". These problems represent imminent potential threats to any democratic system, and especially to the transitional democracies of Central and Eastern Europe. Italy is only the first front in the struggle to develop and implement common rules for the relationship between the media and the governing class. Italians are used to the "television issue" – it has been with them for decades and is not close to a solution.

While it is impossible to break up the duopoly and open up the market to other competitors without strong legislative action, the Government has been touting another strategy: promoting digital terrestrial broadcasting in order to increase the number of available networks. However, the two major players have already seized a large quantity of frequencies, thereby helping to perpetuate their dominance.

The rules governing Italy's media are still extremely haphazard, and often inconsistent with European Union (EU) policies. This poor regulation, and the fact that the Government is currently led by a media tycoon, have raised serious concerns about media freedom. The international community – including the European Parliament, the Council of Europe and other influential international institutions and advocacy groups – have responded by issuing formal warnings and recommendations for Italy to resolve the anomalies of its media system.

Berlusconi may have handed over the management of his empire to third parties, mostly members of his family, but as long as he remains the majority shareholder of Fininvest, and thus of Mediaset, the independence of the newsrooms in his television channels and news magazines will remain in question. Furthermore, if, as has happened on many occasions, Berlusconi is also outspoken on information-related issues and is

not shy about influencing his networks, the absolute ineffectiveness of regulations guaranteeing honest, pluralist and balanced information stands exposed.

The 2004 *Gasparri Law* regulates many aspects of the evolution of the broadcasting market, and makes a timid attempt at privatisation of State-owned television, but it has not improved the *status quo*. The law is widely perceived as a product of the conflict of interest plaguing the political landscape.

The existence of an integrated Italian Authority for Communications as regulatory body for the communications sector might give the impression that the media system and the information marketplace are under good governance. Yet, in reality, the authority's competencies are scattered among several parliamentary organisms and governmental agencies, including the commission in charge of RAI; the Ministry of Telecommunications, which grants public broadcast licences and permits; the anti-monopoly Competition Authority; and, for the past few years, the regional administrations.

In such a chaotic legislative framework, the dominant players are virtually undisturbed in planning their industrial and business strategies. Unfortunately, this commercial free-market does not yield corresponding editorial freedom. Italian broadcast media appear to be structurally tied to the ruling political elite, and the journalism carried out by these media is still affected by a sort of subordination to political interests. Newspapers and magazines, on the other hand, maintain relative autonomy, thanks to the higher plurality of players in the print sector.

RAI appears particularly prone to political influence. The "service agreement" between RAI and the ruling administration requires certain procedures that should, at least theoretically, guarantee internal pluralism and balanced information in the public broadcaster. However, behaviour at RAI is, in fact, dictated by the logic of "*lottizzazione*" – originally an agricultural term for the 'parcelling out' of land, and now a shorthand for the way that hiring for executive posts, journalists and producers is determined by the political parties, especially the ruling coalition. Mediaset, as a private concern that has objectives other than serving the public interest, could pursue a policy more independent from politics. However, as its controlling shareholder is the present head of the Government, Mediaset now appears even more predisposed than RAI to satisfy the needs of its owner's political ambitions and goals. Despite this situation, not all information provided by RAI and Mediaset are non-critical representations of "the master's voice". Indeed, many reporters fight a tough battle to preserve their independence, on a daily basis. Many pay with their own jobs, which is what happened when Mediaset sacked the founder and editor of its most popular daily TV news bulletin, Tg5.

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not shy about influencing his networks, the absolute ineffectiveness of regulations guaranteeing honest, pluralist and balanced information stands exposed.

The new media – digital television, broadband connection, Internet and satellite broadcasting – are advancing rapidly in the information arena, and they have begun to change the habits of millions of Italians. New services are being put online by ambitious entrepreneurs and start-ups, and there appears to be a new synergy between telecommunications and mass communication. New technologies, and the global media market, may succeed in establishing the conditions for a free-market that lawmakers have failed to create. However, even here there are grey areas, because it is dangerous to entrust the fate of democracy to nothing more than the logic of the market.

It is therefore still unclear whether this new approach to the development of terrestrial digital by the current Government is dictated by the stated goal of promoting pluralism or by the efforts of certain policymakers to retain control of the media, especially in view of the failure of digital television in several advanced countries.

The Italian broadcasting system, both analogue and digital, appears to suffer from being overfed: the market pie has been split between the members of an elite club for too long. However, one can feel the pressure from other players, who want to get a chunk of the pie. If new competitors are not able to enter the club with the help of truly pluralistic, market-oriented legislation, they will certainly attempt to leverage the new technologies.

2. CONTEXT

2.1 Background: the Premises of the Current Duopoly

In 2004, the European Parliament¹ and the Council of Europe² approved – almost at the same time – two resolutions deploring the “concentration of political, commercial and media power in Italy in the hands of one person.” The resolutions also stressed the

¹ European Parliament, Resolution of 22 April 2004 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), A5-0230/2004, (hereafter, EP Resolution 2003/2237). Article 60 states that: “It is of importance to note that the Italian system presents an anomaly due to a unique concentration of political, economic and media powers in the hands of a single individual, the current Prime Minister and to the fact that the Italian government is directly or indirectly in charge of all the national networks.” Article 59: “laments the repeated and documented intrusions, pressure and acts of censorship by the administration in the present corporate chart and organisation of the Italian state-controlled television RAI.”

² Council of Europe Parliamentary Assembly, Resolution 1387 (2004) of 24 June 2004, on Monopolisation of the Electronic Media and Possible Abuse of Power in Italy, available on the CoE website at <http://assembly.coe.int/Documents/AdoptedText/ta04/ERES1387.htm> (accessed 1 April 2005), (hereafter, CoE Resolution 1387(2004).

lack of independence of the country's public service television and expressed serious concern about the freedom of expression and media pluralism.

It is rare for such intergovernmental bodies, accustomed to prudent statements and middle-ground compromises, to express such harsh conclusions about a founding State, especially one that is universally included among the established democracies.

The seriousness of these statements conveys the scope of international concern about the role of Silvio Berlusconi, the media tycoon who has served as Italy's prime minister for a total of five years in two mandates – in 1994 and from 2001 until now. Berlusconi has used his office to exercise decisive influence on public television, while he continued to control most of Italy's private television networks. He maintains this control, despite his promise, when he first took office, to distance himself from his business interests and to put his company, Fininvest, into a blind trust. The blind trust was the solution first proposed by the Berlusconi Government in autumn 1994 and four years later in a bill presented by Forza Italia, which was approved by the Chamber of Deputies but rejected by the Senate. In these proposals, the trustee was similar to a fiduciary depository, with the obligation to render an account of decisions taken involving the assets.

However anomalous the Berlusconi case may seem to be, it has deep roots in the complex and contradictory evolution of Italy's media system since 1945. In particular, Berlusconi's virtual monopoly of broadcasting reflects Italy's persistent failure to design a regulatory framework capable of harnessing technological development while also controlling the tendency of successive ruling political coalitions to dominate the public media. Although there are no perfect solutions to these regulatory challenges, Italy seems to have failed more completely in this respect than the other advanced democracies.³

In other words, the unlimited concentration of power that has taken shape in the past decade in Italy is the product of a series of peculiarities and contradictions that characterise the history and legislation of the Italian media, and whose origins can be

³ G. Mazzoleni, "Medienpluralismus in Italien zwischen Politik und Marktwettbewerb" ("Media pluralism in Italy between politics and the market"), in *Media Perspektiven*, 11/2003, p. 517–529, (hereafter, Mazzoleni, *Media pluralism in Italy*).

traced even to the Constitution.⁴ The Italian Constitution of 1947 recognises to the maximum extent the right of free speech and expression by any means of communication, but it was not very aggressive in addressing the newest issues in the media sector at the time.⁵ Unlike many contemporary Constitutions, the Italian Constitution does not expressly affirm the freedom to receive and broadcast information and ideas, it lacks any reference to radio broadcasting whatsoever, and it does not give the requisite attention to the fact that the media are to be regulated and put under control in order to guarantee the survival of a democratic system in Italy.⁶ This shortcoming has contributed to the general belief that freedom and pluralism of the media are not constitutional issues, but must be dealt with by specific legislation.

However, the Constitution should not be blamed for the continuing lack of effective anti-monopoly legislation, or the way in which the public media is subjugated to special interests. It is also far-fetched to attribute the rise of Berlusconi to these ambiguities in the Constitution. Parliament has to take most of the responsibility, because it has sought to preserve the *status quo* rather than innovate in the direction of a pluralistic system. Every media law approved since 1975 is full of rhetorical statements on the value of freedom and of media pluralism, and full of rules aimed at assuring the plurality, objectivity, completeness and impartiality of the media. Yet, in

⁴ Article 21 of the Constitution 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 subject to authorisation or censorship. Seizure is permitted only by a detailed warrant from the judicial authority in the case of offences for which the law governing the press expressly authorises, or in the case of violation of the provisions prescribed by law for the disclosure of the responsible parties. In such cases, when there is absolute urgency and when the timely intervention of the judicial authority is not possible, periodical publications may be seized by officers of the criminal police, who must immediately, and never after more than twenty-four hours, report the matter to the judicial authority. If the latter does not ratify the act in the twenty-four hours following, the seizure is understood to be withdrawn and null and void. The law may establish, by means of general provisions, that the financial sources of the periodical press be disclosed. Printed publications, shows and other displays contrary to morality are forbidden. The law establishes appropriate means for preventing and suppressing all violations.” Constitution of the Italian Republic adopted by the Constituent Assembly on 22 December 1947, published in *Gazzetta Ufficiale* no. 298, extraordinary edition, 27 December 1947, as last amended by Constitutional Law no. 3 of 18 October 2001, *Gazzetta Ufficiale* no. 248, 24 October 2001.

⁵ P. Costanzo, “Informazione nel diritto costituzionale” (“Information on constitutional law”), in *Digesto disc. Pubbl.*, VIII, 1993. 326.

⁶ For a broader study, see: R. Zaccaria, *Radiotelevisione e Costituzione*, (*Broadcasting and the Constitution*), Milano, 1977, from p. 30; P. Barile and S. Grassi, “Informazione (libertà di)” (“Freedom of Information”), in *NNDI*, App. vol IV, 1983, from p. 199; B. Tonoletti, “Principi costituzionali dell’attività radiotelevisiva”, (“Constitutional principles of television activities”), in M. Cuniberti *et al*, *Percorsi di diritto dell’informazione*, (*Commentaries on the law on information*), Milano, 2003, from p. 215, (hereafter, Tonoletti, *Constitutional principles*); and G. E. Vigevani, “Introduzione: informazione e democrazia”, (“Introduction: information and democracy”), in M. Cuniberti *et al*, *Percorsi di diritto dell’informazione*, (*Commentaries on the law on information*), Milano, 2003, from p. 1.

practice, these principles have not been enforced, resulting in the continuation of the duopoly of RAI and Mediaset.

The Constitutional Court has had a significant supplementary role. The court has elaborated innovative theories on the function of the private and public media in democratic systems, and has admonished and advised legislators to come to a discipline consistent with the principles of pluralism. It has also struck down anti-monopoly legislation on several occasions. However, despite its rhetoric, the Constitutional Court has never succeeded in imposing upon the legislature a comprehensive overhaul of the media. This failure is apparently due to an excess of caution and a lack of cooperation from the Parliament.

In the past decade, the solution being pursued was to “neutralise” the broadcasting field by entrusting significant control and regulation to independent entities. Unfortunately, these efforts have neither reduced the oligopoly in the television sector nor the political parties’ undue influence on public television. The authorities involved in the regulation of broadcasting enjoyed substantial autonomy, but when they had to solve sensitive issues at the political level, they acted late, and perhaps with excessive prudence.

This framework defines the role of the players in Italy’s media system: the State-owned television was full of gifted journalists, especially in the first decades of its existence, who were able and willing to educate and inform the public, but they were invariably subject to political pressures and increasingly obsessed by audience and less by the principles of public service broadcasting. Meanwhile, the private television network was always in sound economic shape, but was always monopolised by a single entity, the Mediaset Group. Other national and local networks have achieved an irrelevant portion of total advertising revenue, and they were totally marginal from both a political and commercial standpoint. This scenario has substantially affected the print media. Although print media have been traditionally pluralistic and normally independent, they lack resources and have modest sales by European standards. Furthermore, print media are by and large controlled by a handful of industrialists who have, at the core of their businesses, other commercial interests.

The above contradictions make the condition of the Italian media particularly worrying. Without taking a wholly negative view of democracy and freedom of expression in Italy, the connection between political and media power, and the resulting threat to pluralism, must be seen as extremely serious. The system combines politics and business in a way that causes significant damage to the evolution of broadcasting and causes instability in the political landscape. At the same time, however, Italy remains a country with a lively public opinion, able to react against an increasingly partisan use of the media, and there is massive participation in the political fray. Italy is not really affected by voter apathy. The turnout at the general elections has always been higher than 80 per cent. Above all, Italians are used to the “television issue”: it has been with them for decades and is not close to a solution.

From 1976 – when there was a Decision by the Constitutional Court allowing private networks to broadcast locally⁷ – until the entry into force of the *Gasparri Law* in 2004,⁸ a succession of *coups* has shaped the present state of the media, in which RAI and Mediaset have a solid duopoly and it is virtually impossible to adopt a legislative framework that can guarantee effective pluralism.

It is useful to understand how the present situation came to be. The first step came in 1975, when the Parliament passed the *RAI Law 1975*, which restructured RAI.⁹ The aim of the new law was to transfer control of public television from the executive branch to the political parties represented in Parliament. This change was intended as a sign of openness in deference to the changing political and social landscape. It was hoped that the new law would ensure that RAI's management had the broadest representation possible, from among the various components of the complex social and political fabric. In order to achieve pluralism, lawmakers entrusted control over RAI to a special parliamentary commission, in which all parties were to be granted a presence, and a board of directors representing RAI. The board was supposed to involve the *pro rata* participation of parties representing the governing coalition and the minority. However, the purpose of the bill was soon upset by the so-called "*lottizzazione*", originally an agricultural term for the 'parcelling out' of land, and now a shorthand for the customary method of awarding seats on the RAI board of directors based on party affiliation rather than merit or seniority.

Because it timidly opened the cable television market, the *RAI Law 1975* caused a crack in the broadcasting monopoly, so that businesses willing to invest in that sector were given expectations that they could gain access to the system. In 1976, the Constitutional Court granted the right of broadcasting to more players, while confirming the public broadcaster's exclusive right to broadcast on a national basis.¹⁰ This ruling actually established the idea of pluralism in the Italian media marketplace. However, lawmakers were perhaps too busy preserving their control over RAI, or else they were politically short-sighted. They subsequently proved incapable either of elaborating a strategy for the broadcasting sector or of starting a comprehensive overhaul of broadcasting, even though this has been achieved in other countries such as Germany and the United Kingdom. Italy's Parliament has consistently been unable to provide the market with badly needed legislative stability – a need that is identified by

⁷ Decision of the Constitutional Court, no. 202 of 28 July 1976 (hereafter, Constitutional Court Decision 202/1976), *Gazzetta Ufficiale* no. 205 of 4 August 1976.

⁸ Law on regulations and principles governing the set-up of the broadcasting system and the RAI-Radiotelevisione italiana S.p.a., as well as authorising the Government to issue a consolidated broadcasting act, no. 112 of 3 May 2004, *Gazzetta Ufficiale*, no. 104 of 5 May 2004, (hereafter, Gasparri Law).

⁹ Law on new norms in the field of radio and television broadcasting, no. 103 of 14 April 1975, *Gazzetta Ufficiale* no. 102 of 17 April 1975, (hereafter, RAI Law 1975).

¹⁰ Constitutional Court Decision 202/1976.

the EU, especially in the “Television without Frontiers Directive” (hereafter, TVWF Directive).¹¹

Before the *Mammì Law*¹² of 1990, broadcasting regulation was adopted only through emergency legislation, such as the 1984 law known as the “Berlusconi Decree”.¹³ Through this law, the (then) Prime Minister Bettino Craxi, a good friend of Berlusconi, prevented Berlusconi’s television stations from being “switched off” by the Italian courts. The law epitomised the phenomenon then known as “*consociativismo*”, a sort of bipartisan alliance between the then governing coalition and the main opposition party, the Communist Party. In exchange for passing the law, the governing coalition and the opposition, particularly the Communist Party, were given an even broader control over RAI. The largest governing party, the Christian Democrats, was granted control over the Board of Directors and RAI Uno, the public channel with the largest audience share. The Communist Party was awarded control over RAI Tre, the television channel that was supposed to be transformed into a regional public service network but later became the third largest national television channel.

With the *Mammì Law*, the legislature finally achieved a more structural policy, even though the structure was not necessarily conducive to pluralism. In fact, the law was dubbed “the photocopy law” because it legitimised a *de facto* duopoly of RAI and Berlusconi Group’s Fininvest company. The duopoly had developed, in the absence of any other rules, over the previous 15 years. It was during those years that Berlusconi rose to prominence, and went from being a little-known entrepreneur running a small local television network to a national tycoon. His empire started with Canale 5, a television station that virtually covered the entire national territory, circumventing the Constitutional Court’s prohibition of broadcasting on a national basis. He then purchased Rete4 from the Mondadori publishing group and Italia1 from another Italian publisher, Rusconi.

The lack of legislation regulating the competitive landscape of the media is therefore the cause of the lack of pluralism that has been, and continues to be, the trademark of the Italian broadcasting system. Between the *Mammì Law* (1990) and the *Maccanico*

¹¹ “Television without Frontiers Directive”: Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, 89/552/EEC, OJ L 298 of 17 October 1989, as amended by European Parliament Directive of June 1997, 97/36/EC, OJ L 202 60 of 30 July 1997, consolidated text available on the European Commission website at http://europa.eu.int/eur-lex/en/consleg/pdf/1989/en_1989L0552_do_001.pdf (accessed 15 March 2005).

¹² Law regulating public and private broadcasting, no. 223 of 6 August 1990, *Gazzetta Ufficiale*, no. 185 of 9 August 1990 (hereafter, *Mammì Law*).

¹³ Law converting into law “law decree 807” of 6 December 1984 on urgent dispositions in the area of television broadcasting, no. 10 of 4 February 1985, *Gazzetta Ufficiale* no. 30 of 5 February 1985.

*Law*¹⁴ (1997), there were some important events on the political front, such as the corruption scandals, known under the name of “*Tangentopoli*”, and the launch of Berlusconi’s political career. In the television field, the *Decree Salva-RAI* – which was meant to rescue public television through economic aid – was adopted in 1993.¹⁵ It was once again an emergency law, and it was intended to reorganise the financials of public television, which was being starved by politics rather than business strategies. The law was also intended to reform the appointment mechanism for RAI’s board of directors, which was the key element of “*lottizzazione*”.

With Berlusconi’s advent in 1994, conflict of interest became a central concern. The RAI-Mediaset duopoly came to an end when control over both were put in the hands of a single individual: the Italian Prime Minister. Berlusconi was owner of Mediaset, and, as head of the Italian administration, controlling shareholder of public television. He also held substantial power to influence broadcast licensing. In 2001, Berlusconi won the election and again formed the Government. As noted by several media experts, the approval in July 2004 of the *Conflict of Interest Law 2004* has not solved the problem, because the restraints provided under this law only apply to media executives, not to controlling media shareholders.¹⁶

With the *Maccanico Law*, a left-wing Government introduced some restraints on the duopoly. This law envisioned a partial privatisation of RAI, and it allowed for a long-term period for the enforcement of the provisions regarding the dissolution of one private network, Rete4, and the restructuring of one public channel, RAI Tre, into an advertising-free station. After the Constitutional Court ruling in 2002, which imposed a detailed timetable,¹⁷ the Berlusconi administration enacted the Gasparri Bill, which was approved in December 2003. The Gasparri Bill was vetoed by President Carlo Ciampi, mainly because it was in conflict with Constitutional Court decisions and because he considered the anti-monopoly thresholds provided by the bill to be too vague. However, the bill was finally approved by Parliament in May 2004. The existing duopoly was thus perpetuated, though there are prospects for a significant overhaul of the broadcasting system through the launch of terrestrial digital television, which is an opportunity to build up new networks, competition and content never seen on the Italian broadcast media before.

¹⁴ Law setting up the Italian Communications Guarantee Authority and Introducing Regulations of the Telecommunications and Broadcasting Systems, no. 249 of 31 July 1997, *Gazzetta Ufficiale* no. 177 of 31 July 1997, (hereafter, Maccanico Law).

¹⁵ Decree-law on Urgent Norms for the Recovery and Reorganisation of RAI, no. 558 of 30 December 1993, *Gazzetta Ufficiale*, no. 305 of 30 December 1993 (hereafter, Decree Salva-RAI).

¹⁶ Law on Regulations in the Field of Solving Conflicts of Interest, no. 215 of 20 July 2004, *Gazzetta Ufficiale*, no. 193 of 18 August 2004 (hereafter, Conflict of Interest Law 2004).

¹⁷ Constitutional Court Decision no. 466 of 20 November 2002, *Gazzetta Ufficiale*, first special series of Constitutional Court, no. 47 of 27 November 2002.

2.2 Structure of the Italian television market

The main changes that the Italian market experienced in 2003 included:

- The entrance of Sky Italia into the cable and satellite market. The acquisition by Sky Italia of the existing operators Tele+ and e Stream has created a monopoly in the cable television market, which has coincided with an increase in the number of subscribers and a decrease in the illegal market.
- The development of fibre optic and ADSL networks, which is beginning to contribute to the growth and diversification of the interactive and multi-channel television services.
- The acquisition of licences by the national players, RAI and Mediaset, for the development of a nationwide cable network, causing several smaller operators, which were in difficult financial conditions, to leave the market.
- Experimental use of digital broadcasting techniques by the major nationwide networks, with a growing range of programmes on offer and better coverage.
- Overhauling of the regional and local television sector, in light of the transition to digital terrestrial television. Several companies have been consolidated into multi-regional and national networks.

In 2004, Italy's main broadcasting regulator, the Communications Guarantee Authority (AGCOM), (see section 3.1) outlined the broadcast market as follows:¹⁸

- There is an abundant supply of publicly available television, including 12 national channels and 10 to 15 regional and local channels.
- The two main television operators, RAI and Mediaset, control half of the national television channels, approximately 90 per cent of the television audience and 75 per cent of the overall advertising spending in the market.
- The high number of national and local operators constitutes an entry barrier and restraint on the development of terrestrial digital television.
- Television absorbs over half of the overall mass-media advertising spending.
- Compared to other European countries, there is a relatively underdeveloped system of multi-channel platforms: cable is still relatively unattractive for most of the 20.1 million Italian households, and the increase of satellite television is still restrained by widespread piracy.

