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Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe: The case of Italy

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mediadem

Project profile

MEDIADEM is a European research project which seeks to understand and explain the factors that promote or conversely prevent the development of policies supporting free and independent media. The project combines a country-based study in Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK with a comparative analysis across media sectors and various types of media services. It will investigate the configuration of media policies in the aforementioned countries and will examine the opportunities and challenges generated by new media services for media freedom and independence. Moreover, external pressures on the design and implementation of state media policies, stemming from the European Union and the Council of Europe, will be thoroughly discussed and analysed.

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1. Introduction

There has been a clear link between media organisation and regulation and the Italian political system since the Fascist period when, for the first time, the importance of media as a means to steer civic opinion was acknowledged and developed. The regulation of that period is an example of preventive control over the activity of any publisher, journalist or (radio) broadcaster able to verify *ex ante* the symmetry between the dominant party views and the information actually diffused to the public.[1]

After the fall of the Fascist government and the subsequent end of World War II, the new government started a period of "normalising" the media system, amending and reforming the previous legislation in order to comply with the newly adopted Constitution,[2] which included the freedom of the press as one of its fundamental pillars.[3] Thus, the period between the end of World War II and the 1970s was mostly characterised by the birth, or rebirth, of the press system, with the possibility for the newspapers closed or strongly limited by the Fascist dictatorship to regain their role and importance in the market. The economic boom that characterised the aftermath of the War also comprised the initiation and diffusion of the television service that came into being in 1954.

Only in the 1970s did the press market show signs of financial difficulties, while the same period is thought of as the start of commercial television, since the first private broadcasters emerged in the broadcasting market. The critical situation of the press system then opened the floor to a process that continued during the following decades: the increasing interest of powerful corporate groups in seizing and controlling the major newspapers and magazines, which was only slightly limited by legislative intervention.[4] Nevertheless, the government's concerns over the press crisis found positive results with the enactment of a financial subsidisation of the press that is still in operation now. If at that time such a decision was welcomed as a solution for the safeguard of the principle of pluralism since small and niche publications were saved from complete closure, the stabilisation of such governmental contributions to the press had strongly affected the system, reducing its capabilities to react to endogenous and exogenous factors, such as the increased internal competition through free press and, more importantly, the development of new technologies.

Regarding the broadcasting system, the Italian situation can be seen as a continuous struggle to limit the politicisation of the national broadcasters, in particular the public service broadcaster which has always been strictly controlled by the government and political parties. Indeed, the public service broadcaster

[1] P. Caretti, *Diritto dell'informazione e della comunicazione – Stampa, radiotelevisione, telecomunicazioni, teatro e cinema*, [*Information and communication law – Press, broadcasting, telecommunication, theatre and cinema*] (2009), at p. 38; E. Barendt, *Broadcasting Law – A comparative study*, (1993), at p. 24.

[2] See Law 47/1948 that addressed many of the crucial issues of press regulation, from the liability of publishers and editors of newspapers to the abolition of the obligation to register for any publication, to the definition of the offences concerning the press.

[3] See below at par. 3.2.1. for the analysis of article 21 of the Italian Constitution.

[4] See Law 416/1981.

Radiotelevisione Italiana (RAI) has never been truly independent from the major political parties, though on a few occasions legislation was enacted by the Parliament with the objective of ensuring RAI's independence from the executive branch. However, neither these legislative interventions nor the repeated reference to this point in several judgements of the Constitutional Court were sufficient to achieve a complete separation between the public service broadcaster governance bodies and the executive power. This ended into the "parcelling" of the available channels to the major political parties, the so-called *lottizzazione*, which characterised public service broadcasting for the subsequent decades.

When commercial television began in the 1970s, thanks again to the intervention of the Constitutional Court, the media framework changed. Deregulation allowed private stations to broadcast at the local level. However, the newly-emerged market actors coordinated their activities by transmitting the same programmes nationwide, providing in practice a national broadcasting chain. This situation was not dealt with by the then government, paving the way for the rise of a corporate group which in the mid-1980s started to be seen as the major competitor of the public broadcaster, namely the Mediaset group. In fact, in 1984, because of financial difficulties, two of the national private channels (owned by two different press publishers) were bought by the Mediaset group, adding them to the successful commercial channel already owned, yet also present on the broadcasting network.

The duopoly of Mediaset and RAI channels was then legalised by legislative intervention, showing the not-concealed alliance between politics and media. In particular, the law enacted in 1990 was clearly adapting both content and, more importantly, anti-trust regulation to the existing situation allowing both RAI and Mediaset to keep their channels and frequencies. This situation obviously limited opportunities for access and development of further competitors, thus limiting pluralism in the sources of information of citizens.[5] This situation did not improve due to the results of the 1994 elections, when the media tycoon Silvio Berlusconi, owner of the Mediaset group, won the elections becoming Prime Minister.

The subsequent fall of the executive with the following elections, won by the left wing party, provided a small opening for a more pluralistic regime. In particular, in 1997 Law 249/1997 required the partial privatisation of RAI, the restructuring of the third channel of RAI into an advertising-free station and the dissolution of one of the private channels of the Mediaset group. However, none of the previous choices were put into practice, due to the resistance of the opposition party and parts of the coalition government. The fall of the left-wing executive, paved the way for a new victory for Berlusconi's coalition in 2001. Again the position of Prime Minister Silvio Berlusconi raised continuous debate during any legislative intervention regarding the media sector. The most important intervention during this legislature was Law 112/2004 that attempted to stop the application of the aforementioned provisions of the 1997 law and the subsequent intervention of the Constitutional Court, saving in particular the interests of the Mediaset group and the existence of one of its broadcasting channels. The law also envisioned the possibility of a privatisation of the state-owned television, but this has not yet been carried out in practice. The promotion of digital terrestrial broadcasting was seen then as a solution to the "Italian anomaly", being capable of opening up the market to new competitors and increasing

[5] See G. Mazzoleni and G. Vigevani, "Italy", in Open Society Institute (ed.), *Television across Europe: regulation, policy and independence* (2005) 865, at p. 876.

the level of pluralism as the number of available networks would be increased. However, the two major players have already seized a large quantity of frequencies, thereby perpetuateing their dominance.[6]

An important element of the Italian framework, in light of this short historical analysis of the political and legislative framework, regards the role of the judiciary, and in particular the Constitutional Court, in steering and correcting the media regulation. The Constitutional Court did not only sanction with a declaration of unconstitutionality conduct which does not comply with the Constitution, but it has also developed a comprehensive jurisprudence in the broadcasting field, identifying the fundamental principles governing the media that could be used as guidelines for legislative action. Unfortunately, the reaction of the Parliament to the – not-so-subtle - requests has been almost non-existent, due to internal struggles in the major political parties and the fear of addressing sensitive issues that could result in reduced support in the elections.

New media (such as digital television, broadband connection, Internet and satellite broadcasting) in the meantime has been diffusing all over the country, pushing for a change in the habits of the Italian audience. New technologies and the global media market may succeed in establishing the conditions for a free market that lawmakers have failed to create. However the approach that has been taken by the government for this new framework is to leave regulation almost completely to the logic of the market, which does not provide any guarantee of protecting and enhancing the level of democracy in this sector.

The following paragraphs will analyse more deeply the current media system in Italy providing a general overview of each market sector, namely press, broadcasting, radio and new media (par. 2), before introducing the legislative framework for the media (par. 3). Finally, this contribution will identify the most critical issues that characterise the Italian media policy, providing possible hints for future trends in the country (par. 4).

2. The media landscape in Italy

The press sector is one of the most important business sectors in Italy, thought current trends show that the crisis has heavily affected this sector requiring the adoption of new strategies at the publishing level. The total number of publishers registered at the national registry for communication providers[7] is 848, including electronic press publishers (6.3%), paper press publishers (53.9%) and press publishers that use both mediums (39.8%).[8] The registration – though obligatory for the communication

[6] See below in par. 2.

[7] The *Registro degli operatori di comunicazione* [Communication providers registry] (ROC) introduced by article 1 of Law 249/1997 (which substituted the previous *Registro degli editori*) for press publishers, extended to all communication providers including press agencies, advertising agents, and broadcasters. It is an obligation for any communication service and/or content provider to register with the ROC in order to distribute their content and/or services in Italian communication networks. See G. Corasaniti, "Il registro degli operatori della comunicazione tra problematiche definitorie e deleghe ai comitati regionali per le comunicazioni" [The communication providers registry between definition problems and delegation to the regional communication committees], 25 Dir. Informazione e Informatica (2009) 221.

[8] AGCOM, "Annual Report 2010", available at: http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=19 (last visited on 19/10/2010).

content and/or service providers – does not imply that all the registered members are currently active on the market.

The estimated number of newspapers in Italy is 200, also including the free press. The total is relatively high but it can be explained according to two factors: the geographical area of distribution (newspapers available at the national level are fewer in number, while the regional, inter-regional and provincial press count for more in total; however, looking at the number of copies sold the proportion is the opposite); and specific content (such as economic, sports and political, as many of them are still related to political parties).[9] The most recent data reflects an overall negative situation either in terms of reduced revenues for all segments of press publishing, evaluated at 14% less than 2008 and almost 20% less than 2006. The only case in which the trend for the last year seems merely anti-cyclical is the electronic press, which in the long run provides the best situation, though its importance in value is still limited (see table 1).

