Written Comments in the case of *Centro Europa 7 v. Italy*

March 2010

OPEN SOCIETY
JUSTICE INITIATIVE

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 38433/09 - *Centro Europa 7 S.R.L. v. Italy*

WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE

Pursuant to leave granted on 11 February 2010 by the President of the Chamber, acting under Rule 44 § 2 of the Rules of Court, the Open Society Justice Initiative submits written comments on the legal principles that should govern the resolution of the Article 10 issues presented by this case.

Introduction

1. This case involves the alleged failure of the Italian authorities to provide an operating frequency to the applicant company, which was authorised to broadcast in 1999 but was not granted a frequency to do so until late 2008, and is still not on the air.[1] The application raises questions under Article 10 concerning the market dominance of Italy's principal private broadcasting group, the Mediaset group, and the fact that the Mediaset group was (and continues to be) controlled by the family of the serving Italian prime minister for much of the relevant period.

2. These written comments address the relevant European standards in the following areas:

   A. Guiding Principles. Both the Council of Europe and the European Union have developed standards on broadcast media pluralism. In addition, national legal systems require that governments make provision for a wide range of opinions and voices both within public broadcasting and across national broadcasting as a whole.

   B. Media Ownership. European standards recognise that the duty to ensure pluralism necessitates limits on media ownership, especially in broadcasting.

   C. Political Control. European standards require a diverse governance structure for public broadcasters and prohibit undue political or partisan ownership or control of private broadcasters so as to avoid government or political interference.

A. Guiding Principles on Broadcast Media Pluralism

3. Guidance from this Court, the Council of Europe and the European Union provide principles upon which to consider the question of broadcast media pluralism presented in this case. In addition, the laws and practices of the three European countries of a similar size to Italy – France, Germany and the United Kingdom – provide comparative guidance on the correct application of these principles in concrete circumstances. In many systems a distinction is made between the need to ensure pluralism (1) within the control and output of an individual broadcaster, known as "internal pluralism," and (2) across the broadcasting sector as a whole, known as "external pluralism."

4. This Court has underscored the state's obligation to be the "ultimate guarantor" of pluralism of ideas and information in broadcasting, in part because access to the airwaves remains limited and privileged, despite technological advances.[2] More recently, the Court has addressed significant questions related to licensing of broadcasters, including under circumstances of suspected political bias or otherwise arbitrary decision-making.[3]

5. *European Standards.* The Council of Europe has adopted a rights-based approach to media pluralism, including for broadcast media. In 2007, a Committee of Ministers Recommendation

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[1] In 2005, the case was referred by the domestic courts to the European Court of Justice, which found that the failure to grant the applicant an operating frequency was incompatible with European Union directives mandating fairness in television licensing. Subsequently, in 2008, the Italian *Consiglio di Stato* granted the applicant limited damages, as to both scope and quantum.

[2] See inter alia *Informationsverein Lentia v. Austria,* Judgment of 24 November 1993.

[3] See *Meltex v. Armenia*, Judgment of 17 June 2008, and *Glas Nadezhda v. Bulgaria*, Judgment of 11 October 2007. The Court recognized in these cases that excessive and unchecked discretion over licensing decisions gives officials an inordinate amount of leeway in shaping a media sector that is increasingly vital to democratic debate.

noted that "media pluralism and diversity of media content are essential for the functioning of a democratic society and are the corollaries of the fundamental right to freedom of expression and information."[4]

6. Article 11 of the Charter of Fundamental Rights of the European Union, based on the constitutional traditions of the 27 member states, guarantees that "the freedom and pluralism of the media shall be respected."

7. *France.* The jurisprudence of the French Constitutional Council has recognized media pluralism as an "objective with constitutional value" and a pre-requisite for democracy.[5] The 1986 Freedom of Communication Act tasks the High Broadcasting Council (Conseil Supérieur Audiovisuel, or "CSA") with enforcing its provisions aimed at guaranteeing broadcast pluralism.[6] As a general principle, when awarding radio and television licences, the CSA must balance the aspiring broadcasters' interests with two public-interest objectives: (1) the preservation of socio-cultural diversity and (2) competition within the broadcasting system.[7]

8. *Germany.* The German Federal Constitutional Court has produced perhaps the most profound and comprehensive jurisprudence in the continent on the constitutional aspects of broadcasting freedom. Since 1961, the German Court has issued some thirteen opinions, known as "the broadcasting judgments," that address various aspects of federal and state (Land) regulation of both private and public service broadcasting.