¹⁸ AGCOM, *Annual Report 2004 on activities carried out and work programme 2004*, Rome, 30 June 2004, available on the AGCOM website at http://www.agcom.it/rel_04/rel04_02.pdf (accessed 19 April 2005), pp. 110–111 (hereafter, AGCOM, *Annual Report 2004*).

Table 1. Overview of the television market

Overall television audience	Total number of TV Households (TVHH)	21,320,000
	Number of TV Households (TVHH) – as a percentage of all households	98.5
	Number of channels received by 70 per cent of the population	9
Percentage of TV Households (TVHH) with:		
TV Equipment	Colour TV	99.8
	Multiset (more than 1 TV set)	55.3
	VCR	66.7
	DVD	11.4
	Teletext	78.6
	Remote control	99.6
TV Distribution	Cable connected	0.3
	Satellite private dish/DTH	13.0
	Satellite collective dish/SMATV	4.0
	Only terrestrial	N/A
TV Subscription	Analogue pay TV subscribers	N/A
	Digital TV subscribers	13.8
Digital TV	Terrestrial digital	0.3
	Satellite digital	11.8
	Cable digital	0.2

Source: Datamonitor; Auditel RdB 2003B; Audistar 2003 Eurisko.¹⁹

2.3 The main players in the Italian broadcasting market

The Italian broadcasting market is among the least competitive in the EU. The build-up of the RAI-Mediaset duopoly left several victims on the ground, including the start-ups created by early investors, like the leading Italian publishers Mondadori and Rusconi – as well as Rizzoli in the early 1980s. Therefore, when AGCOM affirms that the Italian television audience can watch at least 12 generalist national channels, it should be borne in mind that six of those channels are the RAI and Mediaset networks. The others, with the exception of channel La 7, are only technically national channels. Although they can be viewed throughout the nation, they are only able to gather, collectively, a meagre 3 per cent audience share. Thus, the number of networks – including the regional and (around 600) local channels – does not mean much when it comes to what really matters in measuring the market: the audience. Indeed, AGCOM itself admits that the six major RAI and Mediaset channels can claim a combined audience share of approximately 90 per cent.²⁰

¹⁹ IP International Marketing Committee, *Television 2004. International Key Facts*, October 2004, p. 174.

²⁰ AGCOM, *Annual Report 2004*, p. 111.

2.3.1 Publicly accessible generalist television

Because free-to-air commercial television offers programming free of charge, and public television offers it for an inexpensive licence fee, this type of broadcasting is likely to prevail over paid television for many years to come. Nonetheless, the Italian television marketplace is undergoing significant changes, mostly due to the development of new technologies, such as digital television and broadband, which will allow the rise of the video-on-demand industry.

Table 2. Map of national television channels

Channel	Launch year	Diffusion	Technical Penetration (per cent)	Language	Programming	Revenue source
Public:						
RAI 1	1954	T, S	100	Italian	Generalist	L-F / Adv.
RAI 2	1954	T, S	100	Italian	Generalist	L-F / Adv.
RAI 3	1954	T, S	100	Italian	Generalist	L-F / Adv.
Private:						
Canale 5	1980	T, S	100	Italian	Generalist	Adv.
Italia 1	1981	T, S	100	Italian	Generalist	Adv.
Rete 4	1982	T, S	100	Italian	Generalist	Adv.
La 7	2001	T	81	Italian	Generalist	Adv.
Europa 7	NA	T	NA	NA	NA	NA
MTV	1997	T	84	Italian/ English	Music	Adv.
Retecapri	1977	T	NA	Italian	Generalist	Adv.
Rete A/ All Music ²¹	2001	T	NA	Italian	Music	Adv.
Rete Mia	NA	T	75	Italian	Tele-shopping	NA

Abbreviations: T: Terrestrial, S: Satellite; L-F: licence fee, Adv.: Advertising
Source: Auditel AGB Italy²²

RAI

Public television consists of three channels: RAI Uno, RAI Due and RAI Tre. RAI is the most prominent Italian cultural outlet. It is historically more closely tied to the

²¹ After VIVA stopped broadcasting RETE A/VIVA in May 2003, RETE A launched RETE A/ALL MUSIC on the same frequencies.

²² IP International Marketing Committee, *Television 2004. International Key Facts*, October 2004, p. 175.

development of Italy's mass communication than the print media, which have suffered from lower readership than is found in most European countries.

RAI controls a number of companies in the broadcasting market. These include Sipra, which is RAI's advertising agent; RAI Trade, which is RAI's subsidiary for improving and commercialising RAI's products; RAI Cinema, which handles the acquisition and marketing of audiovisual and multimedia royalties, mainly for the benefit of RAI Group's production and editorial needs; and RAI Sat, RAI Net, RAI New Media, and RAI Click, which overlook the production and distribution of the relevant related satellite, interactive and digital services. RAI Way manages the broadcasting signal of RAI.

The public television network has 13,000 employees on its payroll, twice as many as Mediaset, which employs 6,500 people, although both produce the same number of broadcasting hours. In addition to the three main television channels, RAI owns four radio channels – Radiouno, Radiodue, Radiotre and Isoradio – which together account for 30 per cent of the average daily national market share.²³

Mediaset

The media giant owned by Berlusconi has always been the strongest competitor of public television. During the past several years, Mediaset's three national television channels – Canale 5, Italia Uno and Rete4 – have challenged the public broadcaster's supremacy in the area once held tightly under RAI control and influence: general television, with a particular focus on entertainment.

Like RAI, Mediaset includes a number of subsidiaries and other industrial and commercial activities supporting its television production. Publitalia '80 has always been the cash cow of the group. It is a very efficient advertising machine, which allowed Berlusconi's television ventures to corner much of the advertising market. It did this by convincing Italian businesses to invest more in television advertisements, first locally, and then later on a national basis. RTI is Mediaset's flagship: It is the company controlling the three nationwide television channels, several radio networks and – following the entry into force of the *Gasparri Law* – more than 20 digital channels, as of January 2005. The Mediaset group also owns one of the biggest libraries of television works in Europe. Its archive includes approximately 5,000 movies, 650 television series (with a total of 14,700 episodes), 740 cartoons (with a total of 22,400 episodes), 17 soap operas (3,900 episodes), and 1,900 television movies.

La 7

La 7 is the television network controlled by Telecom Italia, the former national telecommunications monopoly administrator. Telecom Italia purchased two networks – TMC1 and TMC2 – in the past few years and consolidated them into La 7. Telecom Italia also owns the music television station, MTV. Although Telecom Italia is a very

²³ AGCOM, *Annual Report 2004*, p. 122.

strong firm, and La 7 also has backing from a financial group controlled by the Italian top manager Marco Tronchetti Provera, the network still has not been able to get a significant share of the nationwide audience. Many observers, including some leftist political groups, still hold hope that this network will be the alternative to the virtual monopoly of RAI and Mediaset.

Rete A

This minor all-music network was bought in December 2004 by the Gruppo L'Espresso, which owns the influential daily *La Repubblica* and popular radio stations such as Radio DeeJay. The acquisition marks the publishing group's entrance into the television business. The network will continue to be an all-music channel, but it plans to invest in digital terrestrial broadcasting and launch a multiplex of four or five digital channels.

2.3.2 Pay-TV

In 2003, media magnate Rupert Murdoch acquired what was left of the satellite pay-TV networks Tele+ and Stream, which were both on the brink of bankruptcy, and launched Sky Italia. Sky Italia's goal of bringing satellite television to at least three million households in Italy (out of a total of 21.3 million) was attained at the end of 2004. Clearly, the value of pay-TV is its offering of Italian football premiership games (Serie A), but Sky Italia faces a situation of great uncertainty in the Italian football landscape, as most clubs are struggling financially. More recently, it has had strong competition from Mediaset, which purchased the rights to broadcast some of the most popular football games of Serie A on its new digital networks. La 7 followed suit, and also bought broadcasting rights for some of these matches.

2.3.3 Digital terrestrial broadcasting

Mediaset's moves to control the rights to broadcast the Italian football games on its digital terrestrial networks are a remarkable consequence of the structural changes in broadcasting. As mentioned earlier, the *Gasparri Law* counts on leveraging digital terrestrial to promote pluralism in television. AGCOM's *Annual Report 2004* affirms that five multiplexes, with a capacity of four or five channels each, have been built, and 15 digital channels with national coverage have been made available to the public in 2004.²⁴ RAI, Mediaset and Telecom Italia Media competed strongly to obtain a larger number of frequencies, buying them from the financially weak local television stations. No official figures are yet available, but the acquisition buying process is ongoing.

This move was described as "theft" by media critics: "The RAI and Mediaset frequencies acquisition plan looks like a typical pre-emptive action whose purpose is to

²⁴ AGCOM, *Annual Report 2004*, pp. 115–116.

steal a fundamental resource from potential incoming competitors”, one observer said.²⁵ “The plan will allow the duopoly to expand further”, said another.²⁶

Audience data

Since the 1980s, the three public networks and the commercial television networks have been competing fiercely for audience supremacy. The battle is continuing. Although RAI still holds overall supremacy, for years now it has been besieged by Mediaset, which lags behind by just a few percentage points. In 2003, RAI’s stations, taken together, had a 45.7 per cent audience share, while RTI/Mediaset’s stations – Canale 5, Italia Uno and Rete4 – had an aggregate audience share of 43.2 per cent. That meant that only 8.8 per cent of the audience was left for operators other than Mediaset and RAI. Telecom Italia Media’s network, La 7, mustered just a little over 2 per cent of the audience.

Table 3. Average annual audience share of the main television stations (2002–2003)

Channel	Average annual audience share (per cent)	
	2002	2003
RAI 1	24.4	24.2
Canale 5	22.8	23.2
RAI 2	13.0	12.0
ITALIA 1	10.1	10.5
RAI 3	9.9	9.5
RETE 4	9.4	9.5
La 7	1.9	2.3
Other	8.5	8.8

Source: AGB Auditel²⁷

²⁵ L. Prosperetti “Tv, tentazioni dominanti”, (“TV, dominant temptations”), in *Il Sole 24 Ore*, 10 July 2004, p. 1.

²⁶ OSI Roundtable meeting, Milan, 29 October 2004, hereafter “OSI roundtable comment”. *Explanatory note: OSI held roundtable meetings in each country monitored to invite critique of its country reports in draft form. Experts present generally included representatives of the Government and of broadcasters, media practitioners, academics and NGOs. This final report takes into consideration their written and oral comments.*

²⁷ IP International Marketing Committee, *Television 2004. International Key Facts*, October 2004, p. 178

3. GENERAL BROADCASTING REGULATION AND STRUCTURES

Broadcasting regulation is characterised by the plurality of its regulatory bodies. This situation was caused by a profusion of legislation as well as a tendency by legislators to maintain past institutions, even when they were forced to adapt legislation to Constitutional and European Union principles.²⁸

3.1 Regulatory authorities for the television sector

As in other European countries, the recent evolution of legislation in Italy has paved the way for consolidating the authorities responsible for regulating, supervising and enforcing sanctions in the telecommunications sector into a single independent body – the Communications Guarantee Authority (*Autorità per le Garanzie nelle Comunicazioni* – AGCOM).²⁹ This body was partly created in order to comply with European Community laws, like Directive 90/387,³⁰ and partly created in response to a political crisis in the 1990s, which led to the demand for a stronger role for independent regulatory authorities.³¹

Nevertheless, the functions still ascribed to Government agencies remain important. Thus, the Government, a dominant body in the broadcasting sector until the mid 1970s, retained significant regulatory powers even during the 1980s, and then regained its primary role in regulating broadcasting with the *Gasparri Law* (2004). Parliament, which in 1975 secured its control over RAI following a decision of the Constitutional Court, has maintained significant power, even after the creation of AGCOM. Despite efforts to neutralise media regulation by transferring the control of television to independent bodies, the confusing, complicated regulatory system still leaves much control in the hands of politicians. A growing number of observers seem to feel that the best solution is to give decision-making authority back to the Government and Parliament. Nonetheless, it is important to acknowledge the role in broadcast

²⁸ For a broader study, see: R. Zaccaria, *Diritto dell'informazione e della comunicazione*, (*Information and communication legislation*), Padova, 2002, from p. 149, (hereafter, Zaccaria, *Information and communication legislation*); and O. Grandinetti, “Radiotelevisione”, (“Broadcasting”) in *Trattato di diritto amministrativo* (Treatise on administrative law), Milano, 2003 (hereafter, Grandinetti, *Radio-television*).

²⁹ *Maccanico Law*, art. 1.

³⁰ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision.

³¹ P. Caretti, “L’Autorità per le garanzie nelle comunicazioni: problemi e prospettive” (“The Communications Guarantee Authority: problems and perspectives”), in M. Manetti (ed.), *Europa e Informazione*, (*Europe and Information*), Napoli, 2004, (hereafter, Caretti, *The Communications Guarantee Authority*).

regulation played by AGCOM, as well as the Regions,³² which received more power over broadcasting through amendments to the Italian Constitution.³³ As the situation stands now, there are overlaps and conflicts that make the regulation of the system particularly difficult.

Before examining the composition and functions of AGCOM, it is useful to give an overview of the other bodies with regulatory powers.

3.1.1 The Parliamentary Commission for General Guidance and Supervision of Broadcasting Services

Parliament's evolution in overseeing the broadcasting system stems from different interpretations of the concepts of information pluralism and public service during different historical periods. The two values, of information pluralism and public service, first appeared in the Constitutional Court's landmark decision in 1974.³⁴ This Decision paved the way for Parliament to play an active role in media regulation by granting it the right to appoint the RAI Board of Directors and to determine its policy. It also granted Parliament general power of supervision and control over public television. Following this decision, the Constitutional Court transferred to Parliament the task of guaranteeing programming impartiality. The Court also made Parliament responsible for opening public television to different political, religious, cultural, and other groups in society. In other words, the Constitutional Court acted on the belief that media pluralism is best guaranteed by marginalising the executive branch, which until then had held a firm grip on RAI, and transferring policy-making functions to Parliament.

Parliament's response to the Constitutional Court's jurisprudence was the *RAI Law 1975*. This law created the Parliamentary Commission for General Guidelines and Supervision of Broadcasting Services, *Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi* (hereafter, the Parliamentary Commission for Broadcasting). The Commission is composed of 40 members, 20 members of the Chamber of Representatives and 20 Senators.³⁵ The *RAI Law 1975* granted the Commission the right to query and supervise public television, with the aim of guaranteeing that it would respect the fundamental principles of public broadcasting, including pluralism, fairness, completeness and impartiality of information. The Commission's role in policy-making was based on its right to both determine and to

³² In Italy, there are 20 self-governing regional districts with legislative powers (hereafter, the Regions).

³³ The entire Title Five of the second part of the Constitution was amended by the Constitutional Law no. 3 of 18 October 2001, *Gazzetta Ufficiale* no. 248, 24 October 2001, cit.

³⁴ Decision of the Constitutional Court no. 225 of 10 July 1974, *Gazzetta Ufficiale* no. 187 of 17 July 1974 (hereafter, Constitutional Court Decision 225/1974).

³⁵ The *RAI Law 1975* stipulated that the Commission's members are appointed by the Speakers, upon the advice of the different parliamentary groups, in order to ensure proportional representation. For a more in-depth analysis, see: Grandinetti, *Radio-television*, from p. 2465.

intervene in programming and advertising strategies, in order to guarantee respect for fairness and plurality. The Commission was expected to exercise editorial control and control over individual programme content – in particular news content. The Commission did not have any tasks with respect to private television. Before the adoption of the *Mammì Law* in 1990, private stations had not been subject to any regulations or supervisory body.

Until 1993, one of the most significant, challenging and criticised tasks of the Parliamentary Commission for Broadcasting was the appointment of the RAI Board of Directors. In order to limit political influence over RAI, the *RAI Law 1993* assigned this duty to the speakers of the Chamber of Representatives and the Senate.³⁶ With both speakers being representatives of the political majority, since 1994 the guarantee of a fair and balanced representation of different political coalitions has failed.

In 2004, the *Gasparri Law* took note of this situation, but did not find any solutions other than to transfer responsibility for the appointment of the RAI Board of Directors back to the Government and the Commission, “according to models that would have been classified ‘*consociativi*’³⁷ just a few years before”.³⁸ Parliament’s role is not limited to the Commission’s functions. Other permanent commissions and the Assembly are entrusted with investigating broadcasting, and they are entitled to formulate non-binding opinions on broadcasting regulation.

3.1.2 The Government

The regulatory powers of the executive branch, which were essential prior to the 1975 reform and still crucial until 1997, were diminished by the *Maccanico Law*. However, the *Digital Broadcasting Law 2001*³⁹ and the *Gasparri Law* restored significant influence to the Government, dividing up the tasks among some of its institutions, namely the Council of Ministers, the Prime Minister, and the Ministries of Telecommunications and Economy.

³⁶ Law on the decisions on the company with the exclusive right to public service broadcasting no. 206 of 25 June 1993, *Gazzetta Ufficiale* no. 148 of 26 June 1993, (hereafter, *RAI Law 1993*), art. 2.

³⁷ *Consociativismo* is a word Italians use to describe the political practice of political opposition parties allying with the governing coalition, thus clouding the democratic process.

³⁸ Sabino Cassese, “Il nuovo assetto del sistema televisivo”, (“The new order of the television system”), presentation at the Seminar on the Gasparri Law, organised by the Institute for the Study of Innovation in the Media and for the Multimedia (ISIMM) on October 2003, available on the ISIMM website at http://www.isimm.it/documenti/Documenti/SE081003/Cassese_8_10_03.doc (accessed 20 September 2004), (hereafter, Cassese, *The new order of the television system*).

³⁹ Law converting into law, with modifications, law-decree no. 5 of 23 January 2001, on urgent dispositions on the delay of deadlines for analogue and digital broadcasting (...), no. 66 of 22 March 2001 *Gazzetta Ufficiale* no. 70 of 24 March 2001, (hereafter, *Digital Broadcasting Law 2001*).

The *Gasparri Law* especially empowers the Government by granting the Council of Ministers the ability to enact a so-called “consolidated broadcasting act”, aimed at coordinating the current legislation affecting broadcasting. However, as of 1 May 2005 the act had not been adopted. The *Gasparri Law* also empowers the Government by giving the Minister of Economy, which is RAI’s controlling shareholder, the right to appoint two out of the nine members of RAI’s Board of Directors, including its President.⁴⁰

As far as administrative tasks are concerned, the Government has some relevant competencies in granting broadcasting authorisations and licences. These competencies, especially regarding digital broadcasting, were given back to the Ministry of Communications in 2001. The Government is also entitled to approve the Service Contract with RAI and the Licence Convention between the State and RAI. The Service Contract is a document specifying the mission and content of the public service provided by RAI. It is renewed every three years. The Licence Convention is a 20-year agreement on the conditions of using the licence for public radio and television broadcasting. The most recent Convention was signed in 1994.⁴¹

3.1.3 The Communications Guarantee Authority (AGCOM)

Established in 1997 by the *Maccanico Law*, AGCOM is a national independent authority with competencies in telecommunication, audiovisual material and publishing. AGCOM inherited the functions of the former regulator of publishing and broadcasting activities, the Guarantor for Publishing and Broadcasting. AGCOM took on even more responsibility than that body, as it was defined by law as the authority responsible for guaranteeing the enforcement of free speech rights and for regulating competition. According to a media law expert, AGCOM “has such significant influence over regulation, in addition to powers of control, supervision and enforcement, that it appears to be the real ‘governing body’ of the Italian media”.⁴²

Composition and organisation

AGCOM is a collegiate organ composed of nine members. The president is appointed by a Decree of the President of the Republic, based on advice from the Prime Minister, and in agreement with the Minister for Telecommunication. While the president of

⁴⁰ See: “Le incostituzionalità del disegno di legge Gasparri” (“The non-constitutionality of the draft Gasparri Law”), document sponsored by the organisation Article 21, published in R. Zaccaria, *Televisione: dal monopolio al monopolio, (From monopoly to monopoly)*, Baldini Castoldi Dalai, Milano, 2003, (hereafter, Article 21, *Gasparri Law – non-constitutionality*).

⁴¹ See: *Licence Convention between the State and RAI-Radiotelevisione Italiana S.p.a.*, approved by Presidential Decree of 28 March 1994. The most recent, legally binding service contract, for the period 2003–2005, was approved on 14 February 2003. See: *Gazzetta Ufficiale*, no. 59 of 12 March 2003, (hereafter, RAI Service Contract 2003).

⁴² Caretti, *The Communications Guarantee Authority*, p. 34.

AGCOM must also be approved by the relevant parliamentary Commissions,⁴³ in reality the Prime Minister has the most influence in filling this post. The other eight members of AGCOM are appointed by the Chamber of Representatives and the Senate, each of which chooses four members. AGCOM's members are chosen through an electoral formula that usually leads to an equal representation of the majority and the opposition.⁴⁴ The terms of the AGCOM members are not staggered.

The tenure of AGCOM members' is seven years, and they cannot be re-elected. The *Maccanico Law* stipulates that these members must possess general qualifications, such as recognised and significant professional knowledge and competence. The law also contains provisions to prevent AGCOM members from conflicts of interest. For example, AGCOM members are not allowed to work for companies operating in the communications sector for four years after the end of their mandate.⁴⁵

However, it is doubtful whether these conflict of interest provisions can really guarantee the independence of AGCOM from the market players and the political establishment – even though such objectivity is mandated by Article 3 of EU Directive 2002/21/EC 2002⁴⁶ (hereafter, the Framework Directive), which provides for the relevant national authorities to use their powers in an impartial and transparent fashion.⁴⁷

The means for choosing AGCOM's members creates some potential problems. The voting system means that the division between political coalitions that marks the Italian Parliament may be duplicated within AGCOM. In such a situation, the decisive vote in many matters rests with the AGCOM President, who is the face of the Government because he or she is appointed by Presidential Decree at the joint proposal of the Prime Minister and the Ministry of Communications. Once again, Italian lawmakers have proven unwilling to create divisions between the legislative and executive branches and the supervisory and control authorities. In developing the

⁴³ See: Law on Competition In, and Regulation of, Public Goods and Services, and on Establishing the Public Goods Regulatory Authority, law no. 481 of 14 November 1995, *Gazzetta Ufficiale* no. 270 of 18 November 1995, Regular Supplement no. 136, (hereafter, Law 481/1995), art. 2.

⁴⁴ Article 1 of the *Maccanico Law* provides for the Senate and the Chamber of Representatives to each elect four members of the AGCOM. In addition, it stipulates that each senator and member of parliament votes for one candidate in each of the two internal Commissions of the AGCOM, namely: the Commission for Infrastructures and Networks and the Commission for Products and Services.

⁴⁵ *Maccanico Law*, art. 1(5) with reference to Law 481/1995, art. 2(8)(9)(10)(11).

⁴⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services, published in the *Official Journal of the European Communities* L108/33, 24 April 2002, (hereafter, the Framework Directive).