Table 1: Total revenues for press sector (ml. of Euro)

	2006	**2007**	**2008**	**2009**	**Var. % 08/09**	**Var. % 06/09**
Newspapers	2651	2627	2449	2135	-12.8	-16.7
Periodicals	2162	2138	2020	1577	-21.9	-27.1
Electronic press	119	162	204	197	-3.3	65
Other revenues	833	813	765	774	1.2	-8.1
Total	**5765**	**5740**	**5437**	**4684**	**-13.9**	**-18.9**

Source: AGCOM (2010) and (2007)

The reduction in total revenues flows from two sets of reasons: on the one hand, the economic crisis has negatively affected the purchasing habits of consumers and the investment strategies of enterprises; on the other hand, the diffusion of new media has developed a new approach to the sources of information. Concerning the former, it should be emphasised that the reduced sale of copies affected not only the traditional press but also the free press, which showed the larger decrease (-23.7%), with a concurrent general reduction in advertising expenditures of almost 1/5 as compared to the previous year. Concerning the latter, instead, the data about the average number of Internet users accessing the electronic version of the newspapers show the increasing importance of such source of information, moving from 3.4 millions in 2008 to 3.8 in 2009.[10]

[9] ACGM, *Indagine conoscitiva riguardante il settore dell'editoria quotidiana, periodica e multimediale [Study on the daily, periodical and multimedia publication sectors]* (2006), available at: www.agcm.it (last visited on 19/10/2010).

[10] AGCOM, "Annual report 2010", p. 102 and AGCOM, "Annual Report 2009", available at: http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=17 (last visited on 19/10/2010).

It is worth noting, that in the press sector most newspapers are owned and controlled by a few financial trusts, namely RCS Mediagroup, Gruppo Editoriale L'Espresso, Gruppo Mondadori, IlSole24 and Gruppo Caltagirone. The first three of these comprise almost 60% of the press sector.[11]

Since the end of World War II, the Italian government has subsidised the press sector with direct and indirect contribution to its activity. The justification has always been found in the need to eliminate any economics-based obstacle to pluralism, safeguarding the existence and development of smaller publishing enterprises and cultural initiatives. The recent legislation on the point, namely Law 230/1990, however, has been criticised since the criteria to access indirect contribution were not deemed effective in terms of protection of pluralism; on the contrary they would only fund surreptitiously a specific type of companies (in the legal form of cooperatives) and political parties.[12]

Due to the stratification of different regulation on media subsidisation, the current legal framework is under review in order to provide a reorganisation which could achieve a higher level of effectiveness in the light of the overall objective of promoting the so-called "external pluralism".[13]

The online distribution of printed content is growing and the online versions of newspapers are in the highest positions of rankings of the most visited websites.[14] However, their style and format are not yet satisfactory in view of the available interactivity potentiality of online distribution, as they are still more focused on textual articles with limited role given to multimedia and to user-generated content.[15]

Current strategies of publishing groups attempt to increase revenues in the electronic market, building on the reputation of the offline publications, though at the moment the by-line sales are still insufficient to justify different business strategies. The current debate focuses on the challenge for publishers of newspapers to find ways to charge for content without alienating readers, identifying information products on which to levy additional fees for consumption. Tailored commercial services, such as those available in mobile communication, are currently deemed one possible solution.

The Italian television sector is currently undergoing a wide transformation which is due, partly, to the recently-enacted legislative reform[16] and, partly, to the current shift from analogue to digital television.[17] In contrast to other media sectors, television has been more resistant to the effects of the economic crisis, as is shown by the lesser reduction in advertising revenues and by the increase in additional pay-per-view services. Although analogue television is still the main player on the market, the increasing importance of satellite broadcasting and new communication providers of

[11] AGCOM, "Annual report 2010", p. 94.
[12] See Caretti, *Diritto dell'informazione e della comunicazione*, p. 76.
[13] For the definition of external pluralism, see Constitutional Court, decision n. 474/1984.
[14] AGCOM, "Annual report 2010", p. 92.
[15] R. Bertero, *Il quotidiano online in Italia: Stato dell'arte e possibili evoluzioni* [*The online newspapers in Italy: State of the art and possible developments*] (2009), available at: http://www.lsdi.it/wp-content/Lsdi-tesi_roberta_bertero.pdf (last visited on 19/10/2010).
[16] See the *Testo Unico dei servizi media audiovisivi e radiofonici* [*Code of audiovisual and radio services*] (TUSMAR), legislative decree 177/2005, with the recent amendments introduced by the legislative decree 44/2010, which implemented the AVMS directive in Italy.
[17] The total shift towards digital television is scheduled for 2012, and currently it seems that, after a long 'experimentation' period, the process will be completed on time.

pay-TV implies that the current position is but a moment in an ongoing process whose outcome is not yet definable.

As mentioned, the available data concerning the television sector provides a positive picture of the sector, which registered an increase in overall revenues of 1.7%. Looking at each source, the decreasing trend that affected the advertising revenues is clear, though it is still the most important source of funding for the television sector; a greater more role has been gained by the pay-TV component, comprising 1/3 of the overall revenues (see table 2).

Table 2: Total revenues for television sector (ml. of Euro)

	2006	**2007**	**2008**	**2009**	**Var. % 08/09**	**Var. % 06/09**
Fee	1491	1567	1603	1630	1.7	9,3
Pay-tv	2145	2322	2677	2875	7.4	34
Advertising	3825	3933	3906	3541	-9.3	-7,5
Other sources	156	245	267	548	104.9	251
Total	**7617**	**8067**	**8453**	**8594**	**1.7**	12

Source: AGCOM (2008) and (2010)

Italy, like the other EU countries, has a mixed broadcasting system that provides for a public television provider, RAI, and a set of private broadcasters born during the unplanned period of deregulation in the 1970s. Among the latter, the most important is RTI-Mediaset, whose economic strength has become so large that the current situation in analogue broadcasting can be qualified as a duopoly, whose legitimacy is also questioned by the fact that the owner of the RTI-Mediaset group, the tycoon Silvio Berlusconi, currently occupies the position of Prime Minister.

This perception changes if digital and pay-TV broadcasters are also taken into the picture. As a matter of fact, the main competitors are then three as they also include Sky TV, which is a pay-TV on satellite communication network. Altogether, these three competitors comprise more than 90% of the television market.[18]

RAI represents the public pole of broadcasting. RAI controls three analogue television channels, thirteen digital channels, and seven satellite channels. It also provides three radio channels which almost replicate the audience targets of the analogue television ones. The broadcasting service is assigned to RAI by means of a renewable national contract lasting three years between the company and the Department of Communication, according to the guidelines adopted by the Department and the Italian Communication Authority.[19]

[18] See that each of them has a different business strategy, which is based on the annual household license fee for RAI, while on pay-per-view services for Sky Italia and on advertising investments for RTI-Mediaset. See AGCOM, "Annual report 2010", p. 76 ff.
[19] See below par. 3.1.

Concerning its legal form, RAI is a joint-stock company,[20] whose internal governance has been reformed by the recent legislative decree 177/2005, the *Testo Unico sui servizi media audiovisivi e radiofonici* (TUSMAR), which attempted to overcome the strong connection between the board of directors and the political parties, which resulted in a polarised broadcasting system.[21] The RAI board of directors is now elected by the assembly of the shareholders, giving the representative of the government (the Ministry of Economics and Finance) the possibility to present a set of candidates proportional to number of shares. Moreover, to improve the independence and autonomy of the directors, their mandate now lasts only three years with the possibility of only one renewal. The difficulties encountered in the recent election of the board of directors, however, show that it will be difficult to fully dispel the domination of major political parties over the governing body of RAI.

The shift towards digital television is an ongoing process that has as its objective the full transfer to digital throughout the country by 2012. Currently there are already 40 national free channels and over 30 pay-per-view channels that transmit digitally. Since the initial development of this new broadcasting technique, the Italian legislator was keen to endorse it in order to improve the level of pluralism in the sector, overcoming the scarcity of frequencies that characterised analogue transmission.[22] However, this optimistic interpretation was not shared by the Constitutional Court, which understood the improvement of pluralism only as an "uncertain event", and required instead a set of specific monitoring interventions by the State.[23]

Moreover, the technical development of digital broadcasting opened a debate concerning the general public service function of the broadcasting sector. In particular, it was proposed that, given the increase in the volume of the content being offered and in the potential number of content providers providing it, the model to be adopted should have been a universal broadcasting service.[24] In this approach the general obligations of the public service broadcaster should have been applicable to all broadcasting providers. However, such an interpretation was contradicted by a judgement of the Constitutional Court which affirmed that the move from a public monopoly did not eliminate the need and constitutional rational for a public broadcasting service which still has its purpose of enhancing the participation of citizens in the cultural and social development of the country.[25]

Most broadcasting channels, public or private, have also provided an electronic version of their programmes online, which comprises both free and pay-per-view services. However, the quality of these experiences for the final user is still unsatisfactory. A recent survey focused on the online website of the public service

[20] See article 49 of the TUSMAR.

[21] See that the previous system achieved the so called "*lottizzazione*" of the three broadcasting channels to the governing coalition (RAI 1), right wing parties (RAI 2), and left wing parties (RAI 3). See on this point, P. Mancini, *Elogio della lottizzazione - La via italiana al pluralismo [Praise for lottizzazione – the Italian way for pluralism]* (2009).

[22] The law that opened the doors to experimentation of digital broadcasting dates back to 2001, namely Law 66/2001. See A. D'Arma, "Shaping tomorrow's television: Policies on digital television in Italy 1996-2006", in M. Ardizzoni and C. Ferrari (eds), *Beyond monopoly – Globalization and Contemporary Italian media* (2010) 3, where the author emphasises the underlying economic rationals that caused the Italian government to endorse so quickly and efficiently the new broadcasting system.

[23] See Constitutional Court, decision n. 446/2002.