9. From its first broadcasting judgment, the German Court has emphasized that radio and television are "indispensable means of modern mass communication" that constitute not only a "medium," but also a "critical factor" in the formation of public opinion.[8] A fundamental element of the broadcasters' institutional "freedom of reporting" guaranteed by Article 5 of the German Basic Law is their right to be free of state intervention (principle of Staatsfreiheit). It is constitutionally impermissible for the State to control the editorial management of broadcasting entities either directly or indirectly.[9]

10. The same guarantees are enjoyed by other mass media, including the printed press. However, because of the special importance and peculiarities of broadcasting – including the technical limitations imposed, among others, by spectrum scarcity and the unusually high costs of entry into the broadcasting sector – it is imperative that broadcasting complies with the principle of *viewpoint pluralism*. In the words of the German Court, the broadcasting sector

> "should be neither at the mercy of the state, nor of one single social group. Therefore, broadcasting companies must be organized to allow all interests worthy of consideration to exert influence on their governing boards and to express themselves in the overall programming."[10]

11. To ensure broad-based oversight of programming in practice, the governing boards of German public broadcasters include representatives of political parties, religious denominations, trade unions and employer groups, educational institutions, and other civil society organizations.[11]

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[4] Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content, 31 January 2007. See also the similar Recommendation No. R(99)1 on Measures to Promote Media Pluralism, 19 Jan 1999.

[5] See Decisions No. 84-181 of 10-11 October 1984; No. 86-210 of 29 July 1986; and No. 86-217 of 18 September 1986.

[6] Act (*loi*) No. 86-1067 of 30 September 1986, as amended.

[7] *Ibid.*, Article 27.

[8] 12 BVerfGE 205 (1961) (known as the Zweite Deutsche Fernsehen (ZDF) case), as translated in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed., 1997), p. 404. The case involved a challenge by the Laender, on both federalism and free expression grounds, against the establishment of a second national television station by decree of the federal Chancellor.

[9] *Ibid.*, p. 406.

[10] *Ibid.*, p. 405.

[11] Since regulation of broadcasting is generally a constitutional prerogative of the *Laender*, a periodically revised Inter-State Broadcasting Agreement (RundfunkStaatsVertrag, RStV) has emerged as the main legal framework of German broadcasting. Land-level regulations must be compatible with the RStV.

12. With the emergence of private radio and television in the late 1970s and early 1980s the Court found that as with their public counterparts, private broadcasters are generally required to reflect societal diversity of opinion "in its greatest possible breadth and completeness."[12] The Court noted that it was ultimately the positive duty of the State to ensure, through "substantive, organizational and procedural [legal] provisions" as well as independent oversight mechanisms, that the private broadcasting system, in its totality, complies with those obligations.[13] The Court noted that even if the technological rationale for regulation of broadcasting becomes weaker with time, state regulation will likely continue to be constitutionally required to safeguard pluralism of viewpoints and freedom of broadcasting.[14]

13. With time and technological development, the German Constitutional Court moved from a system requiring every private broadcaster to have a pluralistic oversight body that reflects and guarantees diversity (internal pluralism) to one designed to ensure that the private broadcasting sector as a whole is sufficiently diverse, permitting less stringent controls on individual private broadcasters (external pluralism). In addition, the German Court has consistently held that a robust public broadcasting system remains indispensable to guaranteeing overall diversity and quality of content, including by remedying any shortcomings of the private broadcast sector.[15]

14. *Italy*. Like its German counterpart, the Italian Constitutional Court has played a significant role in seeking to shape the national legal framework for broadcasting, although there has been a marked lack of compliance with several of its key decisions.

15. From its early broadcasting opinions, the Italian Court recognized that both state-controlled and private broadcasters, if not properly regulated, ran the risk of becoming "powerful instruments used for partisan purposes, rather than for the benefit of the entire citizenship."[16] The Constitution therefore required that the broadcasting sector be organized by law in such a fashion as to fulfil two fundamental objectives:

> "[providing] programmes that respond to the need of offering the public services characterized by objective and comprehensive information, broad openness to all cultural currents, and impartial representation of ideas that find expression in society; as well as to promote, render effective and guarantee the right of access [to information] to the highest degree that is possible under the technical constraints."[17]