⁴⁷ S. Cassese, "Il concerto regolamentare europeo delle telecomunicazioni" ("The European regulation of communications"), in G. Morbidelli and F. Donati (eds.), *Comunicazioni: verso il diritto della convergenza? (Communications: towards the rule of convergence?)*, Giappichelli, Torino, 2003, p. 33.

Maccanico Law, legislators have simply opted for the preservation of the *status quo*, which certainly weakens the impartiality and independence of AGCOM.

Media observers have generally expressed positive opinions about the political independence of AGCOM's first members, who were led by President Enzo Cheli and served from 1998, when AGCOM was created, until 2005. However, the spring 2005 appointment of the new members of AGCOM showed signs of increased manoeuvring by political parties, who sought to gain control over the regulator. Although the new President of AGCOM, Corrado Calabró, former President of the regional administrative tribunal of Lazio, is without doubt competent in this field, and all the new members of the AGCOM appointed in the spring of 2005 are likely to be able to do a good job, their appointment involved more partisan considerations than in the past.

AGCOM has its own organisational chart and a staff of 257 employees. It may use the government's structure to exercise its functions and to conduct investigations. To promote transparency, AGCOM publishes a bimonthly Bulletin, both electronically and on paper, and an Annual Report. It also publishes its regulations in the Italian official gazette (*Gazzetta Ufficiale*), and maintains a very comprehensive website that is updated regularly.⁴⁸

In order to encourage a tighter connection between AGCOM and civil society, the *Maccanico Law* provides for a Users' National Council, which acts as a sort of Ombudsman. Composed of experts appointed by consumers' associations, the Council may formulate opinions and make proposals to AGCOM, Parliament, the Government and other public or private organs. The legislation also provides for the establishment of a Regional Committee for Communication to serve as AGCOM's representative in every region. The purpose of the regional committees is to encourage greater decentralisation of powers.⁴⁹

Competencies

AGCOM has the following competencies:

- to establish standards for the industry;
- to supervise the market;
- to grant licences and authorisations; and
- to propose legislation and policies.

AGCOM also has quasi-judicial and consultative competencies, which are dealt with by AGCOM's Council and by its two internal Commissions: the Commission for Infrastructures and Networks, and the Commission for Products and Services.

⁴⁸ AGCOM's website can be accessed at www.agcom.it, (accessed 10 June 2005).

⁴⁹ *Maccanico Law*, art. 1(28).

AGCOM's Commission for Infrastructures and Networks manages some functions related to the telecommunication sector, including: managing the frequency spectrum; establishing the level of fees for interconnection and telecommunication access; supervising network administration and issues related to health damage caused by electromagnetic interference; determining the criteria used to define the plans for the national distribution of telephone numbers for networks and telecommunication services; and managing the public register of telecommunications operators.

AGCOM's Commission for Products and Services has much more significant responsibilities in the area of broadcasting. This Commission enforces compliance with relevant legislation by the broadcasting licensees. It guarantees the observance of legislation on: equal access to political information and campaigning, the protection of youth, rights of linguistic minorities, and the right to reply. It also manages and publishes media audience data and regulates the criteria to be used in opinion polls.⁵⁰

AGCOM's Council, composed of the AGCOM President and eight members, handles all the other aspects not taken care of by the Commissions. This includes advising the commissions, supervising and coordinating AGCOM's activities, and conducting studies and research on telecommunications.⁵¹ AGCOM has powerful authority over matters relating to broadcast licences and authorisations, and anti-monopoly provisions. With respect to anti-monopoly provisions, the law grants the Council the power to supervise market evolution and to verify the "existence of any dominant positions within the broadcasting market or which is otherwise not permitted by law and to take the relevant enforcement actions".⁵²

Under the *Gasparri Law*, the Council gained the power to define the market, in accordance with the principles detailed in Articles 15 and 16 of the EU Framework Directive (2002/21/EC), and to verify "the existence of dominant positions within the integrated communication system" and in the markets that compose it.⁵³ The *Gasparri Law* also empowers AGCOM to intervene when it ascertains the existence of market dominance. It can adopt measures to boost competition and pluralism by issuing a public warning and then by taking "measures necessary for eliminating or preventing" the formation of dominant positions.⁵⁴

Because the anti-monopoly norms are weak, and the sanctions provided by law are not clearly defined, AGCOM has room for broad discretion in the application of its

⁵⁰ Maccanico Law, art. 1(b).

⁵¹ G. Montella, "La collaborazione dell'Autorità per le garanzie nelle comunicazioni all'attuazione della disciplina comunitaria", ("The collaboration of the Communications Authority in achieving community discipline"), in M. Manetti (ed.), *Europa e Informazione, (Europe and Information)*, Napoli, 2004.

⁵² Maccanico Law, art. 1(c).

⁵³ Gasparri Law, art. 14.

⁵⁴ Gasparri Law, art. 14 (reference to Maccanico Law, art. 2(7)).

regulating and sanctioning powers. For this reason, the objections of those complaining about a breach of the Constitution seem well founded, especially since AGCOM regulates a field that is strongly intertwined with the Constitutional protection of fundamental rights.⁵⁵ Moreover, such discretion has apparently allowed AGCOM to avoid exceedingly harsh decisions against the largest broadcasters. The body was less lenient, in March 2005, in the last days of Enzo Cheli's presidency, when it took a series of important steps aimed at boosting competition. These steps included a decision calling for more competition in the digital television market⁵⁶ and severe sanctions on RAI, RTI (Mediaset) and Publitalia '80, Fininvest Group's advertising subsidiary, for having violated Article 2 of the *Maccanico Law*, which addresses dominant positions.⁵⁷

3.1.4 The Competition Authority and the Regions

Some of AGCOM's responsibilities intertwine and overlap with those of another regulator, the Competition Authority (*Autorità garante della concorrenza e del mercato*), which was instituted by Law 287 of 1990⁵⁸ and is in charge of regulating abuse of dominant positions. The Authority also regulates the communication sector, in which AGCOM has only advisory powers.

Under the 2001 amendments to the Constitution, Article 117 gives the Regions certain competencies relating to "organisation and regulation of telecommunications". In addition to posing difficult questions of interpretation, the transfer of regulatory powers to the Regions presents significant conflicts with AGCOM's powers. These conflicts must be resolved by the Government in its "consolidated broadcasting act", which has not yet been adopted. That act is supposed to establish the fundamental principles in the field. Perhaps reforms could involve the local Regional Committee for Communication, which was set up to decentralise the functions of AGCOM.⁵⁹

3.2 Licensing and enforcement measures

The planning of the frequency spectrum – consisting of the procedure for issuing broadcast licences and assigning frequencies – represents the kind of legal "black holes"

⁵⁵ Caretti, *The Communications Guarantee Authority*.

⁵⁶ AGCOM, Decision 136/05, *Gazzetta Ufficiale*, supplement no. 35, 11 March 2005.

⁵⁷ In accordance with Article 1(31) of the *Maccanico Law*, RAI, RTI and Publitalia '80 were fined two per cent of the revenues from advertising pulled in during 2003. (See AGCOM, "Posizioni dominanti: sanzionia RAI, RTI e Publitalia '80", ("Dominant positions: sanctions against RAI, RTI and Publitalia '80"), Rome, 8 March 2005, available online (in Italian) at http://www.agcom.it/comunicati/cs_080305.htm (accessed 15 May 2005).

⁵⁸ Law no. 287 of 1990 on regulations for protecting competition and the free market, *Gazzetta Ufficiale* no. 240 of 13 October 1990.

⁵⁹ Caretti, *The Communications Guarantee Authority*.

in the judicial system that has characterised Italian broadcasting since the mid 1970s. These matters are very badly legislated.

Before examining the current legislative order, it is worth noting the confusion caused by the Constitutional Court's landmark 1976 decision, which allowed private companies to enter the local broadcasting market.⁶⁰ This change should have been accompanied by a planning or authorising framework for broadcasters. The lack of such legislation paved the way for the unauthorised occupation of the frequency spectrum by the largest networks.⁶¹

The lack of any structural planning was not remedied by the *Mammì Law*, which was adopted on 6 August 1990 and was the first law to recognise and regulate both the public and private broadcasting systems. This law established the principle that private operators were eligible for national broadcast licences. The *Mammì Law* provided criteria for the assignment of broadcast licences by the Ministry of Communications and, subsequently, the Ministry of Telecommunications. AGCOM plays a coordination role in the licensing procedure with the Ministry. The *Mammì Law* also provided criteria for the obligations of licensees. However, these criteria proved to be politically impracticable: those broadcasters that had been occupying frequencies unlawfully succeeded in preserving their occupation. The Constitutional Court's 1994 decision, which established the principle of a balanced distribution of the public frequencies and equal treatment of licensees, has also proven useless.⁶²

A first plan to restructure the licensing procedure was drafted by the Ministry of Telecommunications in 1992, but never adopted. A second plan, involving the assignment of analogue terrestrial broadcasting rights, was adopted by AGCOM in 1998. AGCOM took on responsibility in this area after its creation in 1997. Based on this plan, the Ministry of Telecommunications granted broadcast licences to all national private broadcasting operators in July 1999.

In order to guarantee competition among the 11 national television networks – including eight free-to-air and three viewable on subscription – the *Maccanico Law* stipulated that AGCOM must assign each broadcaster frequencies that cover at least 80 per cent of the national territory.⁶³ However, the licences were granted without the assignment of the

⁶⁰ Constitutional Court Decision 202/1976.

⁶¹ On this dispute, see: A. Pace, "La radiotelevisione in Italia con particolare riguardo alla emittenza private" ("Television in Italy with a particular view on private broadcasting"), in *Riv. trim. dir. pubbl.*, 1987, from p. 615; A. Pace, "Il sistema televisivo italiano", ("The Italian television system"), in *Pol. dir.*, 1997, from p. 97, (hereafter, Pace, *The Italian television system*); Grandinetti, *Television*, from p. 2454; and Tonoletti, *Constitutional principles*, from p. 244.

⁶² See: Constitutional Court Decision no. 420 of 5 December 1994, *Gazzetta Ufficiale* no. 51 of 14 December 1994. This affirmed that: "the respect of the pluralistic principle, together with that of equal treatment, requires [...] that relevant networks are – within the technical requirements limits – to be treated equally, and that the lack of frequencies in some regions shall therefore be burdened, as far as practicable, on all the above-mentioned networks in a fair and balanced way".

⁶³ *Maccanico Law*, art. 3, see Grandinetti, *Television*, from p. 2473.

necessary frequencies and, implicitly, without equal coverage of Italian territory. In effect, the private networks that had occupied frequencies unlawfully were authorised to continue to operate without broadcast licences, and the private networks that received licences could not operate because there were no frequencies left.

The situation grew more complicated after the adoption of the Digital Broadcasting Law 2001, which contained an administration plan providing for a complete switchover to digital technology. The Digital Broadcasting Law 2001 provided for distribution of the digital broadcasting frequencies, without specifying any significant parameters either for its implementation or for the assignment of frequencies to the operators. As a result, television networks lacking broadcast licences could keep occupying frequencies, and television networks holding national broadcast licences continued to broadcast using the frequencies already released in the 1990s. Thus, the network Centro Europa 7 was unable to broadcast, because unlicensed broadcasters were occupying the available frequencies and the transmission infrastructures.⁶⁴

The enactment of the *Gasparri Law* only confirmed and worsened the situation established by the Digital Broadcasting Law 2001. As administrative law scholar Bruno Tonoletti had feared, the private monopolist Mediaset has been able to acquire digital broadcasting licences while keeping at its disposal all the frequencies currently owned – or “occupied” – by its three analogue television networks.⁶⁵

Mediaset’s action was an open challenge to the Constitutional Court, which ruled in 2002 that the networks exceeding the ownership limits set by law – which was the case for Mediaset and Rete 4 – must terminate their broadcasting on free-to-air television using analogue technology no later than December 2003. On 23 December 2003, a week before the compulsory implementation of the Court’s ruling, the current administration adopted a decree preventing the withdrawal of the terrestrial broadcasting rights for Mediaset’s Rete 4. In fact, the *Gasparri Law* even authorises networks lacking a broadcast licence to broadcast. This, to the detriment of those who, although they have gone through a competitive process and been awarded the right to broadcast on a national basis, have been forced out of business as they have not been granted the use of public frequencies and infrastructure.⁶⁶

⁶⁴ In the case of *Centro Europa 7 versus the Ministry of Telecommunications*, the Regional Administrative Court of Lazio refused the claim for damages of the broadcaster, stating, among other things, that frequencies cannot be automatically passed to Centro Europa 7 from non-licensed networks. Regional Administrative Court of Lazio, Decision of 13 September 2004.

⁶⁵ Tonoletti, *Constitutional principles*, p. 308.

⁶⁶ AGCOM, “Assetto del sistema radiotelevisivo e della società RAI – Radiotelevisione Italiana”, (“The stability of the broadcasting system and of the company RAI – Italian Radio-Television”), Report AS 247, relating to Decree (‘d.d.l. governativo’) C 3184, available on the AGCOM website at www.agcom.it (accessed), (hereafter, AGCOM, AS 247); For a particularly in-depth analysis of the topic, see: O. Grandinetti, “Principi costituzionali in materia radiotelevisiva e d.d.l. Gasparri”, (“Constitutional principles in the field of radio-television and Gasparri Law”), in *Giornale di Diritto Amministrativo*, no. 2, 2003, (hereafter, Grandinetti, *Constitutional principles*).

This unlawful occupation of the public infrastructure appears to violate the EU Framework Directive (2002/21/CE) and EU Directive 2002/22/CE⁶⁷ (hereafter, the Universal Service Directive), which provide for transparent, non-discriminatory and proportionate procedures for the allocation of frequencies.⁶⁸ (See section 6.)

This situation widens the inequalities among networks, blocking the development of small operators and hindering new operators from entering the market. To this extent, the 2003 Annual Report of the Competition Authority underlines that:

the current arrangement of the broadcasting market is characterised by a strongly unfair allocation of the infrastructures, with two operators, RAI and Mediaset, having much more resources and networks at their disposal than the others.⁶⁹

Radio and television broadcasting services are only supposed to be carried out with a broadcast licence, because they require the use of the public transmission infrastructure. AGCOM and the Ministry of Telecommunication play a fundamental role in enforcing this regulation. The law gives AGCOM the right to formulate and approve the national plan for the assignment of the public frequencies. The Ministry has the right to actually grant the relevant authorisations and broadcast licences. The requirements, conditions and obligations of licensees, with respect to analogue broadcasting, include the following:⁷⁰

- Licences are granted for a period of six years and may be granted to corporations or businesses registered and conducting business in Italy or in the EU.
- The control of Italian operators by individuals or entities of countries outside the EU is permitted, provided that these countries have established a reciprocity clause with Italy in their legal system. An exception to this requirement is made for provisions deriving from international treaties or agreements.⁷¹

⁶⁷ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, published in the *Official Journal of the European Communities* L108/51, 24 April 2002, (hereafter, the Universal Service Directive).

⁶⁸ See: Mastroianni, *The European links*; and EP Resolution 2003/2237. Article 65 diplomatically formulates the wish that the "assignment procedure of the frequencies", provided by the Gasparri Law, would not represent a mere legitimisation of the *status quo*, and would not violate EU norms providing, *inter alia*, that the allocation of the radio frequencies for electronic communication services should be based on "objective, transparent and non-discriminatory principles".

⁶⁹ Competition Authority, *Report on Activity Carried Out in 2003*, 30 April 2004, (hereafter, *Competition Authority, Annual Report 2003*), p. 100, available at <http://www.agcm.it/eng/index.htm> (accessed 19 April 2005).

⁷⁰ AGCOM, Regulation no. 78 on the allocation of licences, 10 December 1998.

⁷¹ See: G. B. Garrone, *Profili giuridici del sistema dell'informazione e della comunicazione*, (*Judiciary profiles of the system of information and communication*), Torino, 2002, p. 109; and Zaccaria, *Information and communication legislation*, from p. 249.

- The main criteria in awarding broadcast licences are economic resources, technological capability and editorial plans of the applicants.

Among the most significant obligations of national licensees are those to:

- broadcast at least three daily television news programmes;
- comply with European production quotas;
- maintain a certain quality level; and
- guarantee the rights to reply and rectification.

Furthermore, licensees must guarantee opportunities for equal access to information programmes for all political subjects, broadcast announcements of State authorities, and respect the norms for the protection of children, as provided by the Self-regulatory TV and Children Code of Conduct.⁷² Such requirements are framed within a logic that aims to treat all broadcasters as public entities that provide a public service and have many obligations, including that of offering “truthful information and events in order to promote the independent development of opinions”.⁷³ It appears that the legislature has given up on its pursuit of business and market pluralism and has decided instead to regulate commercial television, in order to avoid an excessive party-based use of television.

AGCOM is responsible for monitoring and enforcement of the provisions on programming and the obligations of licensees. AGCOM also establishes the type and level of sanctions, which range between approximately €5,000 and €50,000. These are the only sanctions that AGCOM can enforce in the field of programming. Monitoring activities are centred on the protection of viewers, compliance with advertising limits, protection of pluralism in broadcasting and enforcement of *par condicio* – which means equal access to mass communication for all parties participating in elections. Although AGCOM has found many serious violations by broadcasters in these fields, it has only imposed low fines, which failed to deter further violations.

3.3 Independence of public television

3.3.1 From the reform of RAI (1975) to the reform of broadcasting (1990)

Throughout its evolution, the mission of the public broadcasting service has been defined differently and the independence of public broadcasting has experienced several different degrees and cycles.

The public service concept was first envisioned in the *RAI Law 1975*, when television was still a Government monopoly. This was the era of the “historic compromise” between the Catholic, conservative Christian Democrats and the Communists. At that

⁷² *The Self-regulatory TV and Children Code of Conduct*, approved on 29 November 2002.

⁷³ Gasparri Law, art. 6.

time, it was felt that Parliament generally represented the nation, and was therefore entitled to shape cultural policy. The *RAI Law 1975* defined television broadcasting in accordance with Article 43 of the Constitution, as:

a fundamental public service characterised by a pre-eminent general interest as it aims to widen the people's participation and to contribute to the social and cultural development of the country, pursuant to the principles provided by the Constitution.⁷⁴

For these reasons, public broadcasting management was a State prerogative. This law envisioned “subjective” and “scope-oriented” public service, which was to be entrusted to a publicly-owned entity, RAI, under the control of the Parliamentary Commission for Broadcasting. This Commission’s political agenda had to be defined in the law, in order to prevent manipulation by its own members. In other words, the basic principle of the public information system was pluralism of information.⁷⁵ According to the *RAI Law 1975*, only an entity under public control could guarantee “independence, objectivity and openness to different political, social and cultural tendencies, and respect for the right of freedom of expression guaranteed by the Constitution”.⁷⁶

Unfortunately, the reform brought about through the *RAI Law 1975* did not resolve the question of how to balance the need for objectivity and pluralism with the political parties’ tendency to try to control television. While RAI undoubtedly did become more open and pluralist than when it had been controlled by the governing coalition, the management of RAI was increasingly subjected to “*lottizzazione*” – the distribution of posts and power according to political affiliation. This brought the public networks under the strict rule of the largest political parties in Parliament.⁷⁷

Despite efforts at legal reform, the State-controlled RAI was never turned into an independent institution along the lines of the Constitutional Court, the Bank of Italy, or, more recently, the regulatory bodies. RAI remained under the direct control of Parliament, and thus under the influence of the political parties. The reasons for this phenomenon can be traced to the natural inclination of the governing elite to occupy as many influential positions as possible.

The *Mammì Law* put a legislative seal of approval on the present mixed system, influencing the general concept of public service television. The public function is preserved by granting the broadcast licence to a wholly State-owned corporation, but both public and private entities are obliged to uphold the fundamental principles of broadcasting – pluralism, objectivity, completeness and fairness of information, openness to different opinions and openness to political, social, cultural and religious

⁷⁴ RAI Law 1975, art. 1(1).

⁷⁵ P. Barile, “Libertà di manifestazione del pensiero”, (“Freedom of expressing opinions”), in *Enc. dir.*, XXIV, 1974, p. 424.

⁷⁶ RAI Law 1975, art. 1(2).

⁷⁷ See, for example: Pace, *The Italian television system*, from p. 109.

tendencies.⁷⁸ Insofar as pluralism is a constitutional imperative for both private and State-owned entities, all broadcasters are bound by public-service obligations. Any broadcaster not complying with the pluralism principle would be disregarding the principles of freedom of expression and a free market.

In reality, however, these principles hold a merely declamatory value, and no remedies are provided for violations.⁷⁹ Further evidence of this is that the editorial lines of the three networks owned by the Mediaset Group did not show any significant improvement in terms of balance and fairness following the entry into force of the law. On the contrary, during the past decade two Mediaset newscasts, Retequattro and Italia Uno, have assumed the role of loudspeakers for the political views of their owner, Prime Minister Berlusconi. Nevertheless, these principles represent the first evidence of the *Italian surrogate of pluralism*, which is a distinctively Italian version of broadcasting pluralism that involves the proclamation of high principles floating above a media landscape which sweepingly disregards those principles. This situation undermined very extensively the newsrooms' political independence and imposed limits on the contents of commercial television stations as well. (See Section 3.2.)

Another effort to encourage pluralism was the *Par Condicio Law 2000*, which sought to force publicly and privately owned broadcasting operators to comply with the principle that all the political parties should have equal access to politically oriented programmes, even during non-electoral periods.⁸⁰ However, the impact of this law has been rather disappointing to date.⁸¹

3.3.2 From the reform of broadcasting to the Berlusconi years

Italy's political turmoil in the early 1990s and the increased influence of EU laws appeared, at least for a brief and significant moment, to pave the way for a positive revision of the role of public service broadcasting as an independent institution. The "RAI of professors" period, when the Board of Directors was composed mainly of independent academics, was perhaps RAI's only moment of real independence from political parties. However, this period was too short to change the institutional culture. The 1993 reform of the appointment system of the Board of Directors did not produce the desired results. After the victory of the centre-right coalition in the 1994 parliamentary elections, the partisan system of appointing RAI's Board of Directors

⁷⁸ Mammì Law, art. 1(1).

⁷⁹ A. Pace, "Verso la fine del servizio pubblico radiotelevisivo?" ("Towards the end of public service broadcasting?"), in M. Manetti (ed.), *Europa e Informazione, (Europe and Information)*, Napoli, 2004, (hereafter, Pace, *Towards the end of public service broadcasting?*).

⁸⁰ Law on dispositions for equal access to the means of communication during the electoral and referenda campaigns and on political communication, no. 28 of 22 February 2000, *Gazzetta Ufficiale* no. 43 of 22 February 2000, (hereafter, *Par Condicio Law 2000*).

