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Abstract

Television (or "TV") broadcasting today is in the wake of a critical technological revolution. The development of new technologies is becoming increasingly rapid and the legal scenario is changing daily and sometimes disorganically. Regulation in this field is strictly connected with technology and its evolution. For this reason, it is worthwhile to go through a brief outline of the last and most significant television broadcasting techniques. Distribution of TV "signals" has occurred in Europe and especially in Italy — until the beginning of the present decade — almost exclusively through terrestrial networks, i.e. via etere. This situation means that in order to admit new television broadcasters, it becomes necessary to utilize new channels of distribution. The new "frontiers" of television broadcasting concern both the channels of distribution properly considered and the "quality" of the TV signals. As far as the quality of the television signal is concerned, analog transmission is going to be replaced by digital signals that permit not only the saving of precious frequencies, but also the granting of an interactive, higher quality-grade signal.

ANTITRUST LAW AND PAY-TV: THE ITALIAN CASE

*Claudio Cocuzza**

INTRODUCTION[1]

Television (or "TV") broadcasting today is in the wake of a critical technological revolution. The development of new technologies is becoming increasingly rapid and the legal scenario is changing daily and sometimes disorganically. Regulation in this field is strictly connected with technology and its evolution. For this reason, it is worthwhile to go through a brief outline of the last and most significant television broadcasting techniques.

Distribution of TV "signals" has occurred in Europe and especially in Italy—until the beginning of the present decade—almost exclusively through terrestrial networks, i.e. *via etere.* As known, terrestrial frequencies are scarce and, therefore, this kind of distribution does not allow to "gain" and "occupy" new frequencies. This situation means that in order to admit new television broadcasters, it becomes necessary to utilize new channels of distribution.

The new "frontiers" of television broadcasting concern both the channels of distribution properly considered and the "quality" of the TV signals. In the first sense, alternative and most convenient distribution channels are: (i) cable distribution channels, which are not sufficiently developed in Italy, and in Europe in general—for historical reasons—in order to be a real-

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1. Suggested readings on new television techniques and Italian legislative scenario on information technologies, see generally 25 R. ZACCARIA, TRATTATO DI DIRITTO AMMINISTRATIVO 269 (Padova 1996); F. CARDARELLI & V. ZENO ZENCOVICH, IL DIRITTO DELLE TELCOMUNICAZIONI (Roma, 1997); A. Contaldo, *Televisione via satellite, problematiche guiridiche del medium transfrontaliero,* DEMOCRAZIA E DIRITTO 375 (1995); R. BARBERIO & C. MACCHITELLA, L'EUROPA DELLE TELEVISIONI (Bologna, 1989); COUNCIL OF EUROPE, STATISTICAL YEARBOOK OF THE COUNCIL OF EUROPE (1998); V. Zeno-Zencovich, *Il sistema integrato delle telecomunicazioni: spunti sistematici e critici sulla Legge 21 luglio 1997 n.249,* RIVISTA DEL DIRITTO DELL' INFORMAZIONE E DELL'INFORMATICA 735 (1997); A. Contaldo, *Aspetti guispubblicistici della disciplina sulla pay-tv,* DIRITTO D'AUTORE 170 (1994); C. OSTI, AIDA, ASPETTI DELLA REGOLAMENTAIZONE DEL SETTORE TELEVISIVO 185 (1995); Green Paper on the Convergence of the telecommunications, media and information technology sector, and the implications for regulation towards on information society approach, Com (97), 623 Brussels, 03.12.1997; A. Contaldo, *Profili giuridici della piattaforma digitale,* DIRITTO D. AUTORE 3 (1998).

istic alternative to terrestrial distribution, and (ii) satellite network distribution, which has had a significant growth during the last few years. Both aforementioned distribution channels allow broadcasters to acquire new frequencies because of their need of a narrower "space" for their transmissions.

As far as the quality of the television signal is concerned, analog transmission is going to be replaced by digital signals that permit not only the saving of precious frequencies, but also the granting of an interactive, higher quality-grade signal. This revolution concerns not only the techniques of broadcasting of TV signals, but also—and above all—the reception of the transmissions by the television audience. The distinction here is drawn between free-on-air televisions, both state-owned and private, and pay-TVs. In the latter case, the reception of the programs is not free and the audience, or better, the "subscribers," need to pay a fee in order to receive the transmissions. Pay-TVs are in general "thematic," i.e., they provide for the broadcasting of a particular and specific kind of transmission, such as films, sports, etc.