24 Caretti, *Diritto dell'informazione e della comunicazione*, p. 166

[25] See Constitutional Court, decision n. 284/2002.

broadcaster, on the one hand, emphasised the improvements of the interactive character of this offering, while on the other it pointed out the difficulties in providing a user-friendly website, which was perceived as difficult to navigate and always requiring additional external tools, such as search engines.[26]

The radio sector mainly follows the distinction between public service broadcaster, the three RAI channels, and private networks which are individual radios or part of more general media groups. The negative trend in the average number of radio listeners and access to the market of competitors available on different devices (e.g. personal computers and mobile phones) imposes a redefinition of radio networks strategies.[27] In practice, the major publishing groups have increased the development of multimedia activities as synergistic and complementary to the traditional radio service. In particular, web streaming and podcasting seem to be the major solutions attracting online listeners. In addition, mobile services are changing and widening their offerings in terms of content but also providing interactive services to final users, based on the convergence of mediums.

Internet diffusion has reached almost half on Italian population.[28] The wider availability of this new source of information both at home and in offices has changed the use of traditional ways of communication. A recent study of the national population showed that an increased percentage of people use the Internet not only passively (to search for information on education, purchase of goods, etc.), but also to participate in the so-called Web 2.0. The majority of people still have a low level of involvement, such as reading blogs and participating in chats, newsgroups, and discussion forums online, but the interest in user-generated content is beginning to take off also in Italy (see table 3).[29]

Table 3: Internet communication activities (%)

Phone calls	15,9
Video calls	15,9
Chat, blogs, newsgroups and discussion forums	22,3
Instant messaging	21,3
Read blogs	28,5
Write or manage own blogs	7,8
Total	**100**

Source: ISTAT (2009)

News agencies in Italy provide the majority information content to the media. After the experience during the Fascist period of a state-owned (and consequently controlled by government interests) news agency, the *Agenzia Stefani*, the following

[26] AGCOM, "Annual report 2010", p. 202.
[27] AGCOM, "Annual report 2009", p. 83.
[28] ISTAT, Indagine multiscopo sulle famiglie "Aspetti della vita quotidiana", [Multiobjective analysisi on Italian families 'Daily life elements'] (2009), available at: http://www.istat.it/dati/catalogo/20090312_00/ (last visited on 19/10/2010).
[29] Ibid,.

agencies have always been free from government influence in the governance structure. In particular, the oldest news agency *Ansa* is a cooperative company composed only of newspapers publishers. Many others are instead privately-owned companies, such as *Italia, Adnkronos, Asca, Il Sole 24 ore Radiocor*,[30] which provide not only coverage of national news but also foreign news, in some cases with offices abroad (e.g. Ansa), or through connections with foreign news agencies.

News agencies in Italy have improved their role and importance in the emerging ITC-based framework for media, as they have started to provide directly, without the intermediation of any other media provider, additional services to online users as well, such as short video news available on the website, teletext service and an SMS service for mobile phones. In this sense, it is no longer possible to characterise news agencies as mere sources of information for media operators, which have limited connection with the final recipients of such information; rather they have become competitors of other media operators for information provision.[31]

The journalist profession in Italy is regulated by Law 69/1963 which defines journalistic activity as a professional intellectual activity, regulated specially under labour law, and imposes the obligation to enrol in the *Ordine dei Giornalisti*, ODG (journalists register) on any person that engages in such activity, including semi-professionally. The ODG distinguishes between two types of categories: professional (who continually and exclusively work as journalists) and freelance journalists who can work in any communication network. The former category has just under 28 thousands members, while the latter has over 64 thousands.[32] In order to become a professional journalist, a period of practice of at least eighteen months is required after which the applicant must pass a professional qualification test.

The law mentioned above provides for the self-regulation of the category of journalists (the ODG), which can elect their own representatives in internal governance bodies and eventually impose sanctions where there is non-compliance with rules.[33]

In the last ten years the consumption of all types of media increased, at different rates (from 2% of TV to 26.9% of Internet), reaching a higher percentage of the total population (almost 100% in the case of TV diffusion, but not yet 50% in the

[30] Note that many of them were linked to specific political orientations at their birth, such as the Asca to the *Democrazia Cristiana* political party, or Italia to the social democrats . However, all of them have tried to comply with a pluralistic view of information. See S. Lepri, "Storia e funzioni delle agenzie di informazione" [History and function of the press agencies], in V. Roidi (ed.), *Studiare da giornalista. Il sistema dell'informazione [Studying to become a journalist. The information system]*, vol. 1 (2003) 172.

[31] Note that the provision of complete articles or video reports immediately publishable by the media provider has become more and more widespread, without any further intervention. See A. Meucci, "Agenzie di stampa e quotidiani – Una notizia dall'ansa ai giornali" [News agencies and daily news – News from ansa to newspapers], Università di Siena, Dipartimento di Scienze Storiche, Giuridiche, Politiche e Sociali, WP n. 42, 2001.

[32] Ordine Dei Giornalisti, "Annuario Giornalisti 2010" [Journalist yearbook 2010], available at: http://www.annuariogiornalistiitaliani.it/home.asp (last visited on 19/10/2010).

[33] The role of the ODG has also been questioned in front of the Constitutional Court, which did not define it as an institution that limits the freedom of the press because it regulates only the ways in which professional activity should be carried out, it does not impose any limit on the freedom of expression of those who do not wish to become journalists. See Constitutional Court, decision n. 11/1968.

case of Internet diffusion).[34] However, the overall trend showed a multiplication of media and expansion in their use without a general reduction of one type in favour of the others (see table 4).

In more recent years, the data available shows a move from paid to free media services, in particular mobile phone diffusion increased in the basic use but it decreased in the more expensive Internet services; the same situation can be seen for the newspapers where the amount of regular weekly and daily readers has decreased considerably. Yet, online newspapers have also experienced a relatively smaller increase in their consumption. However in this case the rational is not an economic one; instead it related to a different approach to online surfing, and it should take into account the increase in alternative sources of information such as blogs, social media, etc.

Table 4: Media consumption in Italy (percentage of people that have used the media with a frequency of almost once a week during the year)

	2001	2009	Var. % 01/09
Television	95.8	97.8	2
Mobile phone	72.8	85	12.2
Radio	68.8	81.2	12.4
Newspapers	60.6	64.2	3.6
Books	54	56.5	2.5
Internet	20.1	47	26.9

Source: Censis (2009)

According to the European Commission report,[35] Italy has a level of media literacy slightly under the average. Although Italy has a good availability of media and media literacy context, the individual competencies do not achieve a high result, both in use and communication abilities. This is due also to the fact that the current focus of the Ministry of Education objectives towards improvements of ICT skills for students does not have a wider mass media perspective, which could strengthen the interest in and interconnections between traditional education and new technologies.

3. Media policy in Italy

The regulation of the Italian media includes a number of regulatory interventions that have been developed since the end of the Second World War. The different interventions, however, did not result in a comprehensive regulatory framework that

[34] See Censis/UCSI, *I media tra crisi e metamorfosi – Ottavo rapporto sulla comunicazione* [*The media between crisis and metamorphosis – Eighth Report on Communication*] *(*2009), available at: http://www.governo.it/GovernoInforma/Dossier/rapporto_censis_2009/SintesiOttavoComu.pdf (last visited on 19/10/2010).

[35] European Commission, Directorate General Information Society and Media, "Study on assessment criteria for media literacy levels", available at: http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (last visited on 19/10/2010).

coordinates the different sectors. Only recently did the Italian legislator succeed in codifying the patchwork of legislation on media in a unique code, but without any modifications brought to improve its coherence.

The following paragraphs will provide an overview of the most relevant institutional actors that regulate the media and define its policy; then, the existing regulatory framework will be sketched analysing, first, the constitutional provisions related to the freedom of expression principle, then structural regulation, distinguishing among licensing, ownership and competition rules, and finally content regulation, taking into account also the rules on political advertising and on specific media sectors.

3.1 Actors in media regulation and policy

After a long period of retained regulatory power, the government regained its primary role in the Italian media policy with Law 112/2004. The most important body in this area is the Ministry of Economic Development. The Ministry has received the remit of the previous Ministry of Communication[36] covering, all communication networks. In particular, the newly-created Department for Communications is in charge of monitoring compliance with the obligations related to the allocation of digital broadcasting authorisations and/or licences. Moreover, during the previous years of the Ministry's existence, it was a preferred reference for industry representatives and the facilitator in the drafting and approval of numerous codes of conduct, dealing with issues such as the protection of minors and specific methods of sales (i.e. home shopping).[37]

Italy was among Europe's first countries to introduce the "single" or "convergence" regulator in late nineties. The *Autorità per la garanzia delle comunicazioni*, AGCOM (Italian Communication Authority) is a powerful body with a remit for the whole communication sector. It is an independent body created by Law 249/1997, with the competence to monitor the press, broadcasting, electronic media and telecommunications.[38] AGCOM started its operational activities at the end of July 1998, also absorbing the functions of the former Authority of Publishing and Press,[39] while one of its first activities was Italy's first national television frequency plan.[40] The current functions focus on monitoring the shift towards digital broadcasting, the

[36] Law 85/2008 merged the Ministry of Communication and the Ministry for Foreign Trade into the Ministry for Economic Development, creating a specific internal Department for Communications.

[37] However, part of the doctrine acknowledges this fact as potentially spoiling the role and functions of the Communication Authority, which have a similar remit concerning monitoring the compliance with general principles. F. Bruno and G. Nava, *Il Nuovo ordinamento delle comunicazioni – Radiotelevisione, comunicazioni elettroniche, editoria* [*The new telecommunication system – Radio and broadcasting, electronic communications, publishing*] (2006), at p. 138.

[38] This body was partly created in order to comply with European Community laws, such as Directive 90/387/EC, 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. See G. Mazzoleni and G. Vigevani, "Italy", p. 884.

[39] Created by Law 416/1981.