⁸¹ Ottavio Grandinetti defines this new concept of pluralism affirmed by the Constitutional Court as "material pluralism". See: Grandinetti, *Constitutional principles*.

was restored in a new and different form, more in keeping with the majority electoral system adopted in 1993.⁸² In this context of feeble pluralism came the 1995 referendum, during which the public voted in favour of partial privatisation of RAI. At the time, RAI was in the throes of a financial crisis that had forced the company to sacrifice quality in the obsessive pursuit of bigger audiences and advertising income by imitating commercial formats. This situation created a deep crisis in the public perception of public service broadcasting.⁸³

Over the past several years, there have been continuous disputes over RAI's appointments and output. These disputes were caused by political interest in the station and served to further reduce the independence of RAI's management and journalists.

At the beginning of 2002, RAI President Roberto Zaccaria and the Board of Directors resigned. Zaccaria, a scholar with a strong background in constitutional and media law who had been appointed by the previous leftist majority, had clashed with the parliamentary majority and the Berlusconi government. The following Board, headed by Antonio Baldassarre, an authoritative former chairman of the Constitutional Court who was close to the centre-right coalition, had a short and turbulent term. It was characterised by fierce controversy with the opposition, due to the exclusion of some important journalists disliked by the Prime Minister, and by the resignation of three out of the Board's five members. (The Board now has nine members – see section 4.3.1).

The speakers of Parliament attempted to get over the conflict between the majority and the opposition by forming a Board of Directors consisting of persons close to the right-wing parties and by a “guarantor chairman”, who was politically close to the opposition. That position was given to Lucia Annunziata, a well-known liberal journalist, after the former *Corriere della Sera* editor-in-chief, Paolo Mieli, declined it. The outcome of the shift was extremely disappointing. After incessant conflict with the Board, and especially its President, who was also close to the ruling coalition, Annunziata resigned in the spring of 2004. Meanwhile the Board, which was politically close to the majority party, remained in office.

In July 2004, the Parliamentary Commission for Broadcasting approved a motion asking the Board to resign from office after the summer, in order to be able to appoint a new one, according to the provision in the *Gasparri Law*. In spite of strong pressure

⁸² See: Council of Europe Parliamentary Assembly, Report of the Committee on Culture, Science and Education of 3 June 2004 on monopolisation of the electronic media and possible abuse of power in Italy, Rapporteur Paschal Mooney, Doc. 10195, available on the CoE website at <http://assembly.coe.int/Documents/WorkingDocs/doc04/EDOC10195.htm> (accessed 1 April 2005), III Explanatory Memorandum, Point 12, (hereafter, CoE Report 10195).

⁸³ Ernesto Bettinelli describes RAI's plunge: “the way followed in the past and that will be followed in the future appears to be the opposite: the public service provider is a market player, and as such has to live by market rules, including manipulating information and the advertising contents [...]. Even for RAI, the very first daily need is to face competition, with such an outcome that is often criticised by many, but nonetheless is deemed unanimously to be inevitable [...] for its survival in the broadcasting market.” See: Bettinelli, *The maximum pluralism*, p. 304.

across the political spectrum exerted by both the Government and opposition members, nothing happened. Until May 2005, the Board of RAI was composed of four members, all very close to the centre-right coalition. It was only in May 2005 that the Parliamentary Commission for Broadcasting elected seven new members, with two more to be appointed by the Government. Three out of the seven members appointed in May 2005 are very close to the Government and three have links with the political opposition, following the model of *lottizzazione*.⁸⁴

In recent years, RAI's lack of a strong and independent leadership has made its employees and journalists vulnerable to attacks from the ruling coalition. The problems faced by Enzo Biagi and Michele Santoro, two of the country's most popular and respected journalists, who were kicked out of television after Prime Minister Berlusconi expressed his hostility toward them, raised strong concerns, even in the international press.

Starting in 1995, Biagi, one of the fathers of Italian journalism and a man of moderate opinions, hosted a brief daily news programme, *Il Fatto* ("The Fact"), which had high ratings in primetime and good reviews. During the 2001 electoral campaign, Biagi broadcast an interview with the popular filmmaker and comedian Roberto Benigni, who mocked Berlusconi. Biagi was subsequently fired, and his programme was replaced with a quiz-show, with lower ratings. Santoro, a self-proclaimed left-leaning journalist, was the host of the political information show with the largest audience *Sciuscìa* ("Vagabond"), on RAI Due. The show was much discussed and criticised, but it was able to shape public opinion on matters rarely dealt with by Italian television, such as social issues and the connection between politics and the mafia. Despite a decision by the Tribunal of Rome on 3 June 2003, which forced RAI to rehire Santoro with the same tasks that he had previously carried out, the popular journalist did not appear on screen again until the European general elections in June 2004, during which he was a candidate for the left-wing coalition. Another decision by the same Tribunal of Rome, an Italian civil court, on 26 January 2005 stated that Santoro must be rehired with the same functions, and was entitled to damages of €1.5 million. Santoro had not been rehired at the time of writing this report.

After Santoro, RAI Due's main political information programme was assigned to a Catholic journalist with right-wing sympathies, Antonio Soggi, whose show "*Excalibur*" proved to be a failure as far as ratings and audience are concerned. As of 2004, the channel's main political information programme is produced by two journalists, Giovanni Masotti and Daniela Vergara, both very close to the political right. Another popular journalist, Bruno Vespa, who is publicly perceived as a sympathiser of the right-wing coalition, has seen his airtime on television broadening significantly. Although overall, the time dedicated to news and information on RAI has been decreasing, RAI news programmes remain the most reputable source of information in Italy.

⁸⁴ D. Di Vico, "Pontio Pilato e la Rai", ("Pontius Pilate and RAI"), in *Corriere della sera*, 19 May 2005, p 1 and 29 and C. Maltese, "Rai, esce Bonolis, entra Cancelli", ("RAI, Bonolis goes out, Cancelli comes in"), in *La Repubblica*, 18 May 2005, p. 1.

The Biagi and Santoro cases are not unique. There is a clear tendency to influence journalists and marginalise anyone who attempts to voice critical views to large audiences.⁸⁵ There are many cases of journalists, authors and satirists – including Massimo Fini, Paolo Rossi, Sabina Guzzanti and Daniele Luttazzi – who are disliked by parts of the political elite and have therefore been removed from television in the past year. This is particularly worrying, because the lack of effective alternative stations to RAI and Mediaset does not allow these journalists to work with another broadcaster. It appears that only the independent institutions and constitutional guarantors, the President of the Republic and the Constitutional Court, attempted to reaffirm RAI's public service role and force it to uphold the constitutional imperative. With an important ruling in 2004 on the constitutional legitimacy of RAI's licence fee, the Constitutional Court reiterated RAI's obligation to remain within the public sphere. At the same time, it solicited the relevant institutions to rediscover and pursue the public service's essence and original meaning.⁸⁶ The Court affirmed in a 2002 decision that the existence of public service television created and managed by the State, no longer acting as the legal television monopolist but in the context of a public-private mixed system, is justified only because RAI must operate in a different way than any private broadcaster.

The 2002 Decision of the Constitutional Court on the *par condicio* principle affirms that “market pluralism, even in its best expression, cannot guarantee the freedom of expression and representation of the entire political spectrum of opinions”.⁸⁷ Likewise, President Ciampi, in what remains his only formal constitutional message to the Houses of Parliament to date, underlined the importance of impartiality and internal pluralism, and reminded the legislature of the State's fundamental commitment to safeguard Italian cultural identity and public service broadcasting's specific mission. He noted that “the privately-owned broadcasters (expressing so-called ‘external’ pluralism) alone are not sufficient to guarantee complete and fair political access to all parties, if further measures basically inspired by the principle of equal representation of all political forces (expressing so-called ‘internal’ pluralism) are not implemented”.⁸⁸

⁸⁵ European Federation of Journalists, *Crisis in Italian Media: How Poor Politics and Flawed Legislation Put Journalism Under Pressure*, Report of the IFJ/EFJ Mission to Italy of 6-8 November 2003, available at the IFJ website at <http://www.ifj.org/pdfs/Italy%20Mission%20Final.pdf> (accessed 1 April 2005), (hereafter, EFJ, *Crisis in Italian Media*).

⁸⁶ Decision of the Constitutional Court no. 284 of 26 June 2002, *Gazzetta Ufficiale* no. 26 of 3 July 2002.

⁸⁷ Decision of the Constitutional Court no. 155 of 7 May 2002, *Gazzetta Ufficiale* no. 19 of 15 May 2002.

⁸⁸ See the formal constitutional message to the Houses of Parliament on pluralism and impartiality of information by President Ciampi, 23 July 2002, available online in Italian at <http://www.quirinale.it/Discorsi/Discurso.asp?id=20101>.

4. REGULATION AND MANAGEMENT OF PUBLIC SERVICE BROADCASTING

RAI does not have a clear and distinctive identity among the country's broadcasting players. In terms of programming, it resembles its commercial competitors. This is partly because the domestic legal framework lacks a clear definition of the role and responsibilities of public service broadcasting and partly due to political, cultural and professional considerations. Although RAI remains Italy's largest cultural institution, the public broadcaster is often criticised for focusing on ratings, to the detriment of programming quality.

4.1 The public broadcasting system

Pursuant to the decisions of the Constitutional Court and the formal message of the President of the Republic in 2002, Italy's lawmakers should have created an independent and balanced public broadcasting service, but they never succeeded in this. RAI should have an editorial stance established by law, and not by political majorities; but the path indicated by the *RAI Law 1975* was never taken. In other words, RAI should have changed "from a *public company* to an *independent public service* (and not governmental)."⁸⁹ Public service should have had a central role in the information RAI provides. The broadcaster should have remained firmly in public hands and should have sought to protect democratic, social and cultural needs. Instead, RAI is much more like a commercial station.

It is worth emphasising RAI's mission on a qualitative level. Alessandro Pace summarised this mission, and the distinction between public service broadcasting and commercial broadcasting, as follows:

Whereas the public service's programming pursues "functions" (not just informative and entertaining, but educational and cultural as well) with the goal of offering "a well balanced range of entertainment, culture, recreation and information", private broadcasters follow a rational "freedom", deemed as a market value, and not as a subjective legal right (that is so true that the Constitutional Court's attention is focused more on the concept of "pluralism" than that of "freedom"). Therefore, while RAI's programming might certainly be defined by the due respect for a certain agenda and its content subject to restraints, the same cannot be said for commercial broadcasters. The latter, though they may be subject to restrictions as well as obligations, [...] need to be able to benefit from full entrepreneurial independence.⁹⁰

However, the *Gasparri Law* moves in a completely different direction. The law does not consistently define the concept and tasks of public television, and it does not

⁸⁹ Bettinelli, *The maximum pluralism*, p. 303.

⁹⁰ Pace, *Towards the end of public service broadcasting?*, p. 10.

describe the distinction between the “service” provided by private operators and that generally carried out by the State-owned licensee. Indeed, the law states that the “information provided on radio and television by any broadcaster is a service of general interest”.⁹¹ It obliges all broadcasters to comply with the principles and obligations typical for a public service broadcaster.

Among the general principles governing broadcasting information, the *Gasparri Law* stipulates:⁹²

- Broadcasters must give truthful presentation of facts and events, so that opinions may be formed freely.
- Sponsorship of news broadcasts is not allowed.
- There must be daily television and radio news broadcasts by subjects authorised to provide content at the national or local levels on terrestrial frequencies.
- All political subjects are to have equal and impartial access to news programmes and electoral and political broadcasts, in accordance with the procedures laid down by legislation.
- Broadcasters must air official communiqués and declarations by constitutional organs, as laid down by law.
- Methodologies and techniques that surreptitiously manipulate news content are completely banned.

In addition, the law also contains “further and specific duties and obligations that the general broadcasting public service licensee has to fulfil within its overall programming”.⁹³ These provisions made RAI’s role more confusing and unclear. The problem is exacerbated by the fact that the public service broadcaster “is characterised not by its goals, but by making an exclusive reference to its peculiar assignments”.⁹⁴

The *Gasparri Law*, the Licence Convention between the State and RAI, and the Service Contract between the Ministry of Communications and RAI, contain a long analytical list of prescriptions concerning RAI’s policy and programming. They also provide for the public broadcast service to be carried out exclusively by *Radiotelevisione Italiana S.p.A.*, RAI’s publicly-owned controlling corporation, for a period of 12 years.⁹⁵

⁹¹ *Gasparri Law*, art. 6(1).

⁹² *Gasparri Law*, art. 6(2).

⁹³ *Gasparri Law*, art. 6(4).

⁹⁴ Pace, *Towards the end of public service broadcasting?*

⁹⁵ RAI Service Contract 2003.

The *Gasparri Law* contains the duties associated with the general public broadcasting service.⁹⁶ They include:

- Guaranteeing national broadcasting of all programmes of public service radio and television, as far as technical conditions allow.
- Broadcasting an adequate number of radio and television programmes devoted to education, information, training, promotion of culture, and theatrical, cinematographic, television and musical works, including works in the original language, that are recognised as being of great artistic value or highly innovative. The number of hours devoted to such programmes is defined every three years by the Communications Authority. Children's programmes are excluded from the calculation of these hours.
- Allotting broadcasting time, in accordance with the legislation, to: all parties and groups represented in Parliament; regional assemblies and councils; local autonomy associations; national trade unions; religious denominations; political movements; public bodies; political and cultural associations; legally recognised national cooperative associations; and ethnic and linguistic groups.
- Establishing a company for producing, distributing and broadcasting Italian programmes abroad.
- Broadcasting in German and Ladino for the autonomous provinces of Bolzano and Trento, in French for the autonomous region of Valle d'Aosta, and in Slovenian for the autonomous region of Friuli Venezia Giulia.
- Broadcasting free-of-charge announcements of public and social interest as requested by the Prime Minister, and broadcasting information on road and motorway traffic.
- Broadcasting children's programmes at appropriate hours.
- Preserving, and providing public access to, historical radio and television archives.
- Reserving a quota of no less than 15 per cent of the overall annual revenue for the production of European works, including those made by independent producers.
- Creating interactive digital services of public utility.
- Adopting suitable measures for people suffering from sensory disabilities.
- Promoting and developing decentralised production centres.
- Providing for distance learning.

AGCOM has thus been entrusted with planning and approving RAI's programming schedule for education, information, news, training and cultural purposes. The *Gasparri Law* barely alludes to the general mission of public service broadcasting, and

⁹⁶ *Gasparri Law*, art. 17.

contains no effective concrete provisions for its impartiality or funding. There is not a single reference to the principle of independence of public service broadcasting, which, at least on paper, used to be a standard requirement in Italian media legislation, and which is confirmed by numerous international recommendations and treaties.⁹⁷ Overall, RAI is seen as not dissimilar to the privately-owned broadcasters. The only difference between RAI and private stations drawn by this law seems to be that, by virtue of law and pursuant to its agreements with the State, it carries out specific assignments, and its main source of income and financing is the annual licence fee imposed on the taxpayers.

4.2 RAI's financing

RAI is one of the biggest public broadcasting companies in Europe. It employs approximately 4,000 journalists, and it is financed by both the annual licence fee and advertising.

Table 4. RAI financing sources (2002–2003)

	2002		2003	
	Income (€ million)	Share of total revenues (per cent)	Income (€ million)	Share of total revenues (per cent)
Licence fee	1,382.5	53.9	1,432.0	55.2
Advertising	1,038.5	40.5	1,005.3	38.8
Other revenues	144.9	5.6	156.2	6.0
Total	2,565.9	100	2,593.5	100

Source: RAI⁹⁸

⁹⁷ See, in particular: Council of Europe, Committee of Ministers, Recommendation No. R (96) 10 to Member States on the Guarantee of the Independence of Public Service Broadcasting, adopted on 11 September 1996 at the 573rd meeting of the Ministers' Deputies; see also: Protocol on the system of public broadcasting in the Member States annexed to the Treaty of Amsterdam, 2 October 1997 (entry into force 1 May 1999), published in the *Official Journal of the European Communities*, C 340/109, 10 November 1997; Council of Europe, Resolution of the Council of the European Union and of the representatives of the Governments of the Member States, meeting with the Council of 25 January 1999 concerning public service broadcasting (1999/C 30/01), published in the *Official Journal of the European Communities* C 30/1, 5 February 1999 (hereafter, CoE Resolution 1999/C 30/01 on PSB); Council of Europe Parliamentary Assembly, Recommendation 1641 (2004) of 27 January 2004 on public service broadcasting, available on the CoE website at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta04/ER/EC1641.htm> (accessed 1 April 2005), (hereafter, CoE Recommendation 1641(2004) on PSB); For an in-depth analysis, see: Mastroianni, *The European links*.

⁹⁸ RAI, *Annual Report 2003*, Rome, November 2004 (hereafter, RAI, *Annual Report 2003*), p. 36.

RAI is mainly funded by the licence fee. The amount of the fee is decided every year by the Minister of Communications. In the last few years, the tendency has been to leave it unchanged or increase it only slightly, due to the mounting discontent of significant segments of the public over the obligation to pay the fee. For the rest of its income, RAI must rely on commercial activities, such as advertising and sale of its products. The law, however, imposes a ceiling on the amount of advertising revenues that public service television can pull in, to prevent RAI from harming the commercial players. Aside from advertising, the commercial activities of RAI consist of sales of programmes on the international markets. RAI has established specific companies to run these activities, such as RAI Trade, which has the mission of distributing the broadcasting rights of RAI productions – including cinema, drama, television formats and performing arts – worldwide.

RAI's financing sources differ from those of other European public broadcasters. In fact, in some European countries, public service television networks receive their financing solely, or mainly, from the licence fee. Such an arrangement allows the public broadcasters to avoid commercialisation, and it creates a source of funding independent from the Government. In Italy the licence fee – called the broadcasting tax, as it pertains to ownership of a television set – is lower than in most of the Western European markets, like the U.K., Germany or France. In 2003, it stood at €97.10 annually. In the same year, the licence fee in the U.K. was €178, in France €116.50 and in Germany €193.80.⁹⁹ In 2004, the licence fee stood at €99.60, and represented about 60 per cent of RAI's total revenues. This revenue might be higher, but tax evasion is common in Italy, especially evasion of the licence fee. Given the low revenue from the fee, and RAI's high number of employees, the public broadcaster is forced to broadcast programmes that achieve high ratings, so it can remain commercially competitive.¹⁰⁰

The *Gasparri Law* does not intervene directly in RAI's financing. It mandates that the public broadcaster must draft an annual income statement providing, in separate accounts, revenues stemming from the licence fee and its annual operating expenses and costs of goods sold. The law also compels the public broadcaster to respect an advertising cap equal to 4 per cent of its weekly programming schedule and 12 per cent for each hour of broadcasting.¹⁰¹

However, the *Gasparri Law* does provide for some changes that merit attention. For one thing, it withdraws the provisions included in the *Maccanico Law* regarding the setting-up of an advertising-free channel, so the idea of establishing a regional information and service channel was abandoned. A more important change brought in by the *Gasparri Law* is that RAI does not receive financing for being different from a private broadcaster, but instead only needs to meet specific obligations imposed on the

⁹⁹ RAI, *Annual Report 2003*, p. 15.

¹⁰⁰ On this issue, see: A. Pace, "Comunicazioni di massa (diritto)", ("Mass communications (law)"), in *Enc. sc. sociali*, vol. II, Ist. Enc. Italiana, Roma, 1992, from p. 172.

¹⁰¹ In accordance with the *Mammì Law*.

public broadcaster, as provided by the Article 17 of the law. However, the Ministry of Communications does not set a licence fee that is high enough to allow RAI to cover its projected annual operating expenses for fulfilling the specific obligations imposed on the public service broadcaster.

The ideas expressed in the *Gasparri Law* clearly conflict with the 2002 decision of the Constitutional Court, which affirmed that funding through the annual licence fee allows and compels RAI not just to fulfil the specific obligations provided by law:

but, more generally, to adapt its programming schedule and quality to the specific goals of such a public service, without sacrificing it to the audience and advertising demands, and without following the same agenda as that pursued by the private networks [...]¹⁰²

Furthermore, the Council of Europe Resolution of 25 January 1999 on public service broadcasting states that, “the public service broadcaster, given the cultural, social and democratic functions which it pursues for the benefit of the community, is fundamentally responsible for guaranteeing democracy, pluralism, social cohesion and cultural and linguistic differences”.¹⁰³ The European Commission also believes that the overall function of public service broadcasting – and not just its specific obligations – justifies its recourse to the annual licence fee.¹⁰⁴

4.3 Governance structure

4.3.1 Present governance structure

The *Gasparri Law* restored the power to appoint the RAI Board to the political establishment. The result is that the majority of the Board is elected by the ruling coalition.

Board of Directors

The Board of Directors is RAI’s administrative body, and it is entrusted with supervising and implementing the public service broadcaster’s goals and obligations. The Board is composed of nine members, of whom two are elected by the majority shareholder, the Minister of Economy and Finance. Prior to the *Gasparri Law* there were only five members. One of the members chosen by the Minister serves as President of the Board. The other seven members of RAI’s Board of Directors are elected by the Parliamentary Commission for General Guidance and Supervision of Broadcasting Services (hereafter, Parliamentary Commission for Broadcasting) – four

¹⁰² Constitutional Court Decision 284/2002, cit.

¹⁰³ CoE Resolution 1999/C 30/01 on PSB, p. 1.

¹⁰⁴ Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA (notified under document number C(2003) 3528), in the *Official Journal of the European Union*, L 119, volume 47, 23 April 2004.

board members are appointed by the political majority and three by the opposition.¹⁰⁵ The Ministry of Economy and Finance owns 99.55 per cent of RAI Holding, the corporation running RAI. The rest is owned by the Italian Society of Authors and Producers (*Società Italiana degli Autori ed Editori* – SIAE).

In order to partly guarantee the representation of the political minority, the Board President's election becomes effective only after formal receipt of the consent of two thirds of the Parliamentary Commission for Broadcasting. This procedure reflects a reasoning like that envisioned by the *RAI Law 1975*, which was the product of a completely different political environment. It enables political interference in RAI's affairs, making political parties act almost like partners dividing up executive posts. Even worse, the law assigns the Government a substantial role in the appointment process – in evident contradiction with the Constitutional Court's 1974 Decision protecting pluralism.¹⁰⁶

Among its powers, the Parliamentary Commission for Broadcasting is entitled to propose, with a two-thirds majority vote, the dismissal of the Board; formulate proposals on editorial objectives; and convene executive meetings.¹⁰⁷

One positive aspect of the *Gasparri Law* is that it empowers AGCOM to supervise RAI's Board. AGCOM can enforce sanctions against its executives and can verify that the general broadcasting service is performed effectively and correctly.