I. *ECONOMIC TRENDS CHARACTERIZING THE MEDIA MARKET*[2]

Here are some essential features of the Italian scenario: Italy has more than twenty million households, and a very high penetration rate of TV stations. It is the fourth largest European television market, and—this statistic is a key element—RAI and Mediaset[3] are basically attracting more than ninety percent of

2. Suggested readings on economic issues concerning the development of television and media markets, see generally C. Demattè & F. Perretti, *Digital Television: European Groupings Push into the Market*, SCREEN DIGEST, Oct. 1997, at 225; GAMBARO & RICCIARDI, ECONOMIA DELL 'INFORMAZIONE E DELLA COMUNICAIZONE (Roma, 1997); R. Wood, *TV digitale terrestre: meglio dare tanti canali o rilanciare l'alta definizione?*, MIND, Jan. 1997, at 7; John Temple Lang, *Media, Multimedia and European Community Antitrust Law, in* 1997 FORDHAM CORP. L. INST., 377 (Barry Hawk ed., 1998); F. Perretti, *Strategie internazionali delle imprese televisive*, PROBLEMI DELL 'IMFORMAZIONE, June 1995, at 205; Preta, *Come cambia la televisione: dal "broadcasting" al "video-on-demand"*, PROBLEMI DELL 'IMFORMAZIONE, June 1994, at 145; B. OLIVI, LA FINE DELLA COMUNICAZIONE DI MASSA (Bologna, 1997); M. MICCIO & M. MELE, BREVE GUIDA ALLA LEGGE MACCANICO, LE TELEVISIONI DEL FUTURO (Milano, 1997); A.M. Wachtmeister, *Broadcasting of Sports Events and Competition Law*, COMPETITION POL'Y NEWSLETTER, June 1998.

3. RAI is state-owned and Mediaset is ultimately controlled by the Media tycoon Silvio Berlusconi.

the audience. So, as to free-on-air television, there is a duopolistic situation.

The Italian pay-TV market is still modestly developed with just two channels presently operating: i) Telepiù, which is controlled by Canal Plus, the French pay-TV giant, and ii) Stream, which recently began its activity, is owned by Telecom, the recently privatized Italian telephone company. Moreover, Italy has the lowest penetration rate in Europe for cable and satellite, and the pay-TV market has only 4.8% of the total share. It is evident, after a brief analysis of the actual scenario, that a few players are dominating the market. This fact obviously provokes important antitrust responses.

The worldwide trend, increasing especially from 1994 to 1996, is strongly characterized by mergers, acquisitions, and integration among the TV and media industries. Few players are dominating the market—top players being merged companies—and the ten largest media companies basically control almost half of the worldwide media market. Media operators and televisions are also expanding into downstream or upstream markets, into lateral markets, and into markets that are either up or down their original core business. A clear example of this trend is Time Warner, which is a fully integrated company from cinema to press, going from cable to music, video, and TV. Within the realm of such "value of chain" driven vertical integration, pay-TV, digital, and cable TV are growing faster than any other segment in the media sector.

II. *ITALIAN TELECOMMUNICATIONS LEGISLATIVE FRAMEWORK: THE* MACCANICO *LAW AND THE NEW ANTITRUST PROVISIONS*[4]

1997 has been a crucial year for Italy in this specific sector. On July 31, 1997, after a long parliamentary debate, the new radio-television discipline—containing *ad hoc* antitrust provi-

4. Suggested readings on Italian legislative frame and on the recently enforced antitrust legislation, see generally V. DI STEFANO, LA LIBERALIZZAZIONE DELLE TELECOMUNICAZIONI (Milano, 1997); Mario Siragusa, *Competition and the Guarantee of Pluralism of Information in the Recent Italian Television Broadcasting Regulation*, in 1997 FORDHAM CORP. L. INST., 525 (Barry Hawk ed., 1991); P. Fattori, *Brevi note sulla ripartizione di competenze tra Autorità Garante della Concorrenza e del Mercato e Autorità per le Garanzie nelle Comunicazioni*, CONCORRENZA E MERCATO 483 (1998); L'INDUSTRIA DELLA COMUNICAZIONE IN ITALIA (Torino, 1997).

sions—had been finally enacted. This enactment, Law No. 249/97, is also referred to as the *Maccanico* Law,[5] from the name of the minister of the Telecommunications Ministry who proposed it. Often inconsistent with previous legislation that was complicated and unclear, the *Maccanico* Law copes—inter alia—with competition law issues and the need to guarantee pluralism.

Italian legislators tried to resolve these striking issues by creating a new and independent authority whose aim is of regulating and controlling the media market, and avoiding the creation and the permanence of "dominant positions." The peculiar composition of this authority, however—which became effective as of Fall 1998 and which is named *Autorità per le garanzie nelle comunicazioni* ("Authority")—creates serious doubts on the impartiality of its approach. Its members, in fact, are chosen by the Italian Parliament and mirror the political fragmentation of Italy's political system.