16. With the advent of commercial broadcasting, first locally and then nationally, the Italian Court adopted a doctrine, similar to that developed by its German counterpart, requiring the national legislature to guarantee the "external pluralism" of the private broadcasting sector as a whole. This meant, essentially, that the greatest possible number of actors and perspectives be granted access to the airwaves in order to enhance the scope of "voices" and perspectives available to the public.[18] The doctrine does not control the editorial orientation and programming of individual private broadcasters,[19] but it requires the legislature to guarantee, through various means of its choice, the overall pluralism of the private sector. The public broadcaster RAI, on the other hand, must be "rigorously impartial [and comprehensive] in reflecting the debates between the different political perspectives in the country," both within and outside electoral periods (the so-called *par condicio* doctrine).[20] As in Germany, the special role of the public

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[12] 57 BVerfGE 295 (1981) (Third Broadcasting Case), as translated in Kommers, above, p. 409.
[13] *Ibid*. See also 73 BVerfGE 118 (1986) (Fourth Broadcasting Case), at 157-59.
[14] *Ibid*.
[15] 73 BVerfGE 118 (1986).
[16] Judgment No. 225/1974 of 10 July 1974, para. 8.
[17] *Ibid*.
[18] Judgment No. 112/1993, para. 7(e); and Judgment No. 466/2002, para. 8. See also, on the relevant case law of the Constitutional Court generally, O. Grandinetti, "Principi costituzionali in materia radiotelevisiva e d.d.l. Gasparri" ("Constitutional principles on broadcasting and the Gasparri Bill"), *Giornale di Diritto Amministrativo*, no. 2, 2003.
[19] Constitutional Court Judgment No. 155/2002, para. 2(2).
[20] Constitutional Court Judgment No. 284//2002, para. 4.

broadcaster is meant to compensate for possible "pluralistic deficits" caused by the operation of the free market.

17. *United Kingdom.* Pluralism of broadcasting is guaranteed by several U.K. laws, including the 2003 Communication Act, which mandates the communications regulator (OFCOM) to secure "the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests", as well as ensure "the maintenance of a sufficient plurality of providers of different television and radio services."[21] This guidance applies to public interest broadcasters such as the British Broadcasting Corporation (BBC) and also to commercially funded broadcasters with a public interest remit, such as Channel 4. The BBC is an essential part of the overall pluralism of national broadcasting, similar to public service broadcasters in other European countries. The Charter that created the BBC in 1927 was most recently renewed in 2007, and states that the BBC exists "to serve the public interest" and in so doing must represent "the UK, its nations, regions and communities."[22]

B. Regulation of Broadcast Ownership as a Pluralism Tool

18. European standards require diversity of ownership and adopt methods of assessment of undue concentration of ownership that include audience or market share, rather than just simple limitations on how many channels an individual or company can own.

19. The Committee of Ministers Recommendation of 2007 urged member states to adopt specific measures aimed at promoting and maintaining media pluralism, including "the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets."[23] Practice in member states strongly suggests that such measures remain even more relevant in the face of digitalisation.

20. In July 2009, the European Commission published an independent study it had commissioned to identify media pluralism indicators in E.U. member states, with a view to developing a tool for monitoring threats to pluralism. The study, which includes country reports for each of the 27 E.U. states, draws upon the 2007 Committee of Ministers Recommendation in noting:

> "The majority of EU Member States have adopted regulations in the area of media ownership, since limitations on the influence which a single person, company or group may have in one or more media sectors, as well as rules ensuring a sufficient number of diverse media outlets, are generally considered to be important for assuring pluralistic and democratic representation in the media."[24]

21. According to the same study, 20 E.U. countries have media-specific restrictions on same-sector media ownership (e.g. within the print or broadcasting sectors) while 16 countries regulate cross-ownership by the same entity in two or more media sectors (e.g. print and broadcasting). In addition, several countries have adopted additional restrictions on the way in which media outlets can integrate with other industries such as communications networks, the advertising sector or other industrial sectors.[25]

22. In terms of the criteria that should be used to regulate media ownership, the Committee of Ministers Recommendation of 2007 encourages the use of "thresholds based on objective and realistic criteria, such as the audience share, circulation, turnover/revenue, the share capital or

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[21] Communications Act 2003, sec. 3(2)(c)-(d).

[22] At Article 3(1) and 4(d).

[23] Recommendation CM/Rec(2007)2 on Media Pluralism and Diversity of Media Content, 31 January 2007, at para. 2.1.