General Director

The other crucial position in RAI, the General Director, remains basically under the control of the Government. The General Director has the right to hire and manage, and to propose resolutions for approval by the Board. The General Director is elected by the Board in agreement with the shareholders – in particular the Ministry of Economy and Finance. The General Director has a tenure as long as that of the Board member and is responsible for the company's management and reports to the Government.¹⁰⁸

4.3.2 Proposed changes

One of the distinctive and most controversial provisions in the *Gasparri Law* calls for a progressive sale of the State's stake in RAI, in line with the legislature's conviction that

¹⁰⁵ *Gasparri Law*, art. 20(9).

¹⁰⁶ Constitutional Court Decision 225/1974; See: Pace, *Towards the end of public service broadcasting?* and P. Caretti, *Diritto dell'informazione e della comunicazione, (Communication and information law)*, Il Mulino, Bologna, 2004, from p. 169, (hereafter, Caretti, *Communication and information law*).

¹⁰⁷ For an in-depth analysis, see: E. Lehner, "La riforma degli organi di governo della RAI" ("The reform of RAI's governing bodies"), in M. Manetti (ed.), *Europa e Informazione, (Europe and Information)*, Napoli, 2004.

¹⁰⁸ Zaccaria, *Information and communication legislation*, from p. 329.

the development of digital technology will soon ensure such a plurality of programmes that it will make the public licensing procedure unnecessary in the near future.¹⁰⁹

The *Gasparri Law* provides for the incorporation of RAI-Radiotelevisione Italiana Spa into RAI-Holding Spa within 60 days of the adoption of the law. The law also provides for the sale of the corporation through an initial public offering within four months of the merger. The law aims to create a public company, so it sets a limit on the maximum percentage of voting shares to 1 per cent of the share capital. Finally, the *Gasparri Law* provides that the Board of the privatised RAI will comprise nine members, elected at the relevant shareholders' meeting.

RAI's total privatisation is likely to occur in the distant future, and it seems it will be difficult to complete the process. The first steps have been very slow. In February 2005, the Minister of Economy declared that a minority stake could not be floated on the Stock Exchange before autumn 2005.

In any case, total privatisation of RAI seems to be an ineffective and unconstitutional decision. The Constitutional Court's 2002 decision affirmed that public service television must remain in the "public sphere" as far as its structure and the system of appointing its Board are concerned.¹¹⁰ Following this decision, the constitutional legitimacy of the privatisation of RAI has been challenged by those believing that the pursuit of the public interest – meaning the implementation of the public's right to be informed and a greater involvement of citizens in the political and cultural debate – is not compatible with privatisation.¹¹¹ The recommendations of a 2004 report by the Competition Authority are very relevant to this issue:¹¹²

the present regulations governing the public radio and television broadcasting service must be re-examined, envisaging a system for RAI along the lines of the solution adopted in the United Kingdom, with the creation of two separate companies: the first company would be required to provide the general public

¹⁰⁹ A. Parigi, "Prospettive di privatizzazione della concessionaria del servizio pubblico radiotelevisivo fra ordinamento comunitario ed interno", ("Perspectives of privatisation of the public service broadcasting through communitarian and internal order"), in AA.VV., *Diritti, nuove tecnologie, trasformazioni sociali. Scritti in memoria di Paolo Barile, (Laws, new technologies, social transformation. Written in the memory of Paolo Barile)*, Cedam, Padova, 2003 from p. 636.

¹¹⁰ Constitutional Court Decision 284/2002.

¹¹¹ R. Zaccaria, "Servizio pubblico radiotelevisivo, garanzia del diritto all'informazione e istituzioni di effettiva tutela" ("Public service broadcasting, guarantee of the right to information and institutions of actual trusteeship"), in AA.VV., *Diritti, nuove tecnologie, trasformazioni sociali. Scritti in memoria di Paolo Barile, (Laws, new technologies, social transformation. Writings in memory of Paolo Barile)*, Cedam, Padova, 2003, from p. 927; and Pace, *Towards the end of the public service broadcasting?*

¹¹² Competition Authority, *Final reports on general fact-finding investigations into markets sectors in which competition may be impeded, restricted or distorted*, Report no. 13770/2004, (hereafter, Competition Authority, Fact-finding investigation 13770), 26 November 2004, available in Italian at <http://www.agcm.it/eng/>.

service, funded exclusively out of the television licence fee, while the second, commercial in character, would fund its activities through advertising and compete with other broadcasters on the basis of the same obligations governing the amount of time devoted to advertising; in the latter case it would be appropriate for the shares to be floated on the stock exchange and rules of corporate governance put in place to guarantee genuine control over the management. This should be done quickly, before the minority interest in the RAI Corporation was floated in the spring of 2005.

A similar point of view was expressed by Romano Prodi, former President of the European Commission and now leader of the centre-left coalition. In a letter to the mainstream Italian newspaper, *Corriere della sera*, Prodi favoured a separation of RAI into two companies, one with only public service obligations and the second with a more commercial nature. The first company would stay in public hands and fund its activities through the licence fee, while the second would be sold to private enterprises.¹¹³ The centre-left coalition has also recommended stopping the privatisation of RAI that is envisaged by the *Gasparri Law*, and strengthening the anti-monopoly ceilings.¹¹⁴

In any case, RAI's transformation from the long arm of the political establishment to an independent public service is a stated objective, which has never been accomplished by the Italian lawmakers. However, the electoral law – tendentiously favouring the majority, and the evolution of the political landscape toward a bipolar system – makes it indispensable to guarantee the political rights of individuals and the flow of new and alternative ideas.

4.4 Public Service Broadcasting Programming

4.4.1 Output

RAI is still the largest Italian cultural institution. Its traditional activity in the broadcasting sector has expanded to other fields, which have become more attractive for the audiovisual market through the opportunities created by the new technologies.

¹¹³ See the letter Romano Prodi published in *Corriere della Sera*, of 30 December 2004.

¹¹⁴ See the letter by Pierluigi Bersani and Enrico Letta, in *Il Riformista*, 29 January 2005, p. 3; and the article of Franco De Benedetti, in *Il Riformista*, 4 February 2005, p. 4.

Table 5. Total television airtime of RAI (2002–2003)

		2003		2002	
		Total hours of broadcasting	Share of total hours (per cent)	Total hours of broadcasting	Share of total hours (per cent)
National terrestrial broadcasting:	RAI Uno RAI Due RAI Tre	26,006	32.9	26,006	37.1
Satellite transmission:	RAI Sport RAI News 24 SAT Educational RAI Med	37,230	47.1	28,470	40.6
Regional terrestrial broadcasting:	In Italian In German In Ladino In Slovenian In French	7,013	8.9	6,690	9.8
International broadcasting		8,760	11.1	8,760	12.5
Total		79,009	100	69,926	100

Source: Auditel¹¹⁵

Despite the fact that it has yielded to the logic of audience ratings in many of its programmes, both drama and entertainment, RAI still produces a remarkable schedule of news, information and related programmes, including education and sport. These products represent 76.7 per cent of RAI's overall television output, measured in hours of broadcasting, and they take up 93.4 per cent of the output of RAI Tre.¹¹⁶ Furthermore, complying with its bylaws and Service Contract, RAI broadcasts a number of programmes aimed at linguistic minorities, German, Ladino, Slovenian and French.

Radio broadcasting represents a traditional strength of public service broadcasting, despite the hundreds of commercial radio stations that took a substantial portion of RAI's market share over recent years. Music is by far the most common content offered by RAI radio. However, compared to commercial broadcasters, which fill around 80 per cent of their airtime with music, RAI's programming on radio looks well-balanced. RAI offers a substantial amount of non-music content, mainly news and cultural programmes.

¹¹⁵ RAI, *Annual Report 2003*, p. 22.

¹¹⁶ RAI, *Annual Report 2003*, p. 21.

Table 6. RAI radio broadcasting programming – breakdown by genre (2003)

Genre	Share of total hours broadcast annually (per cent)
Music	30
Information	14
Culture	14
Entertainment	14
Newscasts	11
Other	17
Total hours broadcast annually	66,855

Source: RAI¹¹⁷

4.4.2 RAI programme guidelines

RAI has to comply with a number of obligations in its Service Contract, which is signed with the Government every three years. It also has to comply with obligations provided by legislation and with various self-regulatory rules of conduct crafted in the past decade, such as the “Treviso Chart” for the protection of the youth.¹¹⁸

The current Service Contract, for the period 2003–2005, describes in detail RAI’s programming and information obligations.¹¹⁹ The first article of this contract defines RAI’s priorities. One of the public broadcaster’s most important duties is to “guarantee well-balanced and diverse programming, which could maintain the audience level sufficient to fulfil its tasks and, at the same time, guarantee quality broadcasting”. According to the same article, quality represents a “strategic goal of the public service mission”, so that RAI has to “create an internal system to control broadcasting quality.” With respect to the public, the current Service Contract provides for RAI to pay particular attention, in terms of both quality and quantity, to programmes for children. RAI must reserve at least 10 per cent of its schedule between 07.00 and 22.30 hours. Every year, RAI must also increase by 10 per cent its budget for initiatives supporting viewers with disabilities. Lastly, the contract provides criteria for granting local and regional licences to RAI for airing programmes that promote regional and local traditions and culture.

¹¹⁷ RAI, *Annual Report 2003*, p. 21

¹¹⁸ The Treviso Chart is an ethical code that was developed jointly by the Italian Federation of the Press, the main trade union of Italian journalists and the professional association the Order of Journalists. The RAI news department has adopted the code.

¹¹⁹ See: RAI, *Annual Report 2002*, Rome, September 2003 (hereafter, RAI, *Annual Report 2002*), p. 15–16.

The extent to which RAI respects the requirement for well-balanced and diverse programming is frequently disputed in the media and in political circles. RAI of course provides figures proving that its programming is broad, rich, covering most areas of general interest whereas the critics point at RAI's keener attention to populist entertainment.

Sports were among the most popular programmes offered by both RAI and Mediaset in 2003. Other genres considered good quality programming, including films and entertainment, which are also public service imperatives, are fairly well represented in RAI's programme schedule. RAI has estimated that, in 2002, it earmarked 24 per cent of the income generated by the annual licence fee for Italian and European audiovisual production.¹²⁰ The threshold required by RAI's Service Contract is 20 per cent of the income generated by the fee.

On the down side, in 2003 and 2004, RAI also aired reality formats made in-house, such as "*L'Isola dei famosi*" (The Island of the Famous). These shows regularly promote coarse language and vulgarity. Such programming fuelled criticism of RAI, which has been repeatedly accused of becoming a "slave" to audience ratings and blindly competing with similar programmes on Mediaset's channels. During prime-time, mainly between 20.30 and 22.30, RAI generally offers programmes that are higher quality than those it shows in other timeslots – especially the pre-prime. Centre-Left political parties openly favour a stricter application of public service broadcasting principles to RAI's output.

4.5 Editorial standards

In 1999, RAI adopted an internal Code of Practice that is mainly based on its Service Contract and on existing professional codes, such as codes of ethics for all journalists, codes on privacy, codes on advertising and so forth.¹²¹ The norms specified in RAI's Code are very detailed, tackling issues of pluralism, election campaigns, privacy protection, social aims of programming, news balance, advertising content and the protection of minors. The Code does not mention any body entrusted to supervise and sanction the application of these norms. The "Consulta-Qualità", an internal consulting body composed of prestigious personalities entitled to carry out broad evaluations of RAI production, is given the task of monitoring the compliance of the broadcasting programmes with the principles of the Code. However, it has no enforcement powers, and it cannot impose sanctions for contraventions of the Code. AGCOM has no say or sanctioning power when it comes to the internal matters of RAI.

There have been complaints about some RAI programmes by consumer associations and other non-governmental organisations, and also by newspaper columnists and

¹²⁰ RAI, *Annual Report 2002*, p. 16.

¹²¹ RAI, *Carta dei doveri e degli obblighi degli operatori del servizio pubblico radiotelevisivo (The Chart of duties and obligations of the operators of radio and television public service)*, Rome, RAI-Eri, 1999.

politicians. However, RAI officials tend to react to any criticism with fierce defence that eventually impedes any proceeding to give sanctions. Overall, in practice RAI enjoys extensive unaccountability. The cases of actual sanctions are so rare that they are hardly quoted in the literature.

5. REGULATION AND MANAGEMENT OF COMMERCIAL BROADCASTING

The commercial sector is dominated by the Mediaset empire. The main feature and outstanding defect of the commercial broadcasting market is the concentration of power in the hands of Mediaset's owner – and the country's Prime Minister – Silvio Berlusconi. His interest in Mediaset has a tremendous influence on the independence of the newsrooms in his television channels and news magazines.

5.1 The commercial broadcasting system

The Italian legislative framework traditionally experiences a very low level of compliance. Laws on commercial broadcasting can be easily bypassed, and are never complied with anyhow. National privately owned television was born in, and grew up within, a lawless environment – a “Wild West” where frequencies were unlawfully occupied and national broadcasting developed through cronyism, without any antimonopoly regulations. This situation occurred through widespread collusion between a large part of the governing coalition of Bettino Craxi, who was Prime Minister and head of the Socialist Party in the mid-1980s, and the Christian Democrats and Berlusconi, the entrepreneur who controlled the three principal television networks.

It was in this legal and political setting that the *Mammì Law* (1990) was adopted. This was the first set of norms to consistently regulate both public and private broadcasting services. The *Mammì Law* did not intervene forcefully on dominant positions. Instead, it simply took a snapshot of the situation at the time and legitimised it. Thus the law permitted and strengthened the duopoly of RAI and Fininvest (Mediaset's controlling entity), allowing a single entity to hold three national licences at the same time. The only restraint on private monopoly, the prohibition of cross-ownership of three nationwide television networks and newspapers, prompted Berlusconi, Fininvest's owner, to formally transfer the ownership of his influential daily newspaper *Il Giornale* to his brother, Paolo Berlusconi.

The *Maccanico Law* (1997) had the stated purpose of opposing the “creation or perpetuation of dominant positions”, and it included stricter rules than the previous law. It decreased the ownership percentage of the overall public licences that may be awarded to a single entity from 25 to 20 per cent, and it set the ownership limit for each operator to two nationwide analogue, non-encrypted television networks. The

Maccanico Law also introduced a 30 per cent ceiling on control of the advertising market. Any broadcaster with more than 30 per cent of the advertising market was considered to have a “dominant position”.¹²²

Pursuant to the *Maccanico Law*, one Mediaset network (Rete4) should have been transferred to satellite broadcasting and one RAI channel should have been financed through the annual licence fee only. However, these provisions could not be immediately implemented, and, under the *Maccanico Law*, their enforcement was postponed until a future and uncertain date to be determined by AGCOM, “in connection with the effective and significant development of satellite and cable broadcast.”

Even the *Maccanico Law*'s 30 per cent ceiling on control of the advertising market has not been properly applied, and it had little impact on the broadcasting sector. Since 1997, both Mediaset and RAI have not complied with that limit, and the remedies provided by law have never been applied. In 2003, after a long investigation, AGCOM merely conveyed to RAI and Mediaset a “formal claim” for the period 1998–2000, warning them to decrease their relevant dominant position.¹²³ In a separate decision in 2004,¹²⁴ AGCOM also determined that RAI, RTI (Mediaset) and Publitalia (Fininvest Group's advertising vehicle) were in violation of the limits provided by the *Maccanico Law*.¹²⁵ AGCOM applied severe sanctions for the first time on 8 March 2005. These amounted to €20 million for RAI, and €45 million for Mediaset. However, these fines are only for violations in 2003, and they do not take previous years into consideration. If AGCOM had imposed sanctions against “dominant position” in advertising for the entire period of 1998–2003, the amount would have been a massive blow to the broadcasters' finances.

Another Italian peculiarity is the continuous clash between the political establishment – which wants to delay further concentration and to legitimatise the *status quo* – and the Constitutional Court. The Constitutional Court has always underlined the contrast between the current situation and the constitutional principles, soliciting the legislature on several occasions to set strict limits on market shares and on the scope for expanding and operating in different markets.

The Constitutional Court has developed a comprehensive jurisprudence in the broadcasting field, identifying the fundamental principles governing the media and the significant influence exercised by the media in Western democracies. Ever since 1988,¹²⁶ the Court has affirmed that television pluralism could not be accomplished on a national

¹²² *Maccanico Law*, art. 2.

¹²³ AGCOM, Decision 226/2003.

¹²⁴ AGCOM, Decision 117/2004.

¹²⁵ *Maccanico Law*, art. 2(8).

¹²⁶ Following Constitutional Court Decision no. 826 of 14 July 1988, *Gazzetta Ufficiale* no. 29 of 20 July 1988.

basis through a combination of State-owned television and a private sector dominated by a single entity. On another occasion, the Court stated that lawmakers have,

the obligation to prevent the formation of dominant positions and to promote access to the broadcasting sector of the highest possible number of different opinions, so the public could be in a position to make its decisions having in mind different standpoints and alternative cultural forms of expression.¹²⁷

The Constitutional Court has not limited itself to providing the Government with recommendations and sophisticated legal theories on pluralism. It has also taken concrete measures aimed at ensuring media pluralism. For example, in 1994, the Constitutional Court declared as unconstitutional the provisions of the *Mammì Law* that allow a single entity to own three television networks.¹²⁸ In 2002, the Court pointed out the principles included in the European directives on electronic communication and set 31 December 2003 as the final deadline to replace any temporary legislation and implement the anti-monopoly provisions included in the 1997 law.¹²⁹

However, the Court's repeated attempts to bring Italian legislation in line with the principle of external pluralism, or at least with the general rules governing competition, have always proven useless. This situation exists because the legislature wanted to preserve the *status quo* for political convenience and because the media giants were able to find legal loopholes in order to perpetuate their domination. The Court itself shares responsibility for this situation: on several occasions it has saved "provisional legislation" or wrongly trusted the lawmakers' good faith. The Court has not shown enough courage to intervene drastically and impose discipline in line with constitutional principles.¹³⁰ Public law researchers criticise the Court for not having used the only real instrument that the Constitution provides: the ability to declare rules that are found to violate the Charter as provisionally or definitively unconstitutional.

The *Gasparri Law* and the *Rete4 Decree-Law 2003*,¹³¹ which ignored the Court's 2002 decision, represent the latest examples of the Court's alleged "ingenuousness" when

¹²⁷ Constitutional Court Decision no. 112 of 26 March 1993, *Gazzetta Ufficiale* no. 14 of 31 March 1993.

¹²⁸ Constitutional Court Decision no. 420 of 7 December 1994, *Gazzetta Ufficiale* no. 51 of 14 December 1994.

¹²⁹ Constitutional Court Decision no. 466 of 20 November 2002, *Gazzetta Ufficiale* no. 47 of 27 November 2002.

¹³⁰ G. Azzariti, "La temporaneità perpetua, ovvero la giurisprudenza costituzionale in materia radiotelevisiva (rassegna critica)" ("The perpetual provisional state, the real constitutional jurisprudence in the field of broadcasting (critical review)"), in *Giur. cost.*, 1995, from p. 3037.

¹³¹ Decree on urgent dispositions regarding the procedure of definitive ending of the transitory regime of law no. 249 of 31 July 1997, no. 352 of 24 December 2003, *Gazzetta Ufficiale* no. 300 of 29 December 2003. Converted into: Law no. 43 of 24 February 2004, (hereafter, *Rete4 Decree-Law 2003*).

faced with “political forces showing a tendency toward “bending” the relevant legislation for purposes other than those envisioned by the law, or even organically uninterested in resolving the system’s evident illegality”.¹³² In fact, the *Gasparri Law* not only represents the legislature’s last victory over the Constitutional Court, but also a clear challenge to the judges and to the Court’s Decision 466. Parliament abandoned the substantially hypocritical system of permitting the indefinite perpetuation of the *status quo* by providing strict limits on media ownership and then neutralising them.¹³³ The *Gasparri Law* went beyond that, and eliminated many of the rules that might have guaranteed a minimum level of pluralism and prevented the dominance of a private media company. Parliament replaced these rules with much less binding provisions. In other words, the *Gasparri Law* erased the divergence between reality and regulation, allowing the dominant players to conserve, if not strengthen, their dominant position in the media sector.

There have been many well-grounded queries about the possible unconstitutionality of some of the paragraphs of the *Gasparri Law* that deal with anti-monopoly regulation.¹³⁴ These criticisms convinced the President of the Republic to veto the law’s first draft, which was approved by Parliament in December 2003.¹³⁵ In his formal message to the Chambers of Parliament on 15 December 2003, President Ciampi

¹³² Grandinetti, *Constitutional principles*.

¹³³ In order to understand the level of pluralism in Italy before the Gasparri Law, see: AGCOM, *Annual Report on activities carried out and work programme. Presentation by the President of the Authority*, Rome, 10 July 2003, available at http://www.agcom.it/rel_03/eng/Presentation.pdf (accessed 20 April 2005). This report stresses that: “as regards pluralism of information, the situation has remained substantially unchanged during the last five years and is, therefore, rather unsatisfactory, compared with the rest of Europe. There remains, in fact, the original rather rigid duopoly of our mixed television system, in respect of which complaints have been repeatedly submitted to the Constitutional Court. [...] The Constitutional Court, in its recent ruling no. 466 of 2002, referred to on several occasions here, highlighted how the scarcity of resources that had already been underlined in 1994 – with reference to the availability of analogue terrestrial frequencies – has worsened over the years, ‘further negatively affecting respect of the principles of media pluralism and competition and heightening market concentration’”. (pp. 24–25).

¹³⁴ Article 21 of the Gasparri Law; see also: Mastroianni, *The European links*; O. Grandinetti, “Pluralismo e concorrenza del sistema radiotelevisivo in un quadro tecnologico e normativo in evoluzione”, (“Pluralism and competition in the broadcasting sector in a changing technological and legislative framework”), in M. Manetti (ed.), *Europa e Informazione, (Europe and Information)*, Napoli, 2004, (hereafter, Grandinetti, *Pluralism and competition*); and S. Bartole, Final speech at the conference on Constitution and TV, available online in Italian at www.forumcostituzionale.it; For a debate on the “Gasparri reform”, see “Temi di attualità”, available (in Italian) at www.forumcostituzionale.it (accessed 20 April 2005). One advocate of the reform is V. Zeno Zencovich. See: V. Zeno Zencovich, “La disciplina della radiotelevisione nella società della comunicazione”, (“The discipline of broadcasting in the society of communication”), in *Quaderni costituzionali*, 2004, from p. 325.