[40] Note that, on the one hand, the fragmentation of the broadcasting sector was a legacy from the liberalisation of 1976, which resulted in opening the doors to a large number of small and medium sized operators; and on the other, the national frequency plan was a pressing need as Italy has never developed cable and satellite television in parallel to analogue broadcasting.

application of antitrust laws to the telecommunication sector,[41] the monitoring of broadcasting services in terms of quality and compliance with rules on advertising, politics and the protection of minors.[42]

The sanctions applied by AGCOM are proportional to the gravity of the violation, and range from administrative sanctions of a pecuniary nature to more severe sanctions such as withdrawal of the licence for up to ten days.[43]

The internal structure is based on a set of bodies which include: the President; the Commission for infrastructure and networks; the Commission for services and products; and the Council. There are eight Commissioners: four elected by the Senate and four by the Chamber of Deputies. The President of the Communications Regulatory Authority is appointed by the Italian President upon proposal by the Prime Minister and the Minister of Telecommunications. However, the independence of this body is not guaranteed by these rules, as the voting system for the selection of the members could end in a duplication of the political coalitions existing in Parliament. This is one of the examples where resistance to eliminating the tight connection between the legislative and executive branches and supervisory authorities is more than evident in practice.

It is important to mention that the increasing role for AGCOM concerning the press sector was done at the expense of the body previously responsible for them, namely the *Presidenza del Consiglio* [Executive presidential committee]. The role of this body was more clearly defined by Law 400/1988, which created the Department for information and publishing that is now still in charge of the decision concerning the subsidies requested by press industries.

Within the broadcasting sector, another important body should be mentioned, namely the *Commissione Parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi* [Parliamentary Commission for general guidance and monitoring of radio and broadcasting services] (CPIV). The CPIV was created by Law 103/1975 in order to define and monitor compliance with public broadcasting principles, such as pluralism, fairness, completeness and impartiality of information, but it only focuses on the public service broadcaster, RAI. It does not provide a very detailed definition of the objectives to be met by RAI annually, so as not to limit the freedoms of expression and of the press, and at the same time to enhance competition with private broadcasters. In this way the lack of any sanctioning power of the CPIV should also be characterised. However, the interventions of the CPIV have been very few and only in very exceptional cases, as its role has always been restrained by its very political nature. Moreover, the CPIV [also] has an important say over the list of

[41] In collaboration with the *Autorità Garante della concorrenza e del mercato*, AGCM, the Italian Antitrust authority. See G. Montella, "La collaborazione dell'Autorità per le garanzie nelle comunicazioni all'attuazione della disciplina comunitaria" [The collaboration of the communication Authority in the implementation of the European regulations], in M. Manetti (ed.), *Europa e Informazione* [*Europe and Information*] (2004) 189.

[42] In collaboration with the *Commissione Parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi*, see below.

[43] Note that AGCOM's sanctions concerning breaches of antitrust regulation have been very few, and they were almost trying to safeguard the *status quo* in particular in the broadcasting sector. See the exceptions of the severe sanctions imposed on RAI, RTI Mediaset and Publitalia '80 in 2005. See AGCOM, "Posizioni dominanti: sanzionia RAI, RTI e Publitalia 80" [Dominant positions: sanctions for RAI, RTI and Publitalia 80] (2005), available at: http://www2.agcom.it/provv/d_226_03_CONS.htm (last visited on 19/10/2010).

candidates for RAI's board of directors.[44] The fact that the composition of the CPIV replicates the current majority in Parliament still has a strong influence over the decision on candidates, impairing the steering and monitoring functions allocated to the body. Again it is perceivable that, despite efforts to neutralise political control over the media by transferring the monitoring and enforcement functions to independent bodies, the confusing and complicated regulatory system still leaves a lot of control in the hands of politicians.

As mentioned above, the main journalist body is the ODG which is characterised as a guarantee of the rights and autonomy of the journalists towards their employers and publishers in general.[45] However, the traditional structure and approach of ODG has been criticised, and, in this regard, the role of the Constitutional Court in preserving such characteristics is deemed to be very relevant, limiting any attempt to modify this body.[46]

Another organisation that is in charge of protecting the interests of journalists is the *Federazione Nazionale della Stampa Italiana*, FNSI. This is the unitary trade union for the journalism profession, which includes the regional trade unions existing all over Italy. The FNSI role is to negotiate collective labour agreements and provide union services to the members.

It is worth noting that the autonomy and independence of journalists *vis-à-vis* their employers is only protected by "conscience clauses" included in the employment contract, in order for the journalist to keep her retirement contribution also in case of voluntary unilateral conclusion of the contract due to a change in the editorial orientation of the publication. However, this is only a limited shield for the freedom of expression of journalists, while no support has been received by the government through legislative intervention on this point, in particular in the current framework where the merger and concentration of media industries could increase their already greater contractual (i.e. editorial) power.

In order to encourage a tighter connection between AGCOM and civil society, the Law 249/1997 also provided for a *Consiglio Nazionale degli Utenti* [Users national council], which has recently been changed into the *Consiglio Nazionale dei consumatori e degli utenti* [Consumers and users national council].[47] In particular, it may formulate opinions and make proposals to AGCOM, Parliament, the government and other public or private organs. It is composed of experts appointed by consumers' associations.

Aside from this, the participation of civil society to media policy is very limited at least in the institutional setting. However, the recent reactions of public opinion to a legislative proposal concerning the new regulation of tapping and the publication on the media of data concerning existing investigations used in the course of court proceedings should be noted. The draft proposal was deemed to reduce excessively the freedom of the press, and consequently the appropriate level of information of the citizens.[48] This triggered a large debate in society which was

[44] The list of candidates is then approved by the Ministry of Finance and presented to the members of the assembly of the RAI company to vote on it. See article 49 of the TUSMAR.
[45] See Constitutional Court, decision n. 2/1971 and n. 113/1974.
[46] Caretti, *Diritto dell'informazione e della comunicazione*, p. 60.
[47] See article 136 of the legislative decree 206/2005.
[48] Under the latest draft, publishers face fines for publishing reports on wiretapped conversations and leaks of police interrogations. Journalists who report on such material face prison sentences of up to 30

mainly amplified by social media and Internet, and the increasing social opposition had the effect of shifting the timing for the approval of the law, and eventually introducing modifications of its content.[49]

3.2. The media regulatory framework

3.2.1 Freedom of expression and information

The Italian Constitution has overcome the limited dimension offered by the previous constitutional act (the *Statuto Albertino*) which regulated only the freedom of the press and provided wide powers to the executive in limiting such freedom. According to the current wording of Article 21 of the Italian Constitution:

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

2. The press may not be subjected to any authorisation or censorship.[...]

5. The law may introduce general provisions for the disclosure of financial sources of periodical publications.

6. Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law".

The main points of such an expansive definition of the boundaries of freedom of expression can be summarised in the existence of a double relationship: one between the holder of the right and the public authority legitimately able to limit the right, and the other between the holder of the right and the receiver of the content of the freedom of expression, where the public authority is in charge not only of providing the best conditions for the fulfilment of the freedom of expression, but also the best conditions for achieving complete and impartial information for the receivers (i.e. the citizens).[50] The holders of such rights can be citizens or foreigners, either in the individual or collective legal form, with this interpretation being due to the need to provide a space also to opinions that concern collective interests.[51]

The article, moreover, distinguishes between the content of freedom of expression and the means by which such content can be diffused. Although it mentions only the press explicitly, the Italian Constitutional Court has confirmed the application of Article 21 to the entire broadcasting sector.[52]

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days and fines. The use of tapping information will also be restricted for prosecutors: requests to order phone taps, based on 'strong evidence of a crime', will have to be presented to a panel of judges, for approval; such approvals will need to be confirmed every 3 days for the tapping activity to continue.

[49] According to Italian procedural rules, a double approval by the two Chambers of the Parliament on the same text is required for draft laws to be adopted. The draft law was scheduled to be voted on at the lower house of the Parliament by late July, but this has been moved to September. If also in this passage modifications are adopted, the text will once again require the Senate's approval.

[50] To the latter objective was introduced by par. 5 of the article, which was not readily implemented by the Italian government in the first reforms after the fall of Fascism.

[51] See Constitutional Court, decision n. 126/1985.

[52] See Constitutional Court, decision n. 59/1960.

The limits to freedom of expression are to be found in public morality[53] (expressly defined in Article 21), but also in the right to privacy, in state secrets,[54] and the right to honour and the protection of reputation (that the case of breach could be qualified as slander or defamation). On this point, the Supreme Court established a set of requirements to be complied with in order to frame the expression within freedom of information: truthfulness, moderation, and public interest.[55] This clarification was particularly meaningful for journalists who could use such elements as a more authoritative defence in comparison to the previous situation's lack of points of reference.

Regarding the application of Article 21 to electronic content, Law 70/2003 (implementing Directive 2000/31/EC) imposes on the publishers of electronic journals the same obligations as pertain to traditional publishers but only in case when these publishers wish to apply for subsidies provided by Law 62/2001. On this point, a very recent decision of the Supreme Court provided for the exclusion of the application of Article 21 (and in particular of the specific limitations in case of seizures) to online discussion forums.[56] The reasoning of the judges acknowledged that the equalisation of discussion forums etc to the press could provide advantages, such as a higher guarantee of the messages left on the platforms by any user, but at the same time it could impose excessive burdens on the managers or owners of the platforms, which should as a consequence register as a publisher and be subject to tort and civil liability in the role of editor-in-chief.[57] This consequence could indirectly impair the fulfilment of freedom of expression, as it would restrain the provision of online forums since it would be overly burdensome for an individual to comply with the standards imposed on the press.

The Italian constitutional provisions are supported by the application of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Domestic authorities are bound by their respective Articles 10 and 19 on freedom of expression and the freedom to seek, receive and impart information and ideas. The state is also obliged to respect Article 11 of the Charter of Fundamental Rights of the European Union (EU) when implementing EU law. In 2009 the Freedom House Index rated the media in Italy as "partly free", with a total score of 33 points, zero (0) being the best.[58] Italy ranked only above Turkey, holding the 24th position out of 25 Western European countries.