[24] *Independent Study on Indicators for Media Pluralism in the Member States – Toward a Risk-Based Approach: Final Report*, Leuven, July 2009 (prepared for the European Commission Directorate-General Information Society and Media) (hereafter "EC Pluralism Study"), p. 31; at: http://ec.europa.eu/information_society/media_taskforce/pluralism/study/index_en.htm.

[25] *Ibid.*, at Annex III: Overview of Legal and Policy Measures Promoting/Supporting Media Pluralism, p. 784.

voting rights."[26] This is because a single operator that holds only a few channels can still exercise a disproportionate amount of control over national TV coverage if the channels are large and/or influential. European Commission guidelines indicate that a "dominant position" is considered unlikely with less than a 25 percent share of the relevant market, is assumed at 40 percent, and is considered proven with more than 50 percent of market share.[27]

23. As a rule, E.U. countries use multiple criteria for limiting media ownership, combining simple limits on licence allocation with more complex limits on audience or revenue share. Thus, 17 countries use the number of licenses held by a single operator as one of the criteria for media ownership. Fourteen countries use audience and/or market share either in addition or as an alternative to the limit on licenses. These latter countries include Germany and the U.K. (using both audience and market/revenue share), as well as France (mostly capital share).[28]

24. Only four E.U. countries appear to use the "number of broadcast licenses held" as an exclusive threshold,[29] suggesting that it is generally considered to be an inadequate method for safeguarding broadcasting pluralism. Italian broadcasting falls – as a matter of regulatory action and entrenched practice, if not strict letter of the law – in this last category.

25. *France.* French law provides for a series of complex broadcast ownership restrictions. No person or company can hold more than one national terrestrial TV license.[30] Additional restrictions limit the amount of capital or voting rights that a single person/company can control within national (terrestrial) television license-holders. Thus, an entity controlling more than 15 percent of a national TV broadcaster cannot control more than 15 percent of a second such broadcaster.[31] In other cases, French law combines capital share and audience share thresholds, such that no single entity can control more than 49 percent of a national television company whose average audience, from both analogue and digital transmissions, exceeds eight percent of the total national TV audience.[32] Another set of rules limits cross-ownership by the same operator of analogue terrestrial radio or TV stations, cable TV stations and/or print media companies of a certain size.

26. *Germany.* The German constitutional system has been equally concerned about private interest or partisan domination of the broadcasting sector. Thus, already in the second broadcasting case, the Constitutional Court noted that "because of its wide-reaching effect and possibilities as well as the danger of misuse for one-sided propagandizing, [broadcasting] cannot be left free to the free play of market forces."[33]

27. The Inter-State Broadcasting Agreement (RStV) uses primarily the audience share model to prevent "controlling influence" on public opinion by any single operator in nationwide television programming: the relevant threshold is 30 percent of the (average) national audience rating. [34] Any entity whose outlets have a cumulative audience greater than the 30 percent threshold is subjected to sanctions and/or intervention by the competent Land media authority.

28. In addition, cross-ownership restrictions are triggered when a company that already holds a dominant position in a related media market (like print media or Internet services) reaches a 25

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[26] Recommendation CM/Rec(2007)2, above, para. 2.3.

[27] See EU Commission, "Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services" (2002/C 165/03), para. 75. The Guidelines do not specify what constitutes a "market share" in broadcasting markets; in electronic communications markets generally, the Commission defines market shares in function of total market revenue (e.g. from advertising) and/or control of supply (such as viewership). *Ibid*., paras 76-77.

[28] See EC Pluralism Study, above. Additional criteria used include capital shares, voting shares, and share of advertising market.

[29] These are Belgium, Estonia, Malta, and Sweden. Another four countries seem to have no media-specific ownership restrictions, presumably applying general anti-trust laws that tend to use market share criteria.

[30] Act No. 86-1067, as amended, section 41.

[31] *Ibid*., section 39(I)(4).

[32] *Ibid*., section 39(I)(1).

[33] 31 BVerfGE 328 (1971), at 325.

[34] RStV, as amended, art. 26.(1)-(2).

percent audience share in national television. [35] An expert Commission on Concentration in the Media (known as KEK) is charged with the ongoing monitoring and flagging of potentially dominant positions.