¹³⁵ Formal message of the President of the Republic to the Chambers of Parliament, pursuant to Article 74 of the Constitution, as conveyed by the Office of the President to the Chamber of Deputies on 15 December 2003, available online in Italian at <http://www.quirinale.it> (accessed 20 April 2005).

stressed that the delay in adopting consolidated legislation clashed with the Constitutional Court's 2002 decision, which provided a mandatory deadline for the expiration of provisional legislation on broadcasting. Furthermore, he observed how:

the integrated communication system (SIC) – used in the bill as a reference for the calculation of the revenues per operator – could permit, due to its size, whoever commands more than 20 per cent of the market to create a dominant position.¹³⁶

The integrated communication system (SIC) is a wide and heterogeneous concept that encompasses all sorts of advertising in various media, including: television, publishing, radio, Internet, direct advertising activities, sponsorships, revenues from RAI's yearly licence fee, sales of movie tickets, videocassettes, and rented or sold DVDs. Other areas covered by the SIC are: direct state grants to newspaper and magazine publishers, local theatres and broadcasting networks, newspapers owned by political parties and cooperatives. However, books and music albums are no longer part of SIC.

The President's formal message called for constitutional jurisprudence to underline the danger posed by the lack of strict limits to the allocation of advertising revenues to broadcasters. His message points out that, if there are no limits, broadcasters could cause serious financial harm to the print media, drying up one of its most significant sources of income. President Ciampi also emphasised that the bill did not provide details on the type and level of sanctions AGCOM may impose if it finds breaches of legislation on media pluralism. However, the amendments approved by Parliament following the Presidential veto have not altered the overall meaning of the law, and therefore have not resolved the doubts about its constitutionality. The main change brought by the amendments was the decrease of the SIC. It is almost impossible for a single broadcaster to exceed the 20 per cent threshold provided by the law.

5.2 Commercial television ownership

According to its sponsors, the centre-right party coalition and some scholars, the rationale behind the *Gasparri Law* is the need for an overhaul of the regulatory framework for the broadcasting sector in light of the new digital technology and the convergence of the communications systems and services. Yet, the new legislation does not deal adequately with the specificity of the broadcast media compared to other telecommunication sectors, and it undervalues the need for *ad hoc* laws that serve public values, such as media diversity and pluralism. In other words, in the *Gasparri Law*, Parliament confines itself to applying the general anti-monopoly rules to

¹³⁶ Formal message of the President of 15 December 2003, cit.

television, thereby mixing the roles of the competition regulator and that of a watchdog of media pluralism.¹³⁷

Because it simply applies general anti-monopoly rules, the *Gasparri Law* basically eliminates all limits on cross-ownership between print media and television broadcasting. The only exception is the provision, adopted under pressure from the print media publishers, according to which the law prohibits national television broadcasters from purchasing any shares in publishers of daily newspapers, or participating in setting up publishing houses of new daily newspapers before 31 December 2010.¹³⁸

The *Gasparri Law* establishes a ceiling of 20 per cent of the national broadcasting market for each national operator. However, the law postpones the application of this provision until the implementation of the national digital frequencies assignment plan. During this, presumably long, period of transition, the 20 per cent limit is to be calculated on the basis of the overall number of television hours broadcast on a national basis on terrestrial frequencies, both analogue and digital,¹³⁹ without distinguishing between generalist channels, telemarketing channels or even pay-TV channels.¹⁴⁰

By employing this cap system based on the amount of aired programmes, the legislature ignores important benchmarks, such as audience or ratings, which are used in many countries in ascertaining the effective penetration of the relevant stations.

The *Gasparri Law* abolishes the limits on commercial revenues in the broadcasting sector, including advertising, and replaces them with a very broad limit: no operator can “achieve revenues representing over 20 per cent of the overall integrated communication system (SIC) market”.¹⁴¹ The Law assigns AGCOM the role of enforcing this limit. The overall size of the SIC was estimated in 2004 at approximately €26 billion a year.¹⁴² There is no official estimate available.

¹³⁷ It is not understood why the *Gasparri Law* also leaves unchanged more severe anti-monopoly limits for the publishing houses, as they were stipulated in: Law on renewal of Law 416 of 5 August 1981 on the operation of publishing houses and provisions for editorial activities, no. 67 of 25 February 1987, *Gazzetta Ufficiale* no. 56 of 9 March 1995. On this issue, see: Mastroianni, *The European links*.

¹³⁸ *Gasparri Law*, art. 15(6).

¹³⁹ *Gasparri Law*, art. 25(8).

¹⁴⁰ S. Santoli, “Pluralismo e disciplina degli “incroci” proprietari stampa-radiotelevisione”, (“Pluralism and the discipline of the “intersectional” owners of print media and broadcasting”), in M. Manetti (ed.), *Europa e Informazione, (Europe and Information)*, Napoli, 2004, (hereafter, Santoli, *Pluralism*).

¹⁴¹ *Gasparri Law*, art. 15(2).

¹⁴² According to “Ecco quanto vale la comunicazione”, (“This is how much the communications sector is worth”), 4 August 2003, in *Il sole 24 ore*.

AGCOM has criticised the SIC measure for contrasting with the concept of a relevant market as defined by the European Commission – which divides telecommunications services into 18 different markets – because it represents a heterogeneous aggregate of different types of products and services.¹⁴³ By cancelling the *Maccanico Law*'s 30 per cent ceiling on advertisement revenues as a criterion to identify the “dominant position” in the broadcasting sector and advertising market, the adoption of the SIC does not fulfil any anti-monopoly function. In fact, it is likely to strengthen the RAI-Mediaset duopoly, with the commercial broadcaster being especially well positioned to take advantage and grow further.

The only way to control the emergence of a dominant position in a single market is offered by Article 14 of the *Gasparri Law*, which bans the creation of dominant positions in any single part of the integrated communications system. Italian law does not define a “dominant position” in the television market. However, AGCOM considers that this can be found in European Commission principles, mainly those stated in the “Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services”.¹⁴⁴ According to these guidelines, a “dominant position” is considered unlikely with less than 25 per cent of a market, is assumed at 40 per cent and is considered proven with more than 50 per cent.¹⁴⁵

5.2.1 Corporate structure of the main players and cross-ownership

RAI

RAI has been 99.55 per cent-controlled by the Italian State. The *Gasparri Law* provides for a timid privatisation of the station. It allows the sale of small quotas, of up to 1 per cent per shareholder, of the corporation's capital to single buyers, prohibiting the formation of trusts to ensure a scattered share holding. RAI's Board of nine members is to be politically elected, as this task remains a prerogative of the Parliament and RAI's majority shareholder, the Ministry of Economy and Finance. Only when more than 10 per cent of RAI's share capital is transferred to private holders may a non-politically elected representative be appointed to the Board.

¹⁴³ See: AGCOM, AS 247; and Hearing of the President of AGCOM, Enzo Cheli, in the Chamber of Deputies, 12 December 2002, available online in Italian in www.camera.it.

¹⁴⁴ “Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services”, in *Official Journal of the European Communities*, Volume 45, 11 July 2002, C 165/6.

¹⁴⁵ “Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services”, cit., p. 15. See also: AGCOM, Resolution no. 326/04/CONS, available online in Italian at www.agcom.it; and M. Cuniberti and G.E. Vigevari, *La riforma del sistema radiotelevisivo, (The reform of the broadcasting system)*, Turin, 2004, from p. 25.

Economists, intellectuals and representatives of the political opposition believe that the planned privatisation will not be genuine. They believe that, in reality, the political establishment will maintain its strong control over RAI. With the 2006 general elections approaching, this privatisation is becoming a hot topic of pre-electoral polemics between government and opposition parties. As mentioned, Romano Prodi, the centre-left coalition leader, has taken a clear stand in favour of the separation of public service activities from the more commercial activities within RAI.¹⁴⁶ Opposition parties were against selling even a minority stake in RAI on capital markets in the spring of 2005, as required by the *Gasparri Law*. Some parties in the majority coalition, such as the former Christian Democrats and the former pro-fascist parties in Berlusconi's coalition, also resist the privatisation of the public broadcasting company in the pre-electoral stage, because they fear losing control of a critical centre of political influence. Surely, as the Minister of Economy stated in February 2005, the privatisation of RAI will not be launched before autumn 2005.

Mediaset

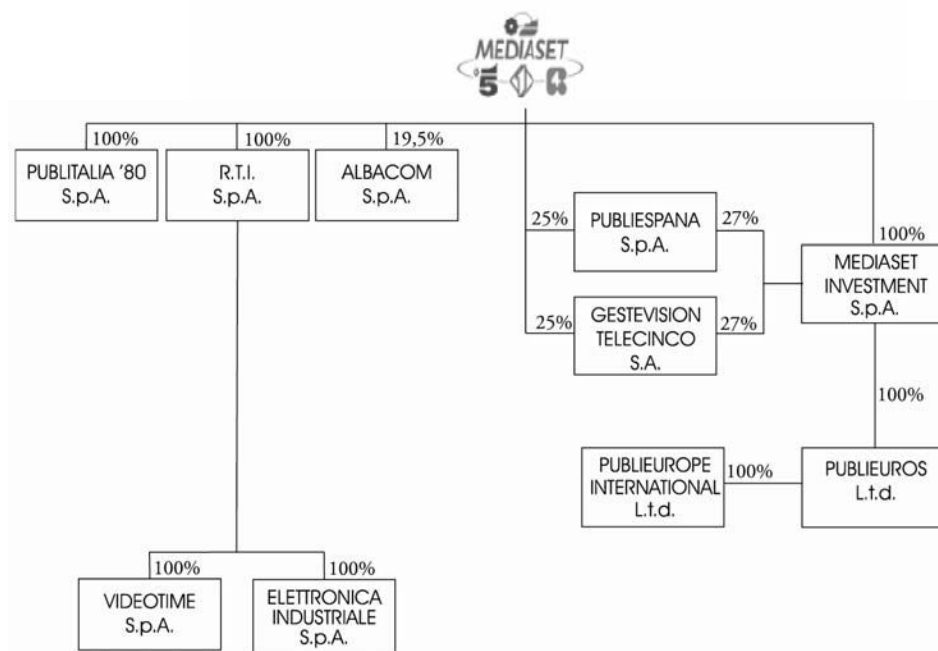
Mediaset represents Fininvest's financial jewel, and it is mostly owned by the Berlusconi family. Fifty-one per cent of Mediaset's share capital is held by Fininvest, and 2.3 per cent is owned by Lehman Brothers. Another 2 per cent of Mediaset is controlled by Capital Research and Management, with the rest traded on the Milan stock exchange.¹⁴⁷ Fininvest is a true publishing and communication giant, holding the majority of shares in one of the largest Italian publishers, Mondadori, which controls 30 per cent of the books market and publishes 50 magazines; the film production company Medusa Film; Mediolanum Bank; and the AC Milan football team. All these activities yielded their shareholders about €200 million in profits in 2003.¹⁴⁸ Mediaset also controls 52 per cent of the share capital in the Spanish commercial television Telecinco.

¹⁴⁶ See the letter by Romano Prodi, "Prodi: la Rai va divisa in due. Allo Stato il servizio pubblico", ("Prodi: Rai must be divided into two. The public service to the State"), in *Corriere della Sera*, 30 December 2004.

¹⁴⁷ On 13 April 2005 Fininvest sold 16.66 per cent of Mediaset capital, cashing in about €2 billion, while nevertheless maintaining the majority stock in the company.

¹⁴⁸ Data published in "U Cavaliere si stacca un assegno da 194 milioni", ("The 'Knight' [Berlusconi] writes himself a cheque for 194 million") in *Corriere della Sera*, 19 June 2003.

Figure 1. Structure of Gruppo Mediaset SpA (2004)



Source: Mediaset¹⁴⁹

The reason that neither Fininvest nor Mediaset owns the majority of the daily newspapers in the group's portfolio is that anti-monopoly provisions in the *Mammì Law* limit cross-ownership of television and newspapers. The newspaper owned by Silvio Berlusconi, *Il Giornale*, was therefore "sold to a third party", which turned out to be Berlusconi's brother, Paolo.

La7

La 7 is the generalist television network born from the ashes of Telemontecarlo, the channel owned by the cinema film producer Vittorio Cecchi Gori. After initial financial troubles, La7 became controlled by the largest Italian telecommunication company, which set up the holding company Telecom Italia Media especially for this venture. Telecom Italia Media also owns the television channel MTV Italia.

¹⁴⁹ Information taken from the Mediaset website, available at <http://www.gruppomediaset.it> (accessed 6 July 2005).

Pay-TV

While generalist traditional television is dominated by the RAI-Mediaset duopoly, the Pay-TV sector is monopolised by a single entity, Telepiù/Sky. Unlike the duopoly, however, Sky's monopoly has been authorised by the European Commission – although only as an exception and for a limited period of time. Some 80.1 per cent of Sky's stake is held by Murdoch's News Corporation, and the other 19.9 per cent is owned by Telecom Italia Media. Neither Telecom Italia nor Murdoch has expressed interest in holding large shares in publishing companies, unlike Berlusconi's Mediaset and other Italian industrialists.

The two most important publishing groups in Italy are the RCS Media Group, which publishes *Corriere della Sera* and *Gazzetta dello Sport*, and Gruppo Editoriale L'Espresso, which publishes *La Repubblica* and many local newspapers. As far as the periodical press is concerned, these two publishing groups, together with Fininvest's subsidiary Mondadori, control more than three-quarters of the weekly and monthly magazine market.

5.3 Funding

The Italian broadcasting market has grown to €5.9 billion in 2003, a sharp increase as compared to the previous couple of years.

Table 7. Total revenues of the main television broadcasters (2002–2003)

	Total revenue (€ million)		Evolution of total revenue 2003/2002 (per cent)
	2002	2003	
RAI	2,385	2,394	0.4
Mediaset	1,851	1,973	6.6
Telepiù/Sky	928	1,098	18.3
MTV/La 7	70	95	35.7
Other companies	316	319	1.3
Total	5,550	5,879	5.9

Source: AGCOM¹⁵⁰

The revenues generated by Mediaset have increased more than RAI's, though Mediaset still lags far behind RAI's overall sales volume. The other new players (Sky and La 7) appear to be growing briskly as well, thanks to an aggressive business strategy. The broadcast industry is driven by the advertising market, which remains the main source of income for the sector (57.3 per cent), while the licence fee share continues to decline, "representing less than 25 per cent of RAI's total revenues".¹⁵¹ The licence fee

¹⁵⁰ AGCOM *Annual Report 2004*, p. 112

¹⁵¹ AGCOM, *Annual Report 2004*, p. 113.

share is declining due to failure by individuals to pay the fee and also because it is set too low, while advertising spending increases.

Table 8. Sources of revenue for the television broadcasting market (2002–2003)

	Year				Evolution of revenue 2003/2004 (per cent)
	2002		2003		
	Revenue (€ million)	Share of total revenue (per cent)	Revenue (€ million)	Share of total revenue (per cent)	
Advertising ¹⁵²	3,240	58.4	3,367	57.3	4
Licence fee	1,383	24.9	1,423	24.2	2.9
Subscription	887	16	1,049	17.8	18.3
Agreements ¹⁵³	40	0.7	40	0.7	0
Total	5,550	100	5,879	100	5.9

Source: AGCOM¹⁵⁴

Traditional generalist broadcasting currently receives some €4,335 million or 51 per cent of the overall television advertising expenditure. Together, RAI and Mediaset take 85 per cent of the revenues.

Table 9. Total advertising spending– breakdown by media sector (2003)

		Total advertising spending (€ million)	Evolution of advertising spending 2003/2002 (per cent)
Print media	All	2,871	-0.4
	Dailies	1,706	-1.3
	Periodicals	1,165	1
Television		4,335	4.5
Radio		479	8.9
Outdoor advertising		687	2.7
Cinema		75	8.7
Internet		92	5.1
Total		8,539	2.9

Sources: Stima UPA and Stima Fieg¹⁵⁵

¹⁵² Data on advertising was provided to AGCOM by Nielsen Media Research and represent the net value, AGCOM, *Annual Report 2004*, p. 113.

¹⁵³ Income for access to television paid by national and local public institutions and companies.

¹⁵⁴ AGCOM, *Annual Report 2004*, p. 113.

¹⁵⁵ From AGCOM, *Annual Report 2004*, p. 171.

This duopolistic control of advertising expenditure has often been investigated and criticised by state authorities. In particular, the Competition Authority noted in a 2004 survey that the harvest of advertising investments has a concentration unparalleled in other EU countries.¹⁵⁶ According to the Competition Authority, some 65 per cent of television advertising is pulled in by the Fininvest-Mediaset Group and 29 per cent by RAI.¹⁵⁷

The Competition Authority survey revealed that the national advertising market, and the television commercials market in particular, was “highly concentrated” and that there were “major entry barriers, mainly due to structural factors which hampered the sound operation of the market”. According to the survey, the advertising market in the press and on the radio has a “fairly competitive structure”.¹⁵⁸

In the same report, the Competition Authority proposed a series of recommendations to improve competition in the national television advertising market including: re-examining the regulations governing the public broadcaster (see Section 4.3); implementing digitalisation in a way that would not perpetuate the duopoly in the terrestrial digital market; and changing the ownership of Auditel, the company now in charge of the peoplemeter measurement system providing audience data to the media buying industry. Auditel is now controlled by RAI and Fininvest

Mediaset is certainly the market leader, ahead of RAI by approximately €1 billion. There was a significant shift in advertising resources towards Mediaset following Berlusconi’s victory in the general elections of 2001,¹⁵⁹ a trend which has also been highlighted by the European Parliament: “The largest Italian corporations have

¹⁵⁶ Competition Authority, *Fact-finding investigation 13770*, section II.

¹⁵⁷ Press release, “The Competition Authority has concluded its fact-finding investigation into the sale of television commercials”, Competition Authority, Rome, 26 November 2004, available at <http://www.agcm.it/eng> (accessed 15 May 2005), (hereafter, Competition Authority, *Press release*).

¹⁵⁸ According to the report, the causes of the concentration of advertising expenditure in the hands of two players, “very largely peculiar to Italy”, included: A shortage of frequencies, permitting Fininvest and RAI to restrict the market entry and development of new competitors; the rules governing the conduct of companies responsible for public broadcasting services, which encouraged the creation of a symmetrical duopoly on the television programme supply side; low penetration by other broadcasters, which limited their access to the television advertising market; the influence of Fininvest and RAI over the ownership of the audience rating companies; and the crossed-equity and non-equity interests, allowing Fininvest to influence the decisions taken by certain leading broadcasters, in particular the newly entering companies, Telecom Italia and TF1-HCSC. Competition Authority, *Press release*.

¹⁵⁹ For example, in 2003 Barilla invested 86.8 per cent less money in the daily newspapers and in the same time it spent 20.6 per cent more on commercials on Mediaset’s networks; and Procter & Gamble spent 90.5 per cent less in daily newspapers and 37 per cent more in Mediaset’s television stations. Even a public company such as the telco Wind slashed its spending on advertising in print media by 55.3 per cent and increased its advertising on the Mediaset’s stations by 10 per cent. Moreover, RAI, in 2003 lost 8 per cent of its ad revenues to the advantage of Mediaset. Source: *Corriere della Sera*, 24 June 2003.

transferred most of their advertising resources from the print media to the commercial networks (Mediaset) and from RAI to Mediaset.”¹⁶⁰

**Table 10. Television advertising revenue (net)
– breakdown by television channel (2003)**

Channel	Advertising market share (per cent)
Canale 5	40.5
Italia 1	17.4
RAI 1	16.5
Rete 4	8.9
RAI 2	8.5
RAI 3	4.2
MTV	1.8
La 7	1.6
TV All Music	0.6

Source: Adex Nielsen¹⁶¹

The strong dependence of both public and commercial broadcasters on the advertising market has always given rise to fierce political disputes. As for commercial broadcasting, the policy followed by many parties was to limit advertising within programmes, on the assumption that this would limit the amount of broadcast advertising and thus reduce the loss of advertising revenues for other sectors, such as print.

Regarding public service television, the question was often whether RAI should rely on the licence fee, and confine itself to supplying public service broadcasting programming, leaving commercial programming to the private stations. Many have criticised RAI for receiving a licence fee as a privileged source of financing while having programming that distinguishes itself only a little from that of the commercial broadcasters, whose only source of income is advertising. Mediaset has even petitioned the EU Commissioner responsible for Competition Policy, requesting an investigation into whether the public broadcaster could be held liable for unfair competition. However, the Italian political establishment opposes the abolition of the licence fee any time soon. In exchange, RAI continues to be subject to limits on the advertising revenues it can collect. There is a mix of reasons for such an apparent contradiction: on the one hand, politicians have an honest commitment to the health of the public broadcaster, but on the other, they can use the broadcaster to their own ends.

Another aspect of the dispute over advertising revenues is cultural and partly political. It is well known that most of RAI's programming is produced for the primary benefit

¹⁶⁰ EP Resolution 2003/2237, art. 57.

¹⁶¹ IP International Marketing Committee, *Television 2004. International Key Facts*, October 2004, p. 184.

of its sponsors and advertisers. Criticism of this programming has been raised mostly by the left-leaning intelligentsia, who want a revision of RAI's cultural populism.

5.4 Programme framework

5.4.1 Independence and impartiality of news information

Besides reliance on advertising, another important issue in the television sector is the independence and impartiality of news information. RAI's traditional dependence on the political establishment has repeatedly induced the legislature to enact regulations that would oblige the public licensee to broadcast balanced information. The *RAI Law 1975*, the *Gasparri Law* and the *Par Condicio Law 2000* all contain clear declarations on the value of independence and respect for pluralism in the information sector, as well as many detailed articles on the implementation of those principles.

Despite this substantial "rhetorical apparatus", allegations of biased information and unfair coverage are virtually a daily event at RAI, as political factions trade angry claims about the behaviour of editors-in-chief, journalists, reporters and analysts. All the regulation enacted in the media sector has failed to produce a solution. One reason for this is the weakness, if not absence, of effective sanctions for repeated violations of the relevant laws. So far, there have been only a few court judgements or administrative sanctions on the grounds of blatantly biased reporting.

Charges of unfair coverage could also be levelled against news services on commercial channels. In their case, the legal framework is less stringent, because commercial television broadcasters, unlike RAI, are not a signatories to "service contracts" with the State. While the laws on news reporting appear to guarantee the principles of independence and impartiality, the reality is very different. No remedy is provided for violating these laws during non-election periods. Sanctions are applied only in obvious cases during electoral campaigns, pursuant to the *Par Condicio Law*.¹⁶²

Aside from Italian journalists' longstanding habit of yielding before political pressure, perhaps in exchange for a job or promotion, the key problem in the media sector is the conflict of interest personified by Berlusconi, the Prime Minister and media tycoon. As Professor Marco Gambaro points out, issues of anti-monopoly and pluralism are common in Europe; conflict of interest is an Italian problem, although raised perhaps more abroad than in Italy.¹⁶³

The *Conflict of Interest Law*, approved by the Chambers of Deputies in July 2004, has not solved the genuine issue of Berlusconi's situation, because it left intact his ownership of mass-media outlets, and does not prevent similar situations. There is a wide range of

¹⁶² Recent examples are the 116 warning proceedings (not sanctions) of the Communications Authority against RAI and Mediaset for some programmes (*Sciuscià*, *Tg4*, *Studio Aperto*, *Primo piano*) for having violated regulations on political pluralism. See: *Corriere della Sera*, 10 July 2004.