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[53] Note that this concept has been updated over time, and the Constitutional Court is the body that has from time to time interpreted such terminology; see Constitutional Court, decision n. 9/1965; and more recently decision n. 368/1992.

[54] The Constitutional Court limited the extension of this concept to a very detailed definition that includes only information that could damage the integrity of the state. See Constitutional Court, decision n. 87/1977.

[55] See Supreme Court, decision n. 4/2000.

[56] See Supreme Civil Court, decision n. 10535/2008.

[57] M. Nisticò, "Un recente intervento della Cassazione a proposito della problematica sussumibilità di internet nel paradigma costituzionale della stampa (osservazione a Cass., 11 dicembre 2008, n. 10535)" [A recent judgment of the Supreme Court regarding the inclusion of internet in the constitutional conceptualisation of the press], available at: http://www.associazionedeicostituzionalisti.it/giurisprudenza/oss_decrilcost/index.html (last visited on 19/10/2010).

[58] Countries scoring 0 to 30 are regarded as having "free" media. See Freedom House, Freedom of the press 2009, Press freedom rankings by region, available at: http://freedomhouse.org/uploads/fop09/FoP2009_Regional_Rankings.pdf (last visited on 19/10/2010).

3.2.2 Structural regulation

Licensing rules

The allocation of electromagnetic spectrum in Italy has been a never-ending process where regulation has always tried to catch up with the evolving broadcasting market, resulting in preserving the positions acquired by private broadcasters (at least the larger one), regardless of the existence of conflicts with the opinions of the Constitutional Court and, recently, the Commission.

Historically, the opening of the broadcasting market to private companies dates back to 1974-1976, following two landmark decisions of the Constitutional Court which steered the political choices on this issue. The first decision focused on the monopolistic position of RAI in the market.[59] The important element of the decision is the fact that, while acknowledging the position of RAI as public service broadcaster, the Court required the legislator to create an internally pluralistic public broadcasting system not only based on the role of RAI, implicitly opening the broadcasting market to private companies. Only in 1976 with a second intervention did the Court clearly acknowledge the possibility for private companies to access the local broadcasting market.[60] However, the requests of the Constitutional Court were not answered by the government, leaving the market to a complete lack of regulation concerning access and authorisations to broadcast at the local level. The effects of this evasion of governmental responsibility were the creation of a commercial broadcasting pole that was mainly based on advertising revenues.[61]

Only in early 1990s Law 223/1990 was adopted to regulate (by legally endorsing it) the public/private radio-television system.[62] The law covered many issues, as it was the first intervention that extended its scope to the communication system as a whole (including the press). In particular, the law provided the criteria for the assignment of radio and television frequencies, with a distribution of licences among RAI, private networks and local broadcasters. However, the criteria and the following licensing plans provided by the Ministry of Communications were not applied and the private broadcasters that had been occupying frequencies unlawfully succeeded in preserving their occupation.

The first successful intervention is to be found almost a decade later, when the subsequent Law 249/1997 designated the newly-created AGCOM as the responsible body for this issue. The success was far from complete, however, as the licences were allocated without the assignment of the necessary frequencies, implicitly allowing

[59] Constitutional Court, decision n. 226/1974.

[60] Constitutional Court, decision n. 202/1976. Note that in the 1980s the court changed its position, affirming that also private national networks could be admitted into the broadcasting sector provided the legislator enacted suitable antitrust laws to prevent the emergence of oligopolies (Constitutional Court, decision n. 148/1981).

[61] A. Pace, "La radiotelevisione in Italia con particolare riguardo alla emittenza private" [Radio and broadcasting in Itay with peculiar attention to private broadcasters], ** Riv. trim. dir. pubbl. (1987) 615; A. Pace, "Il sistema televisivo italiano" [The Italian broadcasting system], ** Pol. dir. (1997) 97.

[62] Note that this regulation was triggered not only by the need to implement the 1989 TVWF directive, but it was also the long-awaited reaction to the intervention of the Constitutional Court that, in 1988, gave its ultimatum on the repeatedly insufficient actions of the executive. See in particular Constitutional Court, decision n. 826/1988.

the unlawful occupation of the broadcasting frequencies to continue, at the expense of the licensed private networks for which no frequencies remained.[63]

The existing framework was then complicated by steps taken towards the switch-over to digital technology. Law 66/2001 provided for distribution of the digital broadcasting frequencies, without specifying any significant parameters either for its implementation or for the assignment of frequencies to operators. The subsequent Law 114/2004 clearly had the objective of translating the existing duopoly of the analogue broadcasting system to the digital one, in particular by granting the private monopolist Mediaset – still officially owned by the Prime Minister Berlusconi – both of the digital broadcasting licences: the lawfully assigned, and the unlawfully occupied analogue frequencies.[64]

The situation was not improved either by the aforementioned TUSMAR which tried to codify into a comprehensive legislative text the vast number of regulations enacted since the early 1970s. The situation of the market, with the low possibility of access for new operators and ongoing inequalities among the networks, induced the Commission to react with a formal infraction procedure concerning the incorrect implementation of most of the "Electronic Package" directives,[65] namely Directive 2002/21/EC, Directive 2002/20/EC, and Directive 2002/77/EC, which provided the new framework for electronic communications Europe-wide.[66]

The current framework took into account the opinion of the Commission and reformed the existing legislation, opening the digital broadcasting market also to new

[63] This was the case of the private network Centro Europa 7, that after a contrary decision of the Administrative Tribunal in Italy presented its claim at the ECJ. On 12 September 2007, the ECJ Advocate General criticised the Italian situation and supported Centro Europa 7's right to be granted frequencies. On 31 January 2008, the ECJ confirmed the opinion of the AG by ruling on the "discriminatory nature" of Italian frequency allocation. See on this decision L. Pace, "Il caso "Centro Europa 7" dinanzi alla Corte di giustizia: ampliamento del campo di applicazione dell'article 49 TCE, tutela della chance del prestatore di servizi e protezione del pluralismo "esterno"" [The case Centro Europa 7 at the ECJ: extending the field of application of article 49 TCE, protection of service provider and protection of 'esternal' pluralism], 53 Giur. Cost. (2008) 4000; and G. Fares, "La Corte di giustizia certifica la contrarietà al diritto comunitario delle modalità di attribuzione delle frequenze per l'esercizio di impianti radiotelevisivi: un caso di provvedimento senza oggetto" [The European Court of justice certifies the breach of community law in the methods of allocation of broadcasting frequencies rights: a case of a measure without object], 18 Riv. it. dir. pubbl. Comunit. (2008) 557.

[64] The law was the solution provided for the unconstitutionality issue acknowledged by the Constitutional Court in 2002 which obliged the termination of the broadcasting activities of those networks exceeding the ownership limits set by law no later than December 2003, which in the case of Mediaset meant that one of the free channels, namely Rete4, should have been stopped. See Constitutional Court, decision n. 284/2002. See more deeply on these issues, O. Grandinetti, "Principi costituzionali in materia radiotelevisiva e d.d.l. Gasparri" [Constitutional principles in broadcasting and the d.d.l. Gasparri], Giornale di Diritto Amministrativo (2003) 1185.

[65] See Reasoned Opinion of the European Commission sent on the 18th July 2007, n. 2005/5086, C(2007) 3339.

[66] See Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities; Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services; Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services; Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks, Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

operators which did not have a previous licence for the analogue broadcasting service, as required by the precedent regulation.[67]

The current framework is now based on action from AGCOM and the Department of Communication.[68] The law gives AGCOM the right to formulate and approve a national plan for the assignment of the public frequencies. The Department of Communication has the right to grant the relevant broadcast authorisations for the content providers and the network operators.[69]

The authorisations are granted for a duration of twelve years, with the possibility of renewal, imposing also obligations and limits on the content providers, namely:

a) compliance with European production quotas;

b) respect for the laws regarding the protection of children; and

c) a guarantee of the rights to reply and rectification.

Furthermore, the networks operators are limited to a single authorisation, either national or local,[70] while one third of potential digital frequencies is to be assigned to local networks operators.

These requirements are framed within a logic that aims to treat all broadcasters as public entities that provide a public service and have various obligations, including that of offering truthful information and events in order to promote the independent development of opinion.[71] At the same time, licences are granted by the Department of Communication, essentially the Ministry, and not by the AGCOM: this for sure creates an "enabling environment" for dependencies between economic and political actors.

Ownership and competition rules

The introduction of a regulation concerning an ownership quota in media companies was originally formulated as a restraint on the concentration trend that has characterised the Italian landscape since the 1970s. Although the first intervention was devoted to the press industries, the following legislation covered all media, in an attempt to overcome uncontrolled media concentration, particularly in the broadcasting sector.

The objective of Law 67/1987 was mainly to create the conditions for free competition in the press market, while at the same time safeguarding the right of citizens to be informed. The law defined the case of abuse of dominant position, where the dominant position is qualified as a company that directly, or indirectly through controlled or parent companies, publishes newspapers whose circulation is more than 20% of the national total, or more than 50% of the referring inter-regional one. The law also covers the case of concealed grouping system, given that also in

[67] See Law 101/2008, article 8-novies and Law 88/2009, article 45.
[68] See AGCOM, "Approvazione del regolamento relativo alla radiodiffusione terrestre in tecnica digitale" [Approval of the regulation concerning the terrestrial broadcasting through digital means], decision 435/2001/CONS and following modifications, available at http://www.agcom.it/default.aspx?DocID=2115 (last visited 19/10/2010).
[69] See the distinction introduced by Law 66/2001 between network providers and media operators.
[70] Only the public broadcasting service provider, RAI, is allowed to have both.
[71] See Vigevani and Mazzoleni, "Italy", p. 895. See below for content rules.

this case an indirect control by one of more firms can be exercised over others. In this respect, the reference to the hypothesis provided by Article 2359 of the Italian Civil Code should be considered, which includes not only the proprietary control over enterprises that are controlled or parent companies, but also indirect control in the case of an "informal group".[72]

Supporting the same objective were the transparency requirements imposed on the press industries, which were required to reveal their annual balance in which advertising revenues and the financing bodies or relevant shareholders should be publicly disclosed.