29. *United Kingdom.* In the UK, the joint parliamentary committee reporting on the draft 2003 Communications Act noted that the public interest in having a pluralistic broadcast sector required the maintenance of a diverse "range of broadcast media owners and voices," and the promotion of a system of broadcast ownership that is committed to providing impartial coverage of news and societal opinions. OFCOM is charged with preserving those values in the broadcasting sector.[36] The 2003 Act introduced new provisions highlighting "the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be sufficient plurality of persons with control of the media enterprises serving that audience." [37]

30. Media operators in the U.K. are subject to both general requirements of competition law, established by the 2002 Enterprise Act, and media-specific anti-trust provisions included in the 1996 Broadcasting Act and the 2003 Communications Act. As a general principle, the broadcasting regulatory authority (OFCOM) must define for every licensed service (including the broadcasting sector) the conditions considered "appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services."[38] According to the Communications Act, the criteria used by OFCOM to assess dominant positions in the telecommunications market, including broadcasting, must follow the relevant E.U. Commission's guidelines on market analysis and assessment of significant market power.[39] Similar rules apply to mergers and acquisitions of media-holding companies.[40] OFCOM routinely uses audience share, among other criteria, to determine whether proposed media mergers would be in the public interest.[41]

31. U.K. legislation also includes restrictions on cross-ownership of media outlets, which ban entities controlling more than 20 percent of the national or a local newspaper market from acquiring a television license (or having more than a 20 percent share in an entity holding a television license).

32. *Italy.* Space constraints do not allow for a comprehensive discussion in these written comments of the historical origins of private broadcasting in Italy, and their ongoing adverse impact on media pluralism in that country.[42] The national broadcast ownership picture, however, has

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[35] The same applies when an overall assessment of a company's aggregate holdings in television and other media markets suggests an "influence" equivalent to that of a company with a 30 percent national TV audience rating.

[36] Report of the House of Lords-House of Commons Joint Committee on the Draft Communications Bill, 25 July 2002, at www.publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/169.pdf.

[37] Section 59(2C)(a) Enterprise Act 2002, as amended.

[38] Communications Act 2003, sec. 316.1.

[39] *Ibid*., sec. 79.2.

[40] E.g. when one of the merging parties controls "at least a 25 percent share of the supply of newspapers or broadcasting in the United Kingdom or in a substantial part of it," the Secretary of State for Trade and Industry may ask OFCOM to carry out a preliminary "legitimate public interest" test on the proposed media merger.

[41] Thus, in February 2007, OFCOM ruled that it would not be in the public interest for the British Sky Broadcasting Group to be allowed to acquire a 17.9 percent stake in the private broadcaster ITV since, among other reasons, the acquisition would bring together "the second and third largest providers of TV news, with a combined audience share of 30.6 percent." The OFCOM opinion led to rulings against the merger by the Competition Commission and the Secretary of State, which were upheld by the Court of Appeal, which ordered BSkyB to reduce its stake in ITV to below 7.5 percent. *British Sky Broadcasting Group Plc v. The Competition Commissioner* [2010] EWCA Civ 2. The Court noted that there must be plurality of both range and number of persons with control of media enterprises (at para. 90) and that limiting the question to one of "number alone does not allow for sufficient protection of the sensitive interest of media pluralism" (at para. 123).

[42] For one such comprehensive discussion, see Open Society Institute, *Television Across Europe: Regulation, Policy and Independence* (2005), Italy chapter (hereafter "OSI Report 2005"), as updated by *Television Across*

remained largely unchanged since the early 1980s, when the privately-held Mediaset Group acquired the three national television channels that it continues to hold and operate to date.

33. For the past two decades, the three Mediaset channels and the three channels of the public broadcaster RAI jointly controlled, on average, more than 90 percent of both the national audience share and total advertising revenue in television.[43] Despite slight declines due to recent competition from satellite channels, the three Mediaset channels continue to command around 40 percent of the aggregate national television audience (including both terrestrial and satellite stations), and more than 50 percent of the national television advertising market. No other private broadcaster in the country begins to compare with Mediaset in terms of market share or overall influence. [44] As noted above, European Commission guidelines consider that a "dominant position" is assumed at 40 percent and is considered proven with more than 50 percent of market share.