As said, the Authority's aim is to monitor competition within media markets. Article 2 of the *Maccanico* Law in fact bans all dominant positions in the broadcasting sector.[6] The striking importance of this provision must be stressed: a total ban of any dominant position, independent from the way in which it has been reached, and a ban which remains effective even in case of spontaneous growth, which is rather unusual and is not provided for by any European Community (or "EC") treaty and most national competition law. Italian legislators intended, therefore, to set significantly high antitrust thresholds in order to create a situation of perfect pluralism in which nobody could be "dominant."

The choice of protecting media pluralism by means of an antitrust rule is rather unusual: one could argue whether antitrust has something to do with pluralism, or whether antitrust and competition law are indeed appropriate tools for controlling and guaranteeing both the pluralism of messages and the pluralism of broadcasters. From a legal viewpoint, these two aspects should remain distinct, as competition and pluralism belong to different areas of the law. Safeguarding pluralism involves constitutional rights of individuals—such as the freedom of thought and the freedom of expression—which deserve a

5. L. 31.7.1997 n°249, in Gazz. Uff. 31.7.1997 n°177, S.O.

6. *Id.* art. 2.

higher level of protection and which should not be submitted to the defense of economic interests such as fair competition. Indubitably, however, pluralism and competition in media markets have many elements in common. Sometimes, it is difficult to draw the exact boundaries between one and the other.

Another important aspect of Article 2 of the *Maccanico* Law that creates uncertainty is that it is unclear whether the dominant position recurs only when the thresholds indicated in the law are triggered or if, indeed, the thresholds are only indicative and may be interpreted by the Authority with a certain degree of flexibility when assessing a dominant position. This distinction is—in practice—a crucial issue because the answer to this question is essential in order to decide whether a commercial agreement or a simple position may be judged "dominant" per se or whether a significant margin for interpretation and application is left to the Authority.

The Authority is also competent to adopt the frequencies allocation plan ("*Piano Nazionale di Assegnazione delle Frequenze*"), which basically determines the quantity of "channels" that are available for terrestrial broadcasting throughout the Italian territory. The Authority issued such a plan on October 30, 1998 and it finally assigned to broadcasters eleven terrestrial channels. This plan means that pursuant to Article 2, paragraph 6 of the *Maccanico* Law,[7] which sets forth antitrust thresholds, each broadcaster is allowed to own no more than two channels broadcasting *via etere*. As a result of the enforcement of the plan, on January 31, 1999, broadcasters owning more than two channels, i.e., both RAI and Mediaset, are obliged to begin "simulcasting," i.e., a contemporary broadcasting of the exceeding channel both on satellite and *via etere*. After this temporary period—in a successive deadline that will be determined by the Authority—exceeding channels shall definitively "leave" terrestrial distribution and will exclusively utilize satellite channels of distribution. Once again, the *Maccanico* Law establishes and sets forth an important set of rules aimed at ensuring pluralism via pure antitrust rules.

From a procedural point of view, the *Maccanico* Law provides for a dual notification system that creates substantial problems. The law provides that any agreement or concentra-

7. *Id.*

tion falling under the thresholds of the new antitrust legislation needs to be notified to both authorities: the Antitrust Authority, which is the public authority competent for the protection and enforcement of general competition rules, and the Authority, which is—as said above—the new authority created *ad hoc* by the *Maccanico* Law for the safeguard of competition within the television market. Such striking duplication creates confusion because under Italian antitrust law, the notification of agreements and mergers becomes compulsory only if some specific and predetermined thresholds are triggered. The result is that in certain cases under the new provisions of the *Maccanico* Law, the notification of the agreement would be necessary, but under antitrust law, the same agreements would not need to be notified.

The *Maccanico* Law antitrust threshold focuses on the maximum amount of frequencies assigned to single national terrestrial broadcasters and the related amount of channels owned by each of them. A threshold of greater significance focuses on the collection of revenues calculated as a percentage of the aggregate national "resources" for both terrestrial and encrypted broadcasting. Such percentage must not exceed thirty percent of the total resources of the TV area. "Resources" comprehends all revenues from the financing of public service, advertising, telesales, and sponsoring agreements with public entities and pay-TV subscriptions.

In case of antitrust violations, the Authority has the power to issue economic sanctions to violators and it may also prohibit the illegitimate behavior, the non-competition agreement, or the banned dominant position. The scope of the Authority also concerns the issuance of TV and radio licenses and their enrolling and the maintenance of a national register of media and telecommunication companies. National and local licenses are granted for a renewable six year term. No broadcaster may be granted more than one national license for encrypted transmissions. Such rigid limitations will be effective as of the date that is going to be indicated by the Authority—after January 31, 1999, pay-TV players shall begin the broadcasting in simulcast.

In conclusion, the new telecommunications legislative framework, which has recently entered into force in Italy, has been introduced as a new "segment" of antitrust provisions applied to the media market. Competition and pluralism are—for certain aspects—jointly regulated and they are part of an overlap

of rules that shall be difficult for lawyers and economic players to cope.