It is important to emphasise that the same obligations and requirements were also to be applied to advertising agencies. The reasoning for this wide field of application lies in the importance that these market actors have in gathering revenues that can support and, consequently, allow the persistence of publishing activity. The legislator took into account the case in which the advertising agency, though formally free from shareholder quota in its client companies, can exert a strong influence upon them due to its role as provider of their advertising revenues. Thus, not only are advertising agencies obliged to register in the ROC and provide their annual balance, but they also have the more stringent obligation where they work exclusively with the press industry. In particular, any advertising agency cannot work exclusively with a press publisher whose circulation covers more than 30% of the total, with this lowering to 20% where the relationship between the two is based on proprietary control.

This very powerful regulation was then reformed by Law 223/1990 which provided for a single set of rules, applicable regardless of the type of media. As mentioned above, the law tried to contain the concentration trend that was increasingly evident in the media sector, yet this first anti-trust regulation did not determine the conditions for a stronger protection for pluralism, as was its objective, but it ended in endorsing the existing duopoly in the broadcasting sector.

The rules focused on three main elements:

- the maximum number of licences assignable to a national broadcaster and the ban on contextual licences at the national and local level;[73]
- the limit that publishers in control of more than 16% of newspapers in circulation were not allowed to receive broadcasting licences;
- the limit on advertising agencies providing advertising to more than three national broadcasters (or two national and three local) where they are also in a relationship of proprietary control with any of them.

These limits, however, were not in compliance with the indication received previously from the Constitutional Court, affirming clearly that "*the pluralism at*

[72] This case refers to the hypothesis of relationships among enterprises so that one or more individuals take strategic and conclusive decisions about the management of all of the enterprises. This power could come from the fact that the individual holds majority interests in the different enterprises, as well as from the existence of minority interests, agreements, or relationships of a different kind. See i.a. U. Tombari, *Il gruppo di società [Corporate group]* (1997).

[73] The licences can be distinguished on the basis of their territorial coverage they have as either national or local. Originally the national coverage was assigned only to the public service broadcaster, while the private ones could only receive the local ones. See above the effect of the decision n. 202/1976 of the Constitutional Court.

national level would not be achieved by the concurrence of a public pole and of a private pole represented by a single entity or an entity in a dominant position in the private sector".[74] This was the reason why in 1994 the same court denied the constitutionality of the first of the aforementioned rules, asking for a reform of the anti-trust system in the media sector in order to achieve pluralism. According to the Court, "*it is not sufficient that the whole media system is characterised by a plurality of initiatives, but it is needed that this principle should be achieved in each and every sector (press, analogue television, satellite television, etc.)*".[75]

The immediate reaction was to create a transitory regime applicable up to the enactment of a codification of the media sector regulation, initially defined by Law 249/1997, and subsequently by Law 112/2004.[76]

The current antitrust rules are included in the TUSMAR that codifies the previous piecemeal legislation, from the perspective of convergent media. The rationalisation resulted in a single article[77] that provides for an *ex ante* limit of 20% of the total financial resources flowing into the market, the *sistema integrato della comunicazione* [integrated communication system] (SIC), where the radio and television activities, the production and distribution of radio and television content, the publishing in form of press, books and electronic media, and the advertising intermediation coincide. The legal cap is reduced to 10% where in one of those specific sectors the revenues are already over 40% of the sector total.

In addition, the law regulates differently the possibility for cross-media ownership, as it eliminate the ban on press industries accessing the broadcasting sector, while it still prohibits, up to the end of 2010, the possibility for national broadcasting enterprises to access the press sector, extending the prohibition also to controlled or parent companies.[78]

The *ex post* monitoring activity is delegated to AGCOM, which should define the relevant markets, and in case of the acknowledgement of a dominant position in the SIC or in a single market the authority can sanction the relevant enterprises and eventually impose measures to restore pluralism.[79]

These provisions, however, have been criticised as the SIC seems to have an extremely wide reach, paving the way for a further, almost uncontrolled growth of the

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[74] See Constitutional Court, decision n. 826/1988.

[75] See Constitutional Court, decision n. 420/1994.

[76] Note that the latter law should be read jointly with the Law 215/2004 concerning the case of conflicts of interests. The law forbids the Prime Minister and other officials' direct involvement in the management of corporations, albeit allowing them to retain ownership. On the transitory nature of both laws mentioned in the text, see C. Pannacciulli, *Pluralismo e mercato nell'attività radiotelevisiva. Profili costituzionali* [*Pluralism and market in broadcasting activity. Constitutional issues*] (2005), at p. 193; G. Azzariti, "La temporaneità perpetua, ovvero la giurisprudenza costituzionale in materia radiotelevisiva (rassegna critica)" [The neverending transitoriness condition, in other words the costitutional caselaw on broadcasting (critical review)], 40 Giur. cost. (1995) 3037; M. Dogliotti, "Regime definitivo e transitorio del sistema radio-televisivo" [Final and transitory rules in broadcasting system], 45 Giur. merito (1993) 675.

[77] Article 43 TUSMAR.

[78] Note that the law still refers to article 2359 of the Civil Code for the definition of proprietary and non proprietary control.

[79] On the difficulties concerning the overlap of competence of AGCOM and the Italian antitrust authority in the same sector see M. Conticelli and A. Tonetti, "La difficile convivenza tra regolazione e antitrust: il caso delle comunicazioni elettroniche" [The difficult coexistence of regulation and anti-trust: the case of electronic communications], 58 Riv. trim. dir. Pubbl. (2008) 71.

existing major broadcasters, to the detriment of potential new media operators. In practice, the legislator seems to rely heavily on a large increase of the content provided by digital broadcasting, almost replicating in the new system the loose control enjoyed by private companies in the analogue television market.

The decision of the Italian legislator to include the prejudice to pluralism as an autonomous criterion for the evaluation of significant market power has also been criticised. This goes further than the obligations imposed by the European regulations on electronic communications.[80] As mentioned above, AGCOM should define the relevant markets and verify whether in any of them there is a company with a dominant position, i.e. a firm possessing more than 20% of market resources (par. 9, Article 43, TUSMAR).[81] Contextually, the legislator couples the hypothesis of the dominant position with those that are "*prejudicial to pluralism*" (par. 5, Article 43, TUSMAR), which could result in a sanction for the firm that, though complying with the anti-trust provisions, damages the legislatively-defined level of pluralism. Although this choice shows that the legislator takes into account the fact that anti-trust provisions could not provide an efficient safeguard for pluralism without favouring the quality of different sources of information, in addition to their quantity, the use of the aforementioned 20% quota of the SIC in order to evaluate the level of pluralism, could not be very effective. The rule was justified so as to prevent an undue amount of political persuasion that could be exerted through an extremely concentrated market. However, a mere anti-concentration rule and a case-by-case analysis of AGCOM within each sector could result in a confusing situation for market actors, that are not aware *ex ante* of the elements that could interpreted as prejudicial to pluralism.

3.2.3 Content regulation

Since 1960 the Constitutional Court has made repeated interventions concerning the tools and methods to achieve the best level of information for citizens in order to enhance their democratic participation.[82] This reasoning has always been framed in the terminology of the Constitutional Court as the protection of pluralism, using it as a justification for the existence of a public service function, and then as the catalyst for the opening of the market to commercial operators. Only in more recent times has the Court defined this concept in a detailed manner, emphasising its internal and external dimensions.[83]

[80] F. Polettini, "Tutela della concorrenza e pluralismo dell'informazione del DDL Gasparri" [Protection of competition and information pluralism of ddl Gasparri], 12 Dir. Ind. (2004) 149; V. Zeno-Zencovich, "Motivi ed obiettivi della disciplina della televisione digitale" [Rationals and objectives of digital television regulation], 21 Dir. Informazione e Informatica (2005) 653; A. Frignani, "La concorrenza nella disciplina radiotelevisiva" [Competition in radio and broadcasting regulation], 23 Dir. Informazione e Informatica (2007) 1005.

[81] This is already far from the current interpretation of the European rules on competition, which at least impose an evaluation of the existing competitors in the market and the additional abusive behaviour. See A. Frignani, "L'abuso di posizione dominante" [Abuse of dominant position], in A. Frignani and R. Pardolesi (eds), *Diritto della concorrenza comunitaria [European competition law]*, (2006), 267.

[82] See Constitutional court, decision n. 59/1960.

[83] See Constitutional court, decision n. 474/1984.

The numerous judgements of the Constitutional Court, though initially finding a limited positive reaction from the legislator,[84] resulted in the progressive endorsement of pluralism among those principles operating in the audiovisual sector. The principle of pluralism, together with the freedom of the media and the protection of the freedom of speech,[85] is now accepted as one of the fundamental principles included in the TUSMAR, which should permeate all the legislative and regulatory intervention.