34. In 1990, Italy adopted its first statute seeking to regulate private broadcasting (known as the Mammi Act) which banned "the establishment or maintenance of a dominant position" in any single broadcasting market (including television).[45] However, neither the legislature, nor the communications oversight authority (set up in 1997) has adopted a clear and coherent definition of what constitutes a "dominant position" in television or other single markets. [46] Attempts to introduce proper limits based on audience or market share have failed. The 1997 Act sought to introduce a threshold of 30 percent of the national advertising market, but the law was not enforced. The 2004 Gasparri Act introduced a ceiling defined as a share of the so-called Integrated Communications System (SIC), an uncommon construction that is so broad and heterogeneous that it has been met by almost universal skepticism and has proved to be entirely ineffective in practice.[47] For other forms of media, an audience share criteria is used. Italian law states that no one entity can control more than 20 percent of the total daily newspaper circulation and local radio audience share, but this does not apply for national radio or national or local television.[48]

35. Simple limits on the number of channels that an individual can control do apply. The Constitutional Court has, on multiple occasions, called on the legislature to set strict limits on a single entity's broadcasting market share and cross-ownership in multiple media markets.[49] In 1994, the Court struck down the provisions of the 1990 Mammi Act that allowed a single entity to own three national television networks on pluralism of information grounds.[50] In response, the 1997 Maccanico Act set the ownership limit for each operator at two nationwide terrestrial

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Europe: Follow-up Reports (2008), Italy chapter (hereafter "OSI Update 2008"); both available at www.mediapolicy.org.

[43] See European Parliament Resolution (2004)0373, para. 55; and OSI Report 2005 and Update 2008.

[44] It appears that in 2008, Sky Italy, the leading satellite TV operator, surpassed Mediaset for the first time in terms of total annual revenue. (See AGCOM Annual Report, July 2009). However, Sky's revenue comes predominantly from its subscription fees rather than advertising, and its audience rating is only about ten percent of the national average. The latter includes the viewership of the Mediaset and RAI channels that are carried on the Sky platforms, and that continue to dominate news and current affairs programming.

[45] See Act No. 223/1990 (Mammi' Act), art. 15.6 (repealed); Act. No. 249/1997 (Maccanico Act), art. 2(1), and 2005 Broadcasting Code, art. 5(1)(a).

[46] In 2007, an AGCOM assessment, using European Commission criteria, found that RAI and Mediaset jointly held a dominant position in Market 18, which covers broadcast content transmission services. AGCOM Deliberation 544/07/CONS of 31 October 2007. In October 2009, AGCOM initiated a proceeding, still pending, to determine the relevant criteria under national law. See AGCOM Deliberation 558/09/CONS.

[47] Act No. 104/2004 (Gasparri Act), art. 15(2). The SIC has been criticized even by AGCOM itself, the Italian communications authority in charge of policing it, for being incompatible with the concept of the "relevant market." In contrast, the European Commission divides telecommunications services into 18 different markets. See OSI Report 2005, p. 919 and note 143.

[48] See EC Pluralism study, p. 350.

[49] See *inter alia* Judgment No. 112/1993 of 26 March 1993.

[50] Judgment No. 420/1994 of 14 December 1994.

television channels.[51] However, these limits have not yet been enforced, as the Maccanico Act also allowed for an indefinite transition period so that the "over-quota" channels held by Mediaset and another provider could migrate to cable or satellite. In 2002, the Constitutional Court set 31 December 2003 as the peremptory deadline for implementing the anti-trust provisions of the 1997 Act.[52] However, a last-minute executive decree adopted by the then-Berlusconi government (and later ratified by Parliament) essentially "overruled" the Court, extending the transition indefinitely until the completion of the analogue-to-digital migration.[53] To this date, Mediaset continues to hold all three of its original channels.

36. The situation has not been changed by the further channels that have been (or will be) made available by the move to digital broadcasting, which might have been an opportunity to increase pluralism. The allocation plan under preparation by the Italian authorities for the analogue switch-off contemplates granting Mediaset one digital multiplex for each analogue channel it currently holds, multiplying its total output by up to five times.[54]

C. Restrictions on Political Ownership and Control of Broadcasters

37. The general legal principles outlined in Section A above highlight the importance to pluralism of preventing the government of the day or partisan special interests from interfering with both public and private broadcasters' editorial freedom and autonomy. Many European countries have adopted legal regimes that specifically ban and/or restrict the ability of senior politicians and political parties to control broadcasting entities and their programming. Thus, 11 E.U. countries, including Germany and the U.K., impose restrictions on direct ownership or control of broadcast media by political actors; while 14 E.U. countries, in addition or alternatively, require broadcasters to maintain independence from political parties and/or politicians. Italy does neither.[55]

38. *France.* France does not appear to have explicit restrictions of that nature, either. However, French law requires the High Broadcasting Authority to consider, in awarding television licences, "the [license] applicant's commitment to providing fair and diverse information and to guaranteeing its editorial independence from its shareholders."[56]