¹⁶³ OSI roundtable comment.

cases of incompatibility between the holding of public posts and involvement in private “activities”, such as management of a business enterprise.¹⁶⁴ The law forbids entrepreneurs from holding corporate offices and Government positions at the same time. However, it does not prohibit owners of companies who do not *formally* have corporate positions from holding Government offices. An *a posteriori* conflict of interest occurs when a member of the Government uses her or his position for personal ends, thereby damaging the general interest. The instruments provided by the law require the abstention of a Government member from areas where there is a conflict and the disclosure of their property.¹⁶⁵ The job of determining whether there is a conflict of interest is assigned to the Competition Authority, but the authority can only report a conflict to the Parliament, which has the last word on whether and how solve it.¹⁶⁶

Berlusconi’s argument that the “mere owner” of a broadcaster does not influence editorial policy was contradicted by the October 2004 dismissal of Enrico Mentana, the respected and balanced editor of Mediaset’s main television newscast. He was replaced by Carlo Rossella, a famous journalist who is politically very close to the Prime Minister. At the end of 2004, newsrooms of all three Mediaset stations were led by journalists with similar political ideas.

Editorial differences between Mediaset’s channels and RAI are not obvious. With the exception of Rai Tre, which continues to have a more “public service outlook”, the RAI channels resemble Mediaset’s channels: all are more or less seeking to appeal to a mass audience and tussling for big ratings.

5.4.2 Guidelines on commercial television programming

Article 6 of the *Gasparri Law* summarises the provisions of previous laws – in particular the *Mammì Law* and *Maccanico Law* – regarding the information output of commercial broadcasters:

1. Information provided on radio and television by any broadcaster is a service of general interest and is to be carried out in accordance with the principles detailed in this chapter.
2. Regulations concerning the guarantee of radio and television information:
 - a) truthful presentation of facts and events, so that opinions may be formed freely; sponsorship of news broadcasts is not allowed;
 - b) daily television and radio news broadcasts by subjects authorised to provide content at national or local levels on terrestrial frequencies;

¹⁶⁴ Conflict of Interest Act, art. 2.

¹⁶⁵ Conflict of Interest Act, art. 3.

¹⁶⁶ Conflict of Interest Act, art. 6.

- c) all political subjects have equal and impartial access to news programmes and electoral and political broadcasts, in accordance with the procedures laid down by legislation;
- d) television stations must broadcast official communiqués and declarations by constitutional organs, as laid down by law;
- e) methodologies and techniques surreptitiously manipulating news content are completely banned.

Through fiscal incentives, such as tax exemptions, previous legislation encouraged local and nationwide television networks that pledged to broadcast informative programmes about the territories and cultural spheres of their viewers. The *Mammi Law* eradicated RAI's monopoly on information, obliging all networks with a licence to broadcast radio and television news programmes. The change forced Berlusconi's channels to compete with the newscast provided by the three RAI networks, Tg1, Tg2 and Tg3, even before he entered electoral politics in the early 1990s. During those years, the general impression was that an alternative information service, not tied to the political establishment, was finally available.

Overall, the laws and the discipline implemented by the relevant authorities acknowledge many of the provisions included in EU directives on broadcasting, such as the European production quotas of the TVWF Directive, but they do not touch on those issues relating to independent and impartial information. Article 6 of the *Gasparri Law* confirms the tendency among lawmakers to provide declarations of principle, which are rarely followed by efficient enforcement procedures. The only significant exception to this general rule is provided by the *Par Condicio Law 2000*, regulating programmes on political issues – especially during pre-election periods, when the legislature must be very particular about carefully measuring the objectivity of information.

It should be noted that the *Par Condicio Law 2000* was enacted by a left-wing governing coalition, with the specific purpose of reducing Berlusconi's excessive power and granting balanced political and electoral information according to the "equal time" obligations, especially during political campaigns and elections. Predictably, this law is disliked by the current Prime Minister, who sought unsuccessfully to amend it before the recent Italian local elections and those for the European Parliament in June 2004. Berlusconi is so convinced of the efficacy of this law that he blamed it for the defeat of his party, Forza Italia, in these elections.

Quotas

There are no obligations for minority quotas for commercial broadcasting. The only quotas applying to commercial television stations are those related to European content.

6. COMPLIANCE WITH EUROPEAN UNION POLICY

The Italian legislation relating to television broadcasting does not fully comply with provisions included in the EU directives and the EU fundamental principles for the mass media sector. Still, over the years, Italy has been at the forefront of implementing many EU directives in this field and, in some respects, in coping with issues relating to new technologies, such as the switchover to digital terrestrial television.

In 1997, Italy anticipated the regulatory framework for electronic communications networks and services provided by the 2002 directives,¹⁶⁷ by adopting a unique law for the telecommunications and television sectors, the *Maccanico Law*, and by creating a single body responsible for its implementation, the Communications Guarantee Authority (AGCOM).

Moreover, as provided by Article 11 of the *Gasparri Law*, television content providers must reserve most national transmission time on terrestrial frequencies for European works. This quota applies to time set aside for news, sport events, television game shows, advertising, debates and teleshopping. The law guarantees non-encrypted live or recorded broadcasts of national and local events that are considered of particular relevance to society and included in a special list drawn up by the Communications Authority. These events include the Olympic Games, all matches of the Italian national football team, the final and the semi-final of the football Champions League and UEFA Cup, the Italian cycling tour, the Formula 1 Italian Grand Prix and the Sanremo Music Festival.

This good record of compliance with many EU directives is spoiled by the overall legislative framework, which makes Italy an evident exception among EU countries. The “Italian case” was brought before the European Parliament, where Italy was prosecuted for violating its citizens’ fundamental right to freedom of information and pluralism, as stipulated in article 7(1) of the European Union Treaty.¹⁶⁸ The European Parliament approved a Resolution in which it,

highlights its deep concern in relation to the non-application of the law and the non-implementation of the judgments of the Constitutional Court, in violation of the principle of legality and of the rule of law, and at the

¹⁶⁷ See: Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, published in the *Official Journal of the European Communities*, L 108/7, 24 April 2004, (hereafter, the Access Directive); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services the *Official Journal of the European Communities*, L 108/21, 24 April 2002 (hereafter, the Authorisation Directive); the Framework Directive (2002/21/EC); and the Universal Service Directive (2002/22/EC).

¹⁶⁸ See the Resolution by Sylviane H. Ainaridi, MEP, and 37 others in: European Parliament, Doc. B5-0363/2003, Motion for a resolution on the risk of a serious breach of the fundamental rights of freedom of expression and of information in Italy.

incapacity to reform the audiovisual sector, as a result of which the right of its citizens to pluralist information has been considerably weakened for decades.¹⁶⁹

The enactment of the *Gasparri Law* has not improved the situation. Indeed, it seems to fail to comply with EU regulations. In general, this law appears to be incompatible with the principles governing the Union itself, including the stipulation of freedom and pluralism of the media, as stated in Article 11 of the Charter of Fundamental Rights of the EU, and the principles of the conventions approved by the Council of Europe and the European Court of Human Rights.¹⁷⁰ Some concerns raised by the *Gasparri Law* include those aspects of the regulation that help to perpetuate the duopoly in the broadcast market.¹⁷¹

Several questions can be asked: is the “general approval” of the use of the frequencies presently occupied by the current broadcasting operators, which are the *de facto* exclusive users, in compliance with principles providing for the licence of public frequencies, which are to be granted pursuant to objective, transparent, non-discriminatory and proportional criteria established by the 2002 directives?¹⁷² Is the exclusion of telemarketing channels and programmes from the parameters used to set the relevant advertising hourly caps in compliance with the EU guidelines within the TVWF Directive? Is the State-sponsored financing of the purchase of set-top boxes for digital television compatible with the general prohibition for the State to subsidise businesses? Is the anti-monopoly threshold, calculated on the basis of the heterogenous basket provided by the *Gasparri Law*, in compliance with the concept of “relevant market”?¹⁷³ Will the rationale of the *Gasparri Law*, that pluralism is driven by the “hidden hand” of digital technology, with no need of further anti-monopoly regulation, allow Italian lawmakers to claim compliance with the obligation provided by EU regulations and relevant treaties to

¹⁶⁹ EP Resolution 2003/2237, point 66.

¹⁷⁰ See: European Court of Human Rights, *Informationsverein Lentia and Others v. Austria*, 24 November 1993.

¹⁷¹ A broad study on the topic has been written by one of the most prominent scholars of European media law, Roberto Mastroianni. See: Mastroianni, *The European links*.

¹⁷² In this regard, strong doubts have been expressed by S. Cassese (see: Cassese, *The new order of the television system*) and R. Mastroianni (see: Mastroianni, *The European links*). For further detail, see also Chapter 3 of this Report.

¹⁷³ Giuseppe Tesauro, President of the Competition Authority, has often written about the incompatibility between the concepts of an integrated communication system (SIC) and competition rights. Strong doubts with respect to the SIC are found in: European Parliament, Resolution 2003/2237, art. 64, which “hopes that the legislative definition contained in the draft act for reform of the audiovisual sector (Article 2, point G of the *Gasparri Law*) of the ‘integrated system of communications’ as the only relevant market does not conflict with Community competition rules within the meaning of Article 82 of the EC Treaty or with numerous judgments of the Court of Justice, and does not render impossible a clear and firm definition of the reference market”.

enact effective legislation preventing and sanctioning the formation and perpetuation of dominant positions in the media sector?¹⁷⁴

The aforementioned concerns and open questions appear to be grave, but do not, by themselves, explain the earnest preoccupation over the Italian case and the repeated calls from a number of institutions – including the European Parliament, the Council of Europe, other influential international organisations and other free-speech advocates – for the Italian Parliament to solve the sector’s anomalies.¹⁷⁵ The Council of Europe Parliamentary Assembly expressed a harsh judgement on this issue:

The Assembly is extremely concerned that the negative image that Italy is portraying internationally because of the conflict of interests concerning Mr Berlusconi could hamper the efforts of the Council of Europe in promoting independent and unbiased media in the new democracies. It considers that Italy, as one of the strongest contributors to the functioning of the Organisation, has a particular responsibility in this respect.¹⁷⁶

On 28 October 2004, Ambeyi Ligabo, United Nations special *rapporteur* on the protection and promotion of the right to freedom of opinion and expression, stated at the end of his visit to Italy that:

Italy shows a strong tradition of freedom of opinion and expression. Written press, in particular, is said to be very liberal and promotes pluralism although its development seems to be hindered by the quasi-hegemonic power of the television. However, based on the interactions I had with several people and institutions, many are worried that recent events, namely concentration of the media and conflict of interest especially in the last few years, are a threat to the right of opinion and expression.¹⁷⁷

In general terms, the problem with the *Gasparri Law* appears to be an insoluble conflict between its rationale and the EU’s emphasis on media pluralism as the most important principle of policy in the communication field.

Emblematic in this respect is Article 11(2) of the EU Charter of Fundamental Rights which – building on Article 10 of the Council of Europe’s European Convention for

¹⁷⁴ For a broader study, see: Mastroianni, *The European links*.

¹⁷⁵ For a preliminary evaluation, see: R. Craufurd Smith, *Il controllo dell’Unione sulla protezione negli Stati membri della libertà di espressione e di informazione: il caso dei media in Italia*, (The EU control on the protection in the Member States of the freedom of expression and information: the case of the media in Italy), available at <http://www.forumcostituzionale.it> and in *Quaderni costituzionali*, 2004, fasc. 3, pp. 632–635.

¹⁷⁶ See the Council of Europe Resolution 1387(2004), point 9; OSCE, *Report on Freedom of the Media*, 11 December 2003, available on the OSCE website at http://www.osce.org/documents/rfm/2003/12/1641_en.pdf (accessed 1 April 2005).

¹⁷⁷ United Nations High Commissioner for Human Rights, Statement by Ambeyi Ligabo, 28 October 2004, Rome, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/96007EB02D68C473C1256F500044D829?opendocument>, accessed 20 April 2005.

Human Rights¹⁷⁸ – expressly affirms that media independence and pluralism shall be respected.¹⁷⁹ This article was adopted under pressure from Italian representatives of the then-ruling left-wing majority, who proposed the amendment related to the pluralism of the media. The inclusion in the Charter of a statement on pluralism shows the high level of concern over media concentration in Europe and its importance to the health of democratic systems.¹⁸⁰ Furthermore, the Charter puts on the EU agenda the Union's power to intervene in this area. It also raises the possibility of common European legislation, which would be more comprehensive than the existing legislation and able to cope, on a European basis, with matters relating to the control and ownership of the media.

The European Parliament called on the Commission to “submit a proposal for a directive to safeguard media pluralism in Europe, in order to complete the regulatory framework, as requested in its above-mentioned resolution of 20 November 2002”.¹⁸¹ The European Parliament also noted that it “considers that the protection of media diversity should become the priority of EU competition law, and that the dominant position of a media company on the market of a Member State should be considered as an obstacle to media pluralism in the European Union”.¹⁸² In this perspective, it would be useful to evaluate the European Commission's capacity for intervention in its role of “guardian of the Treaties”, and particularly of the anti-monopoly law. Above all, after its endorsement in the Treaty of Nice and the Constitutional Treaty, media pluralism has become a principle and even a “policy” of the Union. Consequently, a solution to the pluralism question, in Italy and all of Europe, could be found through actions of the Union.

¹⁷⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 3 September 1953, E.T.S. 005, available on the COE website at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (accessed 1 March 2005).

¹⁷⁹ Art. 11(2) states: “The freedom and pluralism of the media shall be respected” (Charter of fundamental rights of the European Union (2000/C 364/01), the *Official Journal of the European Communities*, C364/1, 18 December 2000).

¹⁸⁰ See: G.E. Vigevani, “Il pluralismo dei mezzi di comunicazione di massa nella Carta dei diritti” (“Pluralism of the means of mass communications in the Charter of Rights”), in *Rivista Italiana di Diritto Pubblico Comunitario*, 2003, from p. 1247; and R. Craufurd Smith, “Rethinking European Union competence in the field of media ownership: the internal market, fundamental rights and European citizenship” in *European Law Review*, October 2004.

¹⁸¹ European Parliament, Resolution 2003/2237, art. 76.

¹⁸² European Parliament, Resolution 2003/2237, art. 77.

7. THE IMPACT OF NEW TECHNOLOGIES AND SERVICES

The shift from analogue to digital broadcasting represents the most significant change in the broadcasting industry in recent years, and, as stated by Minister of Communications, Maurizio Gasparri, it is the main motivation for the reform carrying his name. Indeed, the first article of the *Gasparri Law* states that among its objectives is the updating of the national and regional broadcasting systems, in order to prepare them for the “advent of digital technology and the ever closer association of broadcasting with other means of interpersonal and mass communications, such as telecommunications, publishing, electronic publishing and the various applications of the Internet.”

7.1 Digital television

The *Gasparri Law* is not Italy’s first legislation to mention digital broadcasting. Indeed, in the *Digital Broadcasting Law 2001*, the Parliament showed unusual efficiency in establishing a timeframe for the implementation of the digital revolution. Even the Communications Guarantee Authority (AGCOM) acted swiftly, approving some regulation of the terrestrial broadcasting via digital technology and a plan for the award of the relevant licences.¹⁸³ In the past four years, the Ministry of Communications has granted some 22 digital licences to various companies, including RAI, Mediaset, Telecom Italia Media (La7) and Rete A – a former small network bought up by Gruppo L’Espresso with the purpose of entering the digital television business. The licences awarded so far are only for experimental broadcasting. The Ministry plans to start granting licences for actual digital broadcasting at a later stage.

In theory, the digital licence plan will make available 48 to 60 national channels, 480 to 600 regional channels and about 1,272 local channels on digital multiplexes, each hosting around four to five channels.

In the Italian media landscape, the digital perspective represents both an alibi and an opportunity. It is an alibi, insofar as it justifies postponing indefinitely the issue of pluralism in the broadcasting system to some point in the future. Digitalisation offers an opportunity, in that it may solve the issue of the scarcity of licences and favour synergies among media. Indeed, digital technology allows for quadrupling the broadcasting potential and the number of channels on the same band, thus offering more interesting and ample content to the audience. The licence plan provides for 12 national and six regional multiplexes. The switchover from analogue to digital

¹⁸³ See: Caretti, *Communication and information legislation*, from p. 150; and R. Zaccaria, *Televisione: dal monopolio al monopolio, (From monopoly to monopoly)*, Baldini Castoldi Dalai, Milano, 2003, from p. 138.

broadcasting is envisioned for 2006. This date is totally unrealistic and many experts predict that the switch will have to be delayed by at least four to five more years.¹⁸⁴

In an attempt to promote digitalisation, the *Gasparri Law* states that during the “transition phase”, RAI must comply with a series of obligations, including launching, by 1 January 2004, two blocks of programmes via digital technology that would be accessible to at least 50 per cent of the Italian audience.¹⁸⁵ RAI fulfilled the requirement and started broadcasting the programmes. According to the Financial Law for 2004, each customer leasing or buying the digital set-top box necessary to capture the digital signal is entitled to receive a State subsidy of €150.¹⁸⁶ There are many rules regarding digital broadcasting that are likely to open opportunities for diversification. The most relevant is the division of the public licensing regulator into two different categories: the “network operator” and the “content provider”.

One doubtful aspect of the *Gasparri Law* is its assumption that the new technologies will, in and of themselves, automatically guarantee pluralism. The EU’s Access Directive (2002/19/EC) warned that “competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television.”¹⁸⁷ Moreover, in the Italian case, the existing situation evidently increases the risk of replicating the analogue duopoly in digital forms, without opening up the system to true competition.

Critics of the *Gasparri Law* say it has not addressed the issue of fair distribution of advertising resources. The law has also been criticised because it established a mechanism for granting digital frequencies that simply “grants the licences to the present analogue operators, allowing them to obtain the necessary licences and authorisations to start digital broadcasting”.¹⁸⁸ Other problems noted are that the law allowed RAI and Mediaset to gain many digital licences, without creating efficient instruments aimed at improving competition and allowing new operators to enter the market.

This is why Roberto Mastroianni complains that “the boasted increase” in the number of channels will consist mainly of channels belonging to the existing dominant operators, with independent operators perhaps winning a marginal share of the market.¹⁸⁹ Ottavio Grandinetti said there is a risk that, following the current development, “the switch to digital television would be likely to aggravate the present

¹⁸⁴ See: Grandinetti, *Pluralism and competition*; and S. Ciccotti, “La convergenza tecnologica”, (“The technology convergence”) in G. Morbidelli and F. Donati (eds.), *Comunicazioni: verso il diritto della convergenza? (Communications: towards the rule of convergence?)*, Giappichelli, Torino, 2003, p. 1.

¹⁸⁵ Gasparri Law, art. 25(2).

¹⁸⁶ The Financial Law for 2004, no. 350/2003, *Gazzetta Ufficiale*, 27 December 2003, art. 4(1).

¹⁸⁷ See: Access Directive, art. 10.

¹⁸⁸ See Statement by the President of the Competition Authority, Giuseppe Tesaro and Competition Authority, *Annual Report 2003*, p. 100.

¹⁸⁹ Mastroianni, *The European links*.

deficit of competition and pluralism affecting the Italian system”.¹⁹⁰ The purchase by Mediaset and La 7 of the rights to broadcast the football matches of Serie A on digital networks supports these predictions.¹⁹¹

On 2 March 2005, in an attempt to curb the Mediaset-RAI duopoly’s future dominance of the digital market, AGCOM adopted a decision stating the importance of pluralism in the television sector and in the field of financing sources related to the development of digital broadcasting.¹⁹² The Authority started an investigation in October 2004, and came to the conclusion that the broadcasting market is still characterised by the RAI-Mediaset duopoly, with three companies, RAI, Mediaset and Mediaset’s advertising vehicle Publitalia ’80, found to hold positions that violate the principle of pluralism. In particular, Publitalia ’80 was defined as a “significant market power”, gaining 62.7 per cent of television advertising revenues.¹⁹³

AGCOM’s Decision 136 obliged both RAI and Mediaset to speed up the digitalisation process and to guarantee independent producers significant access to digital television. It also asked Publitalia ’80 to keep separate accounts of revenues from analogue and digital television respectively. AGCOM also stipulated that, for one year, Mediaset would have to use a different advertising vehicle for digital broadcasting activities. These rules are the consequence of the *Gasparri Law*.

Traditional broadcasting, either via analogue or digital technology, does not exhaust the means of television broadcasting regulated by the Italian legislature. Kept afloat by the private sector ever since the Constitutional Court Decision of 1976,¹⁹⁴ cable television experienced a significant development within a chaotic legislative framework in the 1990s, until the enactment of AGCOM Decision 289 in 2001.¹⁹⁵ Similarly, satellite television has been comprehensively disciplined by the *Maccanico Law*, and also by AGCOM’s Decision 289 of 2001.

These broadcasting technologies have experienced significant development in connection with the introduction of Pay-TV, which also experienced late regulation. Pay-TV enjoyed the first consistent legislative framework only after the adoption of the *Maccanico Law*, thereby obliging it to transfer the other networks to cable or satellite.

However, despite legislative developments in the “other” new media, digital television has monopolised the most recent attention of the Italian lawmakers. The *Gasparri Law* contains little or nothing on the new media. Nonetheless, the market has already

¹⁹⁰ Grandinetti, *Pluralism and competition*.

¹⁹¹ See: G. Valentini, “Il digitale terrestre assist a Mediaset” (The digital terrestrial television: help to Mediaset), in *La Repubblica*, 20 January 2005, p. 19.

¹⁹² AGCOM, Decision 136/05, *Gazzetta Ufficiale*, 11 March 2005, supplement no. 35.

¹⁹³ AGCOM, Decision 136/05, cit., art. 126.

¹⁹⁴ Constitutional Court Decision 226/1976.

¹⁹⁵ AGCOM Decision 289/2001, *Gazzetta Ufficiale* no. 189 of 16 August 2001.

reacted, and thanks to other legislative provisions regarding the deregulation of the telecommunications sector, new business realities have appeared, including the Internet, broadband, cable and satellite. AGCOM noted in its 2004 annual report that the growth of the new media sector was brisk. This growth included the public company Fastweb, which is active in television, video on demand, Pay-TV, and rebroadcasting of the traditional analogue channels in digital format, on fibre optic and ADSL. According to AGCOM:

Thanks to the new offer [of new media], the company offering it has been able in the past several months to improve its customer base from those mainly interested in fast and broadband Internet connection to a market segment attracted by premium television content, such as football and movies. It is a phenomenon which appears to have good chances of succeeding and increasing over time. It is not surprising, though, that other operators are following suit with the same business model.¹⁹⁶

7.2 New media

As in other European countries, the Internet, Pay-TV, digital television and mobile telephony (GPRS, and the universal mobile telecommunications system – UMTS) are becoming structural in the consumer market and are contributing significantly to a fundamental change in the habits and lifestyles of millions of people.