In the audiovisual sector the rules are appropriate and touch upon many issues. For instance, users are protected both in terms of access to different types of content, and in terms of access to free broadcasting channels, including quantity rules for a sufficient number of broadcasting programmes available for free at the national and local level, and quality rules concerning these programs, that should cover events with social relevance.[86] Moreover, the codification includes general rules concerning the protection of fundamental principles such as the respect of dignity, and the protection of specific vulnerable categories of users such as minors.[87] It should be emphasised that the codification refers to the co-regulatory instrument approved in 2002, namely the Codice TV e Minori [TV and minors code of conduct], drafted by the then Ministry of Communication and subscribed to by the public and private broadcasters and the relevant associations. The reference within the TUSMAR provides wider and deeper monitoring powers to AGCOM, which is in charge of verifying compliance with the code, including the possibility of imposing direct sanctions.[88]

The aforementioned rules are applicable to any media service provider in Italy, regardless of their public or private legal form. However, the public service broadcaster is still subject to a set of special rules aiming at the promotion of education, civil growth and social development, and of the Italian culture and language as well as the preservation of national identity. These objectives are specified in Articles 45 and 46 TUSMAR, and in particular require that the public service broadcaster allocate an appropriate number of hours, including prime time, devoted to education, information, cultural promotion through cinema, theatre and musical works; provide access to programming for political parties, trade unions, religious groups and other associations of social interest; include programming destined to be broadcast abroad to promote the knowledge of the Italian language and culture; and include programming in minority languages.

Moreover, the public service broadcaster must comply with the obligations imposed by the service contract that is defined by the Department of communication with RAI's board of directors, in which are included general and specific provisions regarding programme type and quality.

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[84] Ibid,.

[85] Note that article 3 TUSMAR includes as fundamental principles, additional to those mentioned in the text, the objectivity, completeness and impartiality of information, the protection of copyright, the openness to different opinions in political, social, cultural and religious fields, the safeguarding of ethnic differences and of the cultural, artistic, and environmental patrimony, both at the national and local level, the respect for freedoms and rights, in particular dignity, health and minors' physical and mental development that are granted by the Constitution, the European law and the international agreements applicable to the Italian state.

[86] See article 32-41 TUSMAR.

[87] See article 34 TUSMAR.

[88] Note that AGCOM should report annually to the Parliament concerning the activities (and the eventual actions) carried out in relation to the co-regulatory action.

The service contract for the three year period between 2010 and 2012 sets out the detail of the public service remit. It takes the new way of assessing compliance with the quality level introduced in the previous service contract (2007-2009), which is no longer based solely on viewing figures but also includes indicators that combine cultural and civil enrichment, respect for the feelings of audiences, innovation, pluralism, independence, balance, ability to entertain and originality. These criteria aim to ensure that public value will permeate all types of programmes on all platforms instead of being measured just in terms of the inclusion of certain type of programmes within the schedule.[89]

The service contract also defines the main quotas on programming, which oblige the public service broadcaster to allocate 15% of its total annual revenue to producing and co-producing films and cartoons, documentaries, drama, ballet, and classical and popular music. RAI must also reserve at least 20% of its total programming on the terrestrial analogue signal to European works by independent producers. It is not known whether RAI fulfils these quotas, as no reports are available from AGCOM or RAI on this topic. There have been no changes to the system of quotas in the new service contract. As before, the new contract also envisages programming for minorities, without imposing any quotas.

Rules on information provision

In general, regarding the information provision it should be noted that the legislative and self-regulatory interventions agree on the fundamental role of correctness, completeness, and impartiality of information.[90] When looking in particular at news broadcasting and other radio and audiovisual information provision the TUSMAR specifies that they constitute a service of general interest, thus they should ensure the truthful presentation of facts, in order to promote the free formation of opinions, prohibiting at the same time any use of methodologies or techniques to manipulate surreptitiously the content of information.[91]

The former principle should be read together with the article concerning the right to act for rectification,[92] and eventually redress, in case of lack of respect to one's personality, honour and dignity, or in case of broadcasting untruthful materials. This right, originally introduced in Law 47/1948, then confirmed in Law 69/1963 for press publication, requires a quick reaction from the audiovisual operator (within 48 hours) to correct the wrongful information provided to the public;[93] however, in addition to this, the audiovisual operator, and the journalist in particular, could be charged with a crime such as libel or defamation, where specific criteria are met. In order to clarify this issue, the Supreme Court provided a set of criteria to be evaluated in order to verify the existence of defamation: the information should be truthful, thus

[89] See I. Katsirea, *Public broadcasting and European law: a comparative examination of public service obligations in six member states* (2008) at p. 90.
[90] See the aforementioned article 3 TUSMAR and the premise of the "Carta dei doveri dei giornalisti", drafted and subscribed to by the ODG and the FNSI (available at: http://www.fnsi.it/Pdf/Carte_deonto/Carta_Doveri.pdf (last visited on 19/10/2010).
[91] See article 7, par. 2 TUSMAR.
[92] See article 32-quinques TUSMAR.
[93] The "Carta dei doveri dei giornalisti" imposes an obligation of rectification on journalists regardless of any request by the interested subject as compliance with the right of the citizens to be correctly informed, in particular when her error could offend or damage individuals, associations, communities, etc.

requiring the journalist to verify the reliability of her sources; the information should be socially relevant; and the information should be provided in a correct manner, avoiding any aggressive and conceited style.[94]

The corresponding self-regulatory interventions are mainly made by journalists and their associations, and range from an ethical code (the *Carta dei doveri dei giornalisti [Journalists ethical code]*) to a code on data protection, a code on the protection of minors (the *Carta di Treviso [Treviso Charter]*),[95] a code on the television broadcasting of trials,[96] and a code on health information (the *Carta di Perugia [Perugiaa Charter]*),[97] etc.

In particular, the ethical code is a comprehensive charter that includes all the principles that should permeate the journalistic activity, excluding the possibility for a journalist to provide his name, voice, or image for an advertising campaign, where such activity could limit the professional autonomy of the journalist. The incompatibility should also be appreciated in the case of concurrent functions that conflict with the rigorous and exclusive research of truthful information.

The code on data protection instead is a co-regulatory instrument[98] that has been drafted by the Journalist Register in collaboration with the Data Protection Authority. After approval by the latter, the code has been introduced as annex to legislative decree 196/2003, the so called Data Protection code. The code has then the status of primary legislation and addresses the balance between freedom of the press and the protection of personal data of citizens. However, the legislator did not consider it sufficient with respect to publication of data concerning investigations within court proceedings. The draft law decree on tapping,[99] which has recently passed the vote in the Italian Senate, intends to modify the Italian Penal and Procedural Codes and introduces new clauses sanctioning the behaviour of magistrates, journalists and publishers in case of non compliance. In particular, the act takes a questionable interpretation of data protection,[100] in order to limit the quantity and timing of the publication of information gathered through telephone interception in addition to any data concerning existing investigations used in the course of court proceedings.[101] Although the draft should still require a double approval from the two Chambers of the Parliament, the ensuing debate raised by public opinion and the criticism by civil society and journalistic associations forced the executive to rethink

[94] See Supreme criminal court, decision n. 3287/2000.
[95] Available at: http://www.fnsi.it/Pdf/Carte_deonto/Carta_Treviso.pdf (last visited on 19/10/2010).
[96] Available at: http://www.mcreporter.info/normativa/deont/processi_tv.pdf (last visited on 19/10/2010).
[97] Available at: http://www.odg.mi.it/node/30170 (last visited on 19/10/2010).
[98] Garante per la Protezione dei Dati Personali, "Codice di deontologia relativo al trattamento dei dati personali nell'esercizio dell'attività giornalistica" [Deontology code regarding the treatment of personal data in journalistic activity], Provvedimento del Garante, 29/07/1998, G.U. n. 179 (1998) available at: http://www.garanteprivacy.it/garante/doc.jsp?ID=1556386 (last visited on 19/10/2010).
[99] See the provisional text of the decree, Senato della Repubblica, "Norme in materia di intercettazioni telefoniche, telematiche e ambientali" [Rules concerning digital, environmental wiretapping], available at: http://www.senato.it/leg/16/BGT/Schede/Ddliter/33809.htm (last visited on 19/10/2010).
[100] See the intervention of the Italian Data Protection Authority on this point, "Intercettazioni, Garante privacy: 'giustificato allarme libertà'", Reuters Italia, 30/06/2010, available at: http://it.reuters.com/article/topNews/idITMIE65T07020100630 (last visited on 19/10/2010).
[101] Under the draft, publishers would face fines of up to €450,000 for publishing reports on wiretapped conversations and leaks of police interrogations. Journalists who report on such material would face prison sentences of up to 30 days and fines of up to €10,000.

the proposal and in order to revise it in a format which is more respectful to the principle of freedom of expression.

The 'par condicio' as equal access to media for political parties

The so-called *par condicio* [equal conditions] law, Law 28/2000, subsequently amended by Law 313/2003, was not only adopted to define the rules applicable to broadcasting and the press during election periods in order to guarantee that citizens have the greatest amount of knowledge about the candidate political parties, but also to regulate comprehensively political communication in the media, in particular the broadcasting sector.[102]

The general rules distinguish between political communication, defined as all broadcasting programmes that provide the different political positions in a dialectic and discursive way (e.g. a debate with participants holding different positions), and self-managed political communication spaces, where the communication is unilateral. The former should be broadcast obligatorily by public and private broadcasters at the national level, while the latter should be broadcast obligatorily by the public broadcaster where requested; in case of commercial broadcasters this is only an optional decision.[103]

During the election period, the rules are stricter and more detailed. In particular national public television stations are obliged to allocate free airtime to political parties, while again commercial broadcasters do not have such an obligation. In any case, paid political advertising on national television is forbidden in Italy. Moreover, the rules also concern television programs such as debates, thematic round tables and press conferences that are not included in the political communication as defined above, providing for a set of limitations and rules of behaviour also for TV hosts.[104]

The law attributes the monitoring and enforcement function to CPIV and AGCOM respectively for public and commercial broadcasters. It is worth mentioning that the sanctions provided are mostly compensatory, as they allow the competent bodies to impose the broadcasting of political communications of those parties damaged by unbalanced scheduling. This is more suitable than economic penalties in order to achieve better access conditions for political parties to the broadcasting sector.