39. *Germany.* German law prohibits political parties and organisations from directly or indirectly owning or controlling radio or TV outlets. The question of their (partial) control of, or involvement with, a private broadcaster was the subject of a recent judgment by the Federal Constitutional Court, which considered the constitutionality of a Land statute that barred granting a broadcast license to any company in which political parties or voter groups held a stake of any size. The Court ruled that an absolute prohibition was not justified. It confirmed, however, its longstanding position that the legislator was free, and indeed required, to ban the involvement of political parties in private broadcasting if, in any given case, the party would be in a position to exercise "determining influence" on the broadcaster's content or programming (e.g. if it controls a significant stake).[57] The advisory councils of most German broadcasters

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[51] The Act limits the total number of licenses that may be awarded to a single entity to no more than 20 percent of the overall number of national terrestrial television licenses.

[52] Judgment No 466/2002.

[53] Decree (*Decretto Legge*) No. 352 of 24 December 2003 (known as the "Rete 4 Decree"), ratified by Act No. 43 of 24 February 2004.

[54] Minutes of Justice Initiative interview with senior AGCOM officials, December 17, 2009, Rome, Italy (on file). A digital multiplex is, roughly, a bundle of up to five digital channels/programmes that can be broadcast within the same frequency range formerly used by a single analogue channel.

[55] EC Pluralism Study, p. 782. In fact, for much of RAI's existence, Italy's three main political groupings had an open agreement to control one RAI channel each.

[56] Act 86-1067, art. 27.

[57] Judgment of 12 March 2008, 2 BvF 4/03. See also Constitutional Court of Bulgaria, Judgment No. 21 of 14 November 1996 (holding that the statutory appointment formula of the National Broadcasting Council, with appointment powers shared by the Parliament, President and the Prime Minister, failed to guarantee the Council's independence from domination by one or more political groups).

include representatives of political parties, which are seen as "socially relevant groups." However, they make up only a small part of the council memberships.[58]

40. *United Kingdom*. In order to guarantee the independence of U.K. broadcast media from undue political influence, the 1990 Broadcasting Act disqualifies certain subjects with political connections from holding a broadcasting licence. These subjects include bodies "whose objects are wholly or mainly of a political nature" and bodies affiliated to them, including corporate bodies and their associates, as well as all individuals who are officers of such bodies.[59] Furthermore, OFCOM can disqualify a person from holding a licence if it estimates that "any relevant body," as defined above, "is, by the giving of financial assistance or otherwise, exerting influence over the activities of that person", and such influence may "lead to results which are adverse to the public interest."[60] The BBC Charter states that "The BBC shall be independent in all matters concerning the content of its output, the times and manner in which this is supplied, and in the management of its affairs."[61] The Corporation is governed by the BBC Trust which is required to ensure "that the independence of the BBC is maintained."[62] Trustees are selected by merit and appointed by the Head of State on the advice of the government in a process overseen by the Commissioner for Public Appointments.

41. *Italy.* The executive in Italy currently has significant influence over both public and private broadcasters, a situation that has been described as a "broadcasting anomaly." The Mediaset Group is effectively controlled by Mr. Silvio Berlusconi, who is currently serving a third term as Italian prime minister, and has alternated as leader of the governing coalition or the parliamentary opposition since the early 1990s. [63]

42. In addition, concerns have been expressed that the Italian government interferes with the independence of the public broadcaster, RAI. The Italian Constitutional Court has required that the governing board of the public broadcaster (RAI), in particular, should be set up in a way that guarantees its objectivity and prevents the executive branch from dominating it, whether directly or indirectly (the so-called "internal pluralism").[64] In 2004, a resolution of the European Parliament regretted "the repeated and documented instances of governmental interference, pressure and censorship in respect of the corporate structure and schedules" of RAI under the Berlusconi government of the time.[65] This means that when Mr. Berlusconi and his party are in power, they control, directly or indirectly, the entire RAI-Mediaset duopoly, which is the primary source of news and information, including political coverage, for the overwhelming majority of Italians. In addition, broadcast licensing and frequency allocation decisions in Italy are ultimately within the power of the executive branch.[66]

43. In 2004 the Frattini Act sought to resolve this conflict of interest issue by prohibiting those in public office from also being the managers and executives of media companies, but this

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[58] EC Pluralism Study, p. 253.