Not all media are able to penetrate the market at the same speed and efficiency as the Internet, which, thanks to sustained marketing, has evidently become the most popular and used means of communication. But even Pay-TV, thanks to the sheer popularity of football in Italy, was able to hit the three-million-subscriber level. Digital television is not yet as popular, because the restructuring and replacement of millions of television sets and devices will likely take several more years and a substantial financial effort for Italian households. Slower development of digital television can therefore be expected, even with the Government's aggressive approach to the distribution and purchase of set-top boxes, which are partially subsidised by the Italian Government. Football is giving a boost to rapid expansion of the new technologies, such as digital terrestrial television. On 22 January 2005, when the first matches in the domestic football championship were played, hundreds of thousands of pre-paid cards were sold by Mediaset and La 7, the two companies that were airing football matches digitally.

Synergies with mobile telephony

The third generation of mobile phone technology, UMTS, is beginning to take hold with Italian consumers, mainly because all GSM operators are activating the service on their networks, making it available to the general public.

¹⁹⁶ AGCOM, *Annual Report 2004*, p. 91.

Access to broadband increased substantially between 2002 and March 2004. In March 2004, there were an estimated 3.4 million connections. Some 2.7 million of them were through ADSL technology.

The enormous market in mobile telephony represents a significant base for the launch and success of the UMTS technology, in which financiers and operators have invested billions of Euros in recent years. Today, Italy has at least 61 million mobile phone subscribers – which means more than one mobile phone for each of Italy's 57 million citizens. In 2004, AGCOM forecast that UMTS will reach 4.5 millions subscribers by 2005.¹⁹⁷ At present there are already 1.7 million users of UMTS.

The most important development is the operators' commitment to provide technologically advanced services, such as MMS, to video telephony, according to the 2004 annual report of the Communications Authority. To these services TIM, a unit of Telecom Italia, added in 2003 the "Mobile TV" service, allowing consumers with mobiles updated with the relevant technology to gain access via streaming to RAI and other networks, such as La 7 and MTV, Coming Soon Television, CNB-CFN, Game Network schedules and programmes. Another, similar, commercial offering has followed suit. The company H3G ("3") offered its customers the possibility to use their mobile screens to watch some reality television shows broadcast by national television networks.

Internet

Following the 2000 boom, the increase in the number of Internet subscribers has stabilised. The number inched up from 19.8 million in 2002 to 22.7 million at the end of 2003. Partly compensating for the recent relatively slow growth in traditional Internet subscriptions, ADSL broadband access has registered faster growth. This ADSL growth has also been helped by Government incentives, which provide €75 funding for each new subscription.

Table 11. Internet penetration (2001–2004)

	Total internet subscribers (millions)			
	2001	2002	2003	2004 (estimated)
Total number of subscribers ¹⁹⁸	17.9	19.8	22.7	25.6
Residential subscribers	12.5	14.4	17.2	20.1
Businesses	7.1	7.6	8.6	9.6
Schools and public institutions	3.9	4.1	4.5	5

Source: IDC¹⁹⁹

¹⁹⁷ AGCOM, *Annual Report 2004*, p. 102.

¹⁹⁸ Some categories of users are overlapping.

¹⁹⁹ From AGCOM, *Annual Report 2004*, p. 107.

It is difficult to predict what the Internet customer base will look like five years from now. The capillary expansion of broadband access will allow the broadcasting of television shows on the net, including Internet-television, as well as voice over the Internet protocol (VoIP). A significant example of this strategy aimed at taking advantage of synergies is well represented by the continuous presence in the traditional television market of the largest telecommunication company in Italy (Telecom Italia), which operates La 7 and the Internet portal RossoAlice, a new service for high-speed ADSL Internet connections:

All these will lead to a gradual shift toward different business models by the telecommunication players. Besides traditional pricing (annual and connection fee), other types of charges and services will increase their weight in the consumers' choices, including premium services (such as broadband content, and other added-value personal services such as data storage etc.)²⁰⁰

Satellite television

Satellite television in Italy means Sky Italia. In this sector, Rupert Murdoch's Italian subsidiary has a monopoly that competitors will probably be unable to challenge any time soon. Satellite television requires substantial capital investments in infrastructure, which normally translates into significant business losses for the first several years, and no guarantee of profits thereafter. For these reasons the real competition to Murdoch's Pay-TV will come in a different form, when the same type of services and contents are offered via different media, such as digital terrestrial television and broadband access. It is not coincidental that the first move against Sky Italia's monopoly has been launched by another communication giant, Mediaset, which purchased the television rights for the football games of AC Milan, Juventus Turin and Internazionale Milan – teams that used to grant exclusive rights to Sky Italia.

One aspect of the television satellite market worth mentioning is copyright piracy, which has characterised the market since its inception. Copyright piracy is mentioned by AGCOM in its 2004 Report. Sky Italia succeeded in limiting “with relative success” the piracy plague that had heavily contributed to the failure of Sky Italia's predecessors, Tele+ and Stream. It is estimated that, in order to solve the issue entirely, more than half the decoders will have to be replaced and a safer decoder system introduced.²⁰¹

7.3 Public debate on digitalisation

The debate on new media in Italy focuses on digital switchover, and it has been less than gripping. There is a simple reason for this: it was the left-wing administration that decided to introduce digital terrestrial television at a brisk pace, with the adoption of the *Digital Broadcasting Law 2001*. The decision of the present right-wing

²⁰⁰ AGCOM, *Annual Report 2004*, p. 108.

²⁰¹ AGCOM, *Annual Report 2004*, p. 115.

Government, led by Prime Minister Berlusconi, to support expansion of digital television as a means of increasing the number of new players has taken the minority by surprise. Although they oppose some aspects of the administration's policy, the opposition could not turn it down altogether. Nevertheless, several media commentators have deplored the fact that the Government is partly subsidising the digital decoders. This initiative is seen as advantageous for the two main players, who are trying to snatch up digital frequencies. The Berlusconi Government earmarked €100 million in 2004, and will allocate a further €150 million in 2005, for subsidising the growth of the two largest networks in the digital business – a policy that is in manifest contradiction to the *Gasparri Law*.

However, several politicians, commentators and analysts, on both the left and right, have raised serious doubts about the workability of digital terrestrial television. They note that it represented half-failure in the few countries that have already had experience with it. In Italy, a market where consumers have been “spoiled” by more than two decades of lavishly free television, no one can really predict how attractive the new channels will prove to be. The 2006 deadline for the switchover to digital terrestrial television is deemed overly optimistic by many analysts.

Marcello Veneziani, a conservative intellectual and member of the governing body of RAI, is very sceptical in this respect: “Judging from the experiences in the U.S., U.K., Spain and Scandinavia, [which were not] successful, one should be more doubtful [about implementation of digitalisation in Italy].”²⁰² Again, the main source of doubt is the political aura surrounding this astute projection into digital terrestrial television. Because the real launch date of digital television remains unknown, and in the opinion of many, will not happen before 2010, Mediaset will remain a dominant player for at least the next four to six years. Ironically, the real immediate success has been already achieved: Berlusconi's Rete4 has been rescued from being “condemned” to migrate to satellite television.

8. CONCLUSIONS

From a financial standpoint, the broadcasting system appears to be in good shape, generating considerable resources and turnover. Advertising remains the main driver of Italian broadcasting, abundantly feeding all media-related business sectors. RAI can count on a constant stream of income from advertising, despite the legal caps. Mediaset continues to show a significant year-on-year increase in income and revenues, thanks to the help of Prime Minister Berlusconi. Pay-TV, meaning satellite, cable and terrestrial digital television, is growing at such a rate that advertisers have begun looking into it with strong interest.

²⁰² Marcello Veneziani, statement in *Corriere della Sera*, 6 August 2003.

The Italian television output, as stressed by the main regulator, AGCOM, creates one of Europe's richest markets, with an abundance of generalist and niche networks that are poised for further growth thanks to new technologies. It is unlikely that any new market players would be able to compete successfully with the reigning, and apparently untouchable, analogue television duopoly, RAI-Mediaset. Digital terrestrial television therefore represents the new frontier for entrepreneurs willing to invest in Italian television. The policies pursued by the current administration, which have raised concerns all over the world, continue to cast doubts about the real intentions of this Government on the development of terrestrial digital broadcasting. Yet, if terrestrial digitalisation takes off – should the two Government agencies fairly supervise its growth and should the conditions which led to its failure in the UK and Spain not be repeated – the next few years may bring a broadcasting revolution.

However, if the financial health of Italian television appears to be sound, given the abundance of resources for business and of choices for consumers, the same cannot be said about its “political” and cultural state of health.

Political influence over the media, and particularly over television, has harmed the development of a healthy media structure. Until the mid-1970s, television was monopolised by the governing coalition and kept under strict control by the ruling administration. This situation long impeded television's modernisation and blocked any attempt at deregulation and any effort towards a true pluralist system. Between the mid-1970s and the *Mammì Law* of 1990, various Governments, happy with their control over public broadcaster RAI, left commercial television in complete legal chaos. This situation allowed a Darwinian selection process, which favoured the financial empire of the new media tycoon, Berlusconi. The 1990s and the past decade have seen Berlusconi's entry into politics, followed by a political and institutional short-circuit, which turned the media subject into a hot debate. It also put often insurmountable obstacles on the path toward pluralism and a true competitive media market, creating a dangerous precedent in the media market, and a potential threat to the democratic system itself.

Even those who will not accept that Italy sits on the brink of a media dictatorship cannot deny that the perennial “media issue”, which has characterised the Republican period since its inception, is becoming more of a “Berlusconi issue”. Such a concentration of media power in the hands of a single individual is without precedent in Italian democratic history and in liberal democracies. The law on conflict of interest approved by the Parliament in July 2004 has not resolved the “issue”. On the contrary, it has made the situation even more complicated. If, in the past, one could say that Berlusconi's policies were unlawful and inopportune, today Berlusconi is well shielded by a law that legitimises the ownership of his media empire.

The fact that the head of the Government has a substantial say in the management of State-owned RAI, heightens concerns that certain political decisions are dictated by a policy prone to favour Mediaset. At the same time, it seems clear that the head of the Government is taking political advantage of his control over both RAI and Mediaset in

order to influence public opinion and the electorate. Such decisions include those on the inflation of the “integrated communication system” and the bet on terrestrial digital television in the *Gasparri Law*. Large industrial conglomerates have withdrawn from traditional generalist broadcasting, apparently preferring not to oppose the present governing class. For example, the Italian telecommunication giant Telecom Italia, which owns a relatively small player, La 7, has given up its strategy of developing and improving its television network.

The unexpected sacking in November 2004 of Enrico Mentana, the founder and editor for more than a decade of Mediaset’s most popular news bulletin, Tg5, on Canale 5, is a disquieting sign that the media are preparing for the 2006 elections. Considered by friends and foes alike as a guarantor of balanced information who brought authority and popularity to Mediaset’s news outlet, Mentana commented that “after the passing of the Gasparri Law, there was no need for a news bulletin to guard Mediaset’s borders.”²⁰³

Thus, the dominant concerns about the state of Italian television are political. The overall performance of the present Italian broadcasting system does not appear to reflect the significant check-and-control role that is traditionally attributed to the media in an advanced democracy. There has been an almost complete control by the majority of the information flow over television channels. This situation contrasts sharply with the truly pluralistic Italian press, where stricter anti-monopoly rules have allowed the voices of the opposition and of large sectors of public opinion to be heard.

In this scenario, it is not difficult to formulate a long list of detailed recommendations to the Italian legislature on the reform of the broadcasting system. It would suffice to reiterate the suggestions and concerns raised by international institutions, NGOs and independent agencies. Particularly relevant was the advice directed to Italian lawmakers by the Council of Europe’s Parliamentary Assembly, including that of ending their long-standing practice of political interference in the media.²⁰⁴ Also significant are the deep concerns of the European Parliament,²⁰⁵ and its recommendation to accelerate work on the reform of the broadcasting sector.²⁰⁶ Other balanced and fair considerations are included in the Italian President’s formal message of 23 July 2002, particularly those pointing out the conditions for any reform: pluralism and impartiality, aimed at shaping a critical and educated public opinion, able to exercise responsibly its fundamental democratic rights.²⁰⁷

²⁰³ Statement of Enrico Mentana in *Corriere della Sera*, 14 November 2004.

²⁰⁴ CoE Report 10195, para. 79.

²⁰⁵ European Parliament, Resolution 2003/2237, art. 66.

²⁰⁶ European Parliament, Resolution 2003/2237, art. 87.

²⁰⁷ See the formal message of the President of the Republic, Carlo Azeglio Ciampi, to the Italian Parliament, on pluralism and impartiality of information of 23 July 2002, available online (in Italian) at <http://www.quirinale.it/Discorsi/Discurso.asp?id=20101> (accessed 1 June 2005).

Nevertheless, it is doubtful that this list of recommendations will bring positive results. The influential critics inside and outside the Italian system have not generated any real momentum for reforming the system. Paradoxically, although facing such a widespread concern, the current Parliament sponsored and approved in 2004 a law which puts RAI under an even stricter control by the political establishment and allowed Mediaset to grow further in the advertising and other media sectors.

It would be useless to propose model media systems that take no account of Italy's actual political environment – namely that the parties, administrative institutions and information operators have been arguing over the independence of State-owned television and its pluralism for at least the past 30 years. In the past decade, they have been debating the issue of conflict of interest and the relationship between media and politics. Legal scholars, political scientists and communication experts are fully aware of the various alternative models, as well as of the different remedies that could promote the right of the public and Italian nationals to be informed and to participate in public life, and to debate in an efficient and knowledgeable fashion. Unfortunately, sectional interests have always prevailed over general principles and legality.

9. RECOMMENDATIONS

9.1 Policy

Digitalisation

1. The Government should postpone the deadline for the switchover to digital television, allowing analogue television for at least five or six more years. The Government should enact “neutral” policies with respect to the different media, so that cable and satellite are not penalised by a preference for digital television.

9.2 Regulatory authorities

Enforcement powers

2. Parliament should adopt changes to legislation to strengthen the powers of the regulatory authorities. In particular, the Communications Guarantee Authority (AGCOM) should be assigned more sanction powers to enforce its decisions.

Independence

3. Parliament should initiate changes in legislation to ensure the independence of the Communications Guarantee Authority (AGCOM), by changing the procedure of appointing its members so that the Prime Minister no longer appoints AGCOM's Chair and Parliament no longer appoints the other

members based on political criteria (*lottizzazione*). One possible solution would be to entitle the President of the Republic with the power to elect AGCOM's members.

Frequency allocation

4. The Communications Guarantee Authority (AGCOM) should ensure compliance by the Italian State with European Council Directives 2002/21/CE and 2002/22/CE, which call for transparent, non-discriminatory and proportional procedures for the allocation of the radio-electrical frequencies.
5. Parliament should amend legislation in order to prevent the legalisation of broadcasters who illegally occupy frequencies.

9.3 Public and private broadcasters

Local broadcasters

6. Parliament should take steps to introduce legislation to give more financial and technological aid to the private local television broadcasters, to promote the establishment of alternative networks to the national ones.

9.4 Public broadcaster

Restructuring

7. Parliament should halt the ongoing process of privatisation of RAI which is unrealistic from an economic point of view (as the *Gasparri Law* stipulates that a shareholder cannot own more than 1 per cent of RAI's shares) and unconstitutional (as it sets up a complete privatisation of a public service).
8. Parliament should take steps to split RAI into two separate companies, one with public service obligations and the other with a commercial profile, in line with the recommendations of the Competition Authority in its report of 16 November 2004 (AGCM Ruling no. 13770).
9. Parliament should take steps to make the public service broadcasting offered by the new RAI an *independent public service* (non-governmental) with the legal structure of a foundation like the British Broadcasting Corporation (BBC). The commercial part of RAI should be privatised and sold on capital markets, with no restrictions.

Independence

10. Parliament should take steps to amend the *Gasparri Law* to ensure that RAI becomes a truly independent institution, like the Constitutional Court or the Bank of Italy.
11. Parliament should take steps to guarantee that the members of the RAI Board are politically independent from the influence and control of the Government and political parties. This can be achieved for example if Board members are elected by a qualified majority vote, and serve staggered terms. Another way can be to entrust the appointment of a part of the Board to AGCOM or to the AGCM.

Professionalisation

12. Parliament should adopt changes in legislation to ensure that members of the RAI Board are appointed according to their professional expertise and qualifications. To ensure this, candidates running for the RAI Board should be subjected to rigorous hearings in Parliament.
13. Parliament should make changes in legislation to introduce stricter incompatibility criteria for the members of the RAI Board. Individuals who have served in Parliament or been members of political parties, or had interests in communication businesses, should be forbidden from becoming members of the RAI Board.
14. Parliament should make changes in legislation so that the General Director of RAI is appointed solely by the RAI Board, without consultation with the Government.

9.5 Private broadcasters*Diversity and pluralism*

15. Parliament should take steps aimed at solving the “Italian anomaly” by breaking Mediaset’s monopoly on commercial broadcasting before the changeover to digital television.
16. Parliament should amend the *Gasparri Law* to ensure the implementation of the Decision of the Constitutional Court – that demands a 20 per cent threshold for each analogue television broadcaster and guaranteeing an effective variety of sources of information to citizens – before the switchover to digital television.
17. The Government should promote diversity and pluralism in broadcasting by supporting financially new entrants on the broadcasting market.

18. The Government should follow European best practice in defining a monopoly in the broadcasting market, in terms of the audience share or the percentage of television advertising market.
19. Parliament should amend the articles of the *Gasparri Law* defining the integrated communication system (SIC), to establish clear definitions of the separate markets inside the SIC, and introduce new rules providing for clear thresholds to identify dominant positions, in order to protect pluralism and competition. Parliament should also adopt legislation imposing limits on the advertising revenues that a media company can control.
20. Parliament should introduce legal provisions to ensure that television audience measurement is carried out by an agency independent of any corporate interests. Television companies should be banned from holding stakes in any such agency.
21. The Law on Conflict of Interest should be amended to introduce explicit incompatibility between the holding of elected or governmental positions and the ownership of media outlets.

ANNEX 1. Table

Table A1. Main laws regulating broadcasting in Italy

Year	Name of the act	Regulation	RAI	Private broadcasters
1974	Decision of the Constitutional Court no. 225 of 1974	Granted Parliament general power of supervision and control over public television.	Granted Parliament the right to appoint RAI Board of Directors and to determine its policy.	
14 April 1975	RAI Law 1975	Created the Parliamentary Commission for general guidance and supervision of the broadcasting services and assigned it with broad regulatory powers with respect to public TV.		
1976	Decision of the Constitutional Court no. 202			Allowed private broadcasters to air locally.
6 August 1990	Mammì Law	First law to recognise and regulate broadcasting as a dual system consisting of public and private broadcasters.	Preserved public service broadcasting by granting the broadcast licence for PSB to a wholly State-owned corporation.	<ul style="list-style-type: none"> – Allowed private broadcasters to air nationwide. – Introduced criteria for the assignment of broadcast licences and obligations for licensees. <ul style="list-style-type: none"> – Legitimised the duopoly of RAI-Mediaset, by allowing a single entity to hold three national licences at the same time. – Introduced the prohibition of cross-ownership of three national television networks and newspapers.
25 June 1993	RAI Law 1993		Assigned the responsibility for appointing the RAI Board of Directors to the Speakers of the Chamber of Representatives and the Senate.	
31 July 1997	Maccanico Law	<ul style="list-style-type: none"> – Diminished the regulatory powers of the Government. – Established the Communications 	<ul style="list-style-type: none"> – Envisioned a partial privatisation of RAI. – Set out a long-term plan for turning RAI Tre into an advertising- 	<ul style="list-style-type: none"> – Introduced stricter rules on broadcasting concentration than previous laws, establishing the

		Guarantee Authority (AGCOM), a national independent authority with regulatory powers in the telecommunication, audiovisual and publishing fields.	free channel.	ownership limit for each operator to two national analogue television networks. – Also introduced the criterion of 30 per cent ceiling on the advertisement revenues as identifying a “dominant position” in the broadcasting sector and advertising market. – Obligated Pay-TV to own only one licence for terrestrial broadcasting.
22 February 2000	Par Condicio Law 2000	Established rules for equal access for all political parties to politically-oriented programmes. – Gave back to the Government significant influence.		
22 March 2001	Digital Broadcasting Law 2001	– Set up a distribution plan for the digital broadcasting frequencies and a timeframe for the introduction of digitalisation.		
3 May 2004	Gasparri Law	– Regulates the transition of terrestrial broadcasting services to digital technology. – Establishes new thresholds for concentrations in the broadcasting market (20 per cent of the integrated communication system (SIC) revenues). – Gives to the Council of Ministers the power to enact the so-called “consolidated broadcasting act” aimed at coordinating the current legislation affecting broadcasting. – Empowers AGCOM to adopt pro-competition measures. – Authorises networks lacking a broadcast licence (such as Retequattro) to continue broadcasting.	– Transfers responsibility for the appointment of the RAI Board of Directors back to the Government and the Parliamentary Commission for General Guidance and Supervision of the broadcasting services. – Gives to the Minister of Economy, which is RAI’s controlling shareholder, the power to appoint two out of the nine members of RAI’s board, including its President, before privatisation. – Provides for the privatisation of RAI, allowing for the sale of small quotas (of up to 1 per cent) of the corporation’s share capital to single buyers, prohibiting the formation of trusts.	

ANNEX 2. List of legislation cited in the report

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Additional reading section

For more about the independence and impartiality of AGCOM following the adoption of the *Maccanico Law*, see:

- O. Grandinetti (see: Grandinetti, *Radio-television*, p. 2488);
- Pace (see: A. Pace, “Considerazioni finali”, (“Final considerations”), in G. Morbidelli and F. Donati (eds.), *Comunicazioni: verso il diritto della convergenza? (Communications: towards the rule of convergence?)*, Giappichelli, Torino, 2003, from p. 181; and

P. Caretti (see: Caretti, *The Communications Guarantee Authority*).

For more general studies, see also: G. Amato, “Autorità semi-indipendenti ed Autorità di garanzia”, (“Semi-independent Authority and Guarantee Authority”), in “*Autorità indipendenti e principi costituzionali, Atti del Convegno di Sorrento del 30 maggio 1997*” (*Independent authorities and constitutional principles. Documents from the Conference in Sorrento 30 May 1997*), Cedam, Padova, 1999.

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For more in the integrated communication system (SIC):

Critical about the incompatibility between the concepts of the SIC and competition rights is Guido Rossi, an Italian specialist in competition law (see: interview in *La Repubblica*, 4 December 2003). Such doubts are widely shared, even after the amendment of the calculation method of the SIC.

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