A less stringent set of rules is applicable to the press in the same period, imposing as a general principle the obligation for the publisher to distinguish clearly in publication informative content from campaigning communications. Moreover, no further indications are given in terms of correctness and impartiality, this being due to

[102] See R. Borrello, "Stampa e par condicio: riflessioni critiche sulla vigente disciplina" [Press and par condicio: critical observations on the current regulation], 53 Giur. Cost. (2008) 2767.

[103] Note that the self-managed political communication spaces are subject to specific rules in terms of duration and content in order to guarantee their integrity and value. For instance, their duration cannot last for less than one minute and no more than three, and they must allow a motivated exposition of the political programme of the interested party. They cannot be inserted during a commercial advertising break and may not interrupt a programme, but have to be included in specific slots together with other similar messages. See article 2, 3 and 4, Law 28/2000.

[104] See article 5, par. 3 where the law provides that television hosts "*are required to have a correct and impartial approach running the programme, so as not to influence surreptitiously the free choice of the citizens*".

the fact that the legislator relies on a greater number of sources of information available to citizens in the press market in comparison to the broadcasting one, which can also assist in granting visibility to all political parties.

The level of invasiveness of the legislation in the broadcasting sector is higher than the average level in European countries, and it has been also questioned in terms of compliance to the constitutional principle of freedom of the press.[105] The justification for the level of detail that can be found in the Italian law should be found in the specificity of the Italian system, where the leader of one of the main political parties and currently Prime Minister is still the owner of the main commercial competitor in the broadcasting sector. Thus, the same person can directly or indirectly influence the editorial choices of the majority of the information sector. From this perspective, the degree of detail of political communication on broadcasting can be interpreted as a way of rebalancing this anomaly of the Italian system.[106]

Rules concerning Internet content

The recent reform addressing the aforementioned TUSMAR in order to implement Directive 2007/65/EC introduced in the first article of the codification that the general principles are applicable to "*the provision of audiovisual and radio media services, taking into account the convergence process among the different means of communication, such as electronic communications, electronic publishing and Internet in all its applications*". However, the definition of audiovisual media services provided in Article 2. a) TUSMAR, referring directly to Articles 56 and 57 of the Treaty limited the application of the rules contained in the codification to a specific category of audiovisual media providers, namely those that have the objective of informing, entertaining or educating the public through the use of an electronic communication network. The article then clearly excludes the provision of services that are not mainly economic and not in competition with television broadcasting, such as private Internet websites (e.g. blogs) and services consisting of the provision or distribution of audiovisual content produced by individual users so as to share them (e.g. Youtube) or to exchange them in a specific community (e.g. Facebook); the same exclusion is applicable to exchange of emails or text messages, and to services which do not have as their main objective the provision of audiovisual content, such as online games, search engines, electronic versions of newspapers and magazines, and online gambling.

The choice of the legislator in this case was to exclude from the field of application of the TUSMAR all Internet-related services that could not be interpreted as an organised form of audiovisual information or entertainment service provision. The original draft of the amending regulation imposed the obligation to register for any internet user who provided video content or web streaming online, regardless of whether they were professionals, thus imposing heavy administrative burdens on those users which provided such content only occasionally. Moreover, this could have been interpreted as an equivalence between Internet websites focused on video sharing and broadcasting stations, which consequently could impose not only registration obligations but also a stricter liability regime conflicting with the position of the former as an Internet intermediary provider defined through Law 70/2003. The

[105] See Constitutional court, decision n. 48/1964.
[106] Caretti, *Diritto dell'informazione e della comunicazione*, p. 157.

choice to move away, yet not so unambiguously,[107] from this situation is to be welcomed as providing a more reasonable implementation of the provisions of the AVMS directive.

Regarding blogs and discussion forums, as mentioned above, the jurisprudence has clarified that these forms of online communication should not be subject to the same regime as the press, and in particular the obligations of registration to the ROC, and the exclusion of seizures or similar preventive sanctions.[108] This has been confirmed also in terms of the editorial responsibility of the blogger or moderator of the discussion forum, as a recent decision of the Court of Appeal of Turin, overturning the First Instance approach, acknowledged the responsibility of a blogger only concerning her own produced and uploaded content, without any obligation to monitor comments and intervention coming from other users, thus excluding any equivalence between a blogger and an editor-in-chief of an online newspaper.[109]

However, this exclusion does not mean that the manager of the blog or discussion forum is exempted from compliance with the rule concerning the protection of honour, reputation, personality, and the private life of persons, which is also applicable to any content diffused online.[110] However, it should be noted that another just published decision of the Supreme Court addressed the monitoring function of editors of online newspapers, in particular where the online publication could be framed as defamatory.[111] The judges acknowledged the applicability of Article 57 of the Penal Code concerning defamation only to newspapers published on paper, due to the fact that the interactivity of the Internet medium can not impose the obligation to verify all the materials received in form of comments and reviews by the editor.

4. Media policy and democratic politics: an assessment

The analysis presented in the previous paragraphs shows with sufficient clarity that the Italian media system is still in a period of transition, and further developments both in terms of legislative interventions and new balances in the market power allocation are likely. This situation has been determined by the evolution of communications technologies that do not involve only the Italian state, but the whole European media in general. It is also possible to argue that the technological evolution

[107] See that the criteria of "not mainly economic" and "not in competition with the television broadcasting" have been criticised due to their lack of specificity and possible extended interpretations by many commentators, see "Decreto Romani, meglio ma non bene", PuntoInformatico, 02/03/2010, available at: http://punto-informatico.it/2823280/PI/Commenti/decreto-romani-meglio-ma-non-bene.aspx (last visited on 19/10/2010). Moreover, the definition of non-linear audiovisual media service could surreptitiously include the scenario of video sharing websites, as it is defined as "*audiovisual media service provided to the vision of programmes chosen by the user, based on a catalogue of programmes selected by the provider*". See article 2, lett. m), TUSMAR.

[108] See above, par. 3.1.

[109] See Court of Appeal Turin, 23 April 2010.

[110] See the recent case of *Vividown v Google*, where four Google executives were convicted for violating data protection, in connection with the on-line posting of a video showing a disabled person being bullied and insulted. The Milan Tribunal, while acquitted all Google executives with regard to the charge of defamation, sentenced three of them to a six-months suspended jail for violation of the data protection law. See Milan Tribunal, decision n. 1972/2010.

[111] Supreme Court, decision 1907/2010.

has catalysed the existing trend of the internationalisation of the problems that characterise the media, requiring repeated interventions by the European bodies.

The Italian regulatory framework was developed in three main phases. The first, dating back to the period between the two World Wars, was based on a public monopoly over the means of information, including the press sector being heavily controlled through the obligation for journalists to adhere to mainstream political thinking. In this period, the State was not only the regulator of the media, but it also started to be involved in the organisation of the broadcasting sector, due to the interpretation of the broadcasting activity as falling into the category of public service. The final outcome of this period was the affirmation of the monopoly of the state over broadcasting, creating the tight relationship between political power and the media that still exists today.

The second phase in the evolution of media regulation coincided with the deep constitutional changes which came about after the recognition of new principles and rights in the relationship between the State and citizens. The time period of this phase dates to the 1960s and 1970s, when the model of public monopoly of the broadcasting media declined and the concentration trend that characterised the press required a comprehensive regulatory framework. The debate in that period was focused mainly on the social impact of the media and its capability to affect the cultural and political education of citizens. The main reference point was the principle of freedom of expression, read in light of the pluralism of sources of information, yet which should also take into account the technical limitations applicable to specific media. Thus, the legislator was asked to balance the monopolistic role of the state in the media sector with the unavoidable needs of free and independent media. The subsequent interventions can be seen as a set of corrections and amendments to the existing framework, focusing on three axes: the balance between the role of the Parliament and the executive in the regulation of the media system, and in particular their respective roles regarding the public service broadcaster; the definition of a closer relationship between media networks and local communities; and the introduction of new forms of the participation of social groups in the management and use of the media, for instance through the creation of new consultative bodies and the definition of an access right for specific social groups.

The last three decades have seen the enactment of the "third generation" legislation.[112] The social context has changed, and the regulation has faced new challenges: the acceleration of technological innovation that has eliminated the rationale for the scarcity of resources in broadcasting networks, the increasing pressure from the entrepreneurial and advertising sectors for a liberalisation and privatisation of broadcasting, the need to embrace the media as a converged whole that is no longer compartmentalised into different market sectors. The opening of the broadcasting market also to private or commercial television was the first step moving into this new framework; however, the Italian legislator did not provide sufficiently defined rules that could regulate access and activities of these new market actors. Attempts were made to correct market abuses, introducing both ceilings for advertising revenues, so as to monitor funding mechanisms, and anti-trust regulations, in order to verify the level of concentration in the sector.

The main points that the current framework still has not resolved are, first, the role of the State, that shifted from the position of editor and deliverer of the

[112] Caretti, *Diritto dell'informazione e della comunicazione*, p. 186.

informative activity, to a subject that is regulating and monitoring the application of common principles in a sector were private actors now comprise the majority. Secondly, the increasing importance of the independent communication authority in terms of regulatory functions, which is able to be more impartial due to its distance from political parties. However, such independence is yet to be achieved completely. Thirdly, the difficulties in introducing effective anti-trust rules that can limit concentration trends and, at the same time, regulate the flow of financial resources among the different media. Finally, the role of the public service broadcaster in the new context, that is no more a pillar for the safeguard of the internal pluralism of information – a role which cannot be imposed directly over private actors – but is more a guarantee of access for the public to new communication technologies, in an attempt to avoid the risk of introducing new forms of social marginalisation.

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