[59] Broadcasting Act 1990 (as amended by Broadcasting Act 1996), Sch. 2, Part II, sec. 1(1)(d)-(g). The same prohibition applies to corporate bodies in which any of the bodies or individuals mentioned above hold a share of at least five percent or which are controlled by them. *Ibid.,* Sch. 2, Part II, sec. 1(1)(h)-(j).

[60] *Ibid*., Sch. 2, Part II, sec. 4(1).

[61] Article 6(1).

[62] Article 23(b).

[63] The Berlusconi family owns Fininvest, a major publishing and communications company that, in turn, holds a controlling 31-percent share in Mediaset (before 2005, it held a 51 percent share). Fininvest also controls one of Italy's largest publishers (Mondadori), a film company and the AC Milan football team, among other assets. Mediaset's own advertising arm, Publitalia '80, maintains a dominant position in the national advertising market. See OSI Update 2008, p. 31.

[64] Judgment No. 225/1974 of 10 July 1974, para. 8(a). See also Constitutional Court Judgment No. 826/1988 of 14 July 1988.

[65] Resolution (2004)0373, para. 59. For a description of the (potential for) disproportionate influence exercised by the government of the day on RAI's governance and programming, see OSI's 2005 Report and 2008 Update.

[66] Licenses and frequency authorizations are issued by the Telecommunications Ministry, in consultation with AGCOM, the communications authority. See 1997 Act, as amended; 2005 Broadcasting Code, arts. 15-16 and 21; and AGCOM Regulation 78/1998.

prohibition did not include the owners or controlling shareholders. In 2004, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution which "deplored" the failure of successive Italian governments since 1994 to resolve the conflict of interest issue and "disagreed with the leading principle of the Frattini Bill."[67] Furthermore, PACE highlighted Italy's television duopoly "anomaly" and expressed strong doubts that the anti-trust provisions of the then-recent Gasparri Act would address the problem, and called for "specific measures to bring an end to the current RAI-Mediaset duopoly … and to ensure that digitalisation will guarantee pluralism of content."[68] The European Parliament made similar observations and recommendations in a resolution in April 2004, noting that the "level of concentration of the television market in Italy is currently the highest within Europe," and the anomaly "owing to a unique combination of economic, political and media power in the hands of one man."[69] The resolution concluded that "the right of [Italian] citizens to pluralist information has been considerably weakened for decades."

Conclusion

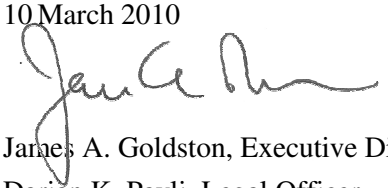
44. European standards arising out of the jurisprudence of this Court and pan-European democratic traditions require that states must guarantee the right of individuals and the public at large to have access to a pluralistic media sector, especially in broadcasting. This right assumes that neither the government, nor special private or partisan interests should be allowed to singularly control or dominate the broadcasting sector or significant parts thereof—either structurally or in terms of content. States should ensure that a sufficient variety of outlets and perspectives, provided by a range of different owners, is available to the public. Allowing, in particular, senior politicians and/or government officials to control, directly or indirectly, significant segments of the national broadcasting sector is incompatible with current European notions of freedom of expression.

Suggestions for general measures

45. It appears that the Court has yet to assess a country's overall compliance with its Article 10 obligation to guarantee its citizens access to pluralistic broadcast media, or the potential conflict of interest raised, in that same respect, by senior officials with significant proprietary holdings in various media sectors.

46. The circumstances of the current case have arisen within the context of a greater and older malaise of the Italian broadcasting and information system. That general situation would not be cured even if the current applicant were to go on the air tomorrow. In the event that an Article 10 violation is found in this case, we urge the Court to consider ordering measures of a general and systemic nature to be implemented by Italy with a view to addressing its broader failure to guarantee the pluralism of its broadcasting system. The flawed digital transition being currently implemented by Italy, and its possibly irreversible consequences, make the case for such corrective, general measures even more pressing and compelling.

10 March 2010



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[67] PACE Resolution 1387 (2004) on Monopolisation of the Electronic Media and Possible Abuse of Power in Italy, 24 June 2004, para. 3. See also the European Commission for Democracy Through Law (Venice Commission) Opinion No. 309/2004 of 13 June 2004 (prepared at the request of PACE).
[68] Para. 11.
[69] Resolution (2004)0373, paras 55, 60.