III. *"RELEVANT MARKET" DEFINITION FOR TELEVISION: THE COMMUNITY AND NATIONAL APPROACH*[8]

The *Maccanico* Law does not provide for a legislative "market definition" of TV "products," and therefore—for antitrust purposes and in order to correctly foresee the results in case of enforcement of the law—it is necessary to examine how Italian and European antitrust case law brings about the process of defining such a relevant market. On December 1997, the European Commission ("Commission") issued a Notice on the methodology that shall be utilized in the case of a definition of a relevant market for the purposes of European Community competition law. Also, the Italian Antitrust Authority proposed, in April 1996, a clear definition of the criteria that are to be used in order to determine the relevant market. The importance of a clear and correct determination of the methodology used by antitrust authorities in the definition of relevant markets is—in a certain sense—strategic. In fact, violations of the antitrust rules occur only if the behavior or the agreement of the companies at stake triggers the thresholds or the prohibitions provided by the law in a specific market and can be considered "relevant" for antitrust purposes.

Leaving alone relevant geographic markets, whose definition is less difficult, relevant product markets have been defined by both European and Italian antitrust authorities as the markets that comprise all those products/services that are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices, and their intended use. Suppliers who operate within a specified market are there-

8. Suggested readings on market definition, see generally Commission Notice on the definition of the relevant market for the purposes of the Community competition law, O.J. C 372, 09.12.1997; M. Furse, *Market Definition–The Draft Commission Notice*, 18 EUROPEAN COMPETITION L. REV. 378 (1997); K.S. Desau, *The European Commission's Draft Notice on Market Definition: A Brief Guide to the Economics*, EUROPEAN COMPETITION L. REV. 473 (Oct. 1997); S. Baker & L. Wu, *Applying the Market Definition Guidelines of the European Commission*, EUROPEAN COMPETITION L. REV. 273 (June 1998); G. BRUZZONE, AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, L'INDIVIDUAZIONE DEL MERCATO RILEVANTE NELLA TUTELA DELLA CONCORRENZA, (1995); A. Niutta, *Il mercato rilevante*, CONCORRENZA E MERCATO 132 (1998); C. Koboldt, *Bertelsmann/Kirch/Premiere: Never Say Never Again*, LONDON ECON., July 9, 1998, at 5.

fore subject to an aspect of competitive constraints that is particularly strong: demand substitutability. This approach implies that, starting from the type of products that the involved players sell and the area in which they sell them, additional products and areas will be included into or excluded from the market definition depending on whether competition from these other products and areas sufficiently affects or restrains the pricing of the parties' products in the short term. In other words, it is necessary to establish whether the customers would switch to readily available substitutes as an answer to a hypothetical semi-permanent price increase in the products and areas being considered.

Demand substitutability is therefore the prevailing criterion used by antitrust authorities in order to frame relevant product markets. In light of the above, it is now important—for antitrust purposes—to understand if the product substitution principle has been respected by antitrust authorities when defining the relevant television market. The answer to such a crucial question is unfortunately negative. Case law reveals that relevant television markets have been defined as setting aside the criterion of demand substitutability.

Such discrepancy between the declared and assessed criteria and their practical enforcement is difficult to explain, and it may be clearly perceived in the Commission's judgement in *MSG Mediaservice.*[9] In this case, the Commission decided that the considered relevant markets are the markets of free-on-the-air TV and pay-TV—the former absolutely separate from the latter. The distinction depends on the following criterion: the relevant market is qualified by virtue of the "principal economic relationship" that, in the Commission's opinion, characterizes TV products. The Commission asserts that the pitting of pay-TV versus free-on-the-air TV is due to the fact that the principal economic relationship in free-TV is between TV providers and advertisers.

The distinction therefore depends on a presumed prevailing economic relationship. On the contrary, in pay-TV, the key economic relationship is between TV and TV viewers. Is the demand substitutability "main-stream" criterion completely forgotten? The Commission does not justify its change of perspective. The rationale of this decision has been further confirmed in the

9. Commission Decision No. 94/922/EEC, O.J. L 364/1 (1994) (MSG Media Service).

RTL-Veronica[10] judgment and therefore it is possible to affirm that this is the prevalent trend in the Commission's case law.

The Italian Antitrust Authority has adopted the same criterion of interpretation in the few cases that it has examined. TV markets have been identified pursuant the prevailing economic relationship definition principle. It is difficult to agree with this approach considering the real attitude of consumers: for them, in a plurality of cases, going to a movie theatre, watching a free-TV movie on commercial television, or paying a price to the video rental shop or to the pay-per-view operator often is the same thing. For consumers, all these products might be deemed to be substitutable for each other, comprising, therefore, a unitarian market.

10. Commission Decision No. 96/346/EEC, O.J. L 134/32 (1996) (RTL/Veronica/Endemol).