

Media System of Italy

report by our correspondent

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for the
Study on Co-Regulation Measures
in the Media Sector

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The above study aims at providing a complete picture of co-regulatory measures taken to date in the media sector in all 25 Member States and in three non-EU-countries, as well as of the research already done. The study will especially indicate the areas in which these measures mainly apply, their effects and their consistency with public interest objectives. In this context, the study will examine how best to ensure that the development of national co- and self-regulatory models does not disturb the functioning of the single market by re-fragmenting the markets. This study started at the end of December 2004, the final report will be compiled by the end of December 2005.

More information on the study can be found at <http://co-reg.hans-bredow-institut.de>

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Italy

Introduction

The Italian media markets are regulated by a complex and variegated bulk of sources of law. The basic principles (freedom of expression, freedom of private communications, freedom of private economic initiative) are enshrined in the Italian Constitution of 1948 (see below), but also in the European Convention on Human Rights (1950) and the European Treaties. Both these external sources hold the rank of primary sources according to article 117 of the Italian Constitution.

The Constitution also requires that the actual regulation of any single media sectors must be determined by Parliamentary statutes (*riserva di legge*). As a consequence, specific rules concerning single media sectors are included in a number of acts, whose compatibility with the Constitution is controlled *ex post* by the Constitutional Court.

As to the broadcasting sector, Italy has a dual system including a strong public (Rai-Radio televisione italiana) and some private operators.

In 2003, the market shares of broadcasting companies (both free and pay tv) were as follows (source: AGCOM):

- Rai - 39,5%
- RTI (Mediaset) - 34,3%
- Sky Italia - 12,2%
- Gruppo La 7 (TIM) - 1.6%
- Others - 5,5%

Rai started its transmissions in 1954 and maintained its monopoly until the late '70s, when private competitors entered the market first at the local level, then at the national one. The first statute which expressly permitted national private broadcasting dates 1990 (Law n. 223 of August 6th, 1990). Nowadays, the Mediaset group holds a dominant position in the private sector.

The broadcasting sector has developed in a rather confused fashion, characterised by a continuing tension between Constitutional Court decisions and legislative choices. According to the first, the pluralistic principle was not respected by the Parliamentary acts which permitted a single group to hold a dominant position in the private sector, in particular controlling three national analogic channels. The trend of the next years will be a progressive switch from the analogue to the digital system of television broadcasting, with the increase of the number of channels available to operators.

The press market has of course a longer story. Freedom of press is firmly enshrined in the Italian Constitution and in a series of statutes adopted afterwards. Today the notion of "editorial product" is rather large, including not only the written press, but also digital products diffused by electronic systems (law n. 62/2001). The press market is characterised by a rather large number of operators both in the daily press and in the magazines markets. Main

operators are Mondadori (Fininvest group), Editoriale Espresso (publishing newspapers as la Repubblica and magazines as L'Espresso). RCS (publishing the first newspaper by number of readers, Il Corriere della Sera).

As to the distribution of economic resources between the two main sectors (press and tv), the Italian scenario is quite different from other European States. As a matter of fact, Tv broadcasters control 54,3% of the total investment in the whole media market, whereas press operators (magazines and newspapers) hold a minor share (37,8%). Other sectors hold minimal shares (Radio: 4,3%; Cinema: 1,1%; external advertising, 2.5%) - Source: Nielsen Media Research.

Other media sectors are present in the Italian markets, but their regulation is not object of hard law in terms of protection of pluralism.

Constitutional law

The basic constitutional principle of freedom of expression is codified in Article 21 of the Italian Constitution. It contains a first paragraph dedicated to the right:

"Everybody has the right to manifest his or her own thought freely with the word, the writing and every other mean of diffusion".

The following paragraphs are all dedicated (only) to the press. This is due to the necessity, felt by the writers of the text, to avoid any possible loss of liberty as happened during the Fascist regime:

"The press cannot be subject to authorisations or censorship.

It can be preceded to sequestration only for motivated action of the judicial authority in the case of crimes, for which the law on the press expressly authorises it, or in the case of violation of the norms that the same law prescribes for the indication of the responsible.

In such cases, when there is absolute urgency and the timely intervention of the judicial authority is not possible, the sequestration of the periodic press can be performed from official of judicial police who must immediately, and not ever over twenty-four hours, do declaration to the judicial authority. If this one doesn't confirm it in the following twenty-four hours, the sequestration is intended revoked and deprived of every effect.

The law can establish, with norms of general character that are made public the means of financing of the periodic press".

Finally, the last paragraphs intend to avoid publications and other public spectacles which offend morality. This is generally interpreted as referred to the protection of minors, and applied to any media including television and radio broadcasting. In addition, Art.31, par. 2, of the Constitution states that the Republic

"protects the maternity, the infancy and the youth favouring the necessary institutes to such purpose".

No specific reference may be found in the Constitution to the Broadcasting system. The Constitutional Court, in a series of judgements, stated that a correct interpretation of Article 21 requires the protection of pluralism in the broadcasting sector. This principle is considered "ineludible" and has served as a parameter of legitimacy of Italian legislation on media (see Decisions 420/1994 and 466/2002).

No reference in Constitution also to public broadcasting. As to private initiatives, Art.41 provides that:

"The private economic initiative is free. It cannot be done in contrast to the social utility or in way to bring damage to the safety, to the liberty, to the human dignity".

This provision, together with the pluralistic principle in Article 21, served as the legal basis for the imposition and rules to broadcasters concerning access to the markets. This must be authorised by the administrative authority according to the general interest. The same Constitutional provisions permit content requirements to media operators.

1. Broadcasting

1.1. Regulatory framework

1.1.1. Legal provisions

The regulation of broadcasting market derives from several Parliamentary acts and Governmental decrees. The basic acts is Law n. 223 of 1990, Law n. 249 of 197 instituting the Authority for the guarantees in Communications (Agcom), Law n. 112 of 2004, which provides with a new system of protection of pluralism and rules on the protection of minors. Advertising provisions are mainly included in Law n. 223 of 1990, Law n. 327 of 1991 executing the Strasbourg Convention on Transfrontier Television and Law n. 122 of 1998. Legislative Decree n. 74 of 1992 prohibits misleading advertising.

1.1.2. Administrative regulation/rules

Both the Ministry of Communications and the AGCOM hold the power of adopting administrative decrees concerning broadcasting. As to advertising, Decree n. 425 of 1991 is dedicated to advertising of tobacco and alcoholic products. Decree n. 581 of 1993 concerns sponsorship and teleshopping. AGCOM Regulation n. 538/01/CSP of 26th July, 2001, provides for detailed rules on the insertion of advertising in television programs.

1.1.3. Other provisions, especially co-regulatory or self-regulatory measures, codes of conduct, etc.

- The Institute for Advertising Self-Regulation acts according to a Statute freely accepted by media operators.
- In the context of political campaigns Law n. 28 of 2000, as modified, provides for a co-regulatory system concerning the use of transmission time for messages from political parties.
- With regards to the protection of children in television programmes, the main private and public tv operators have signed a *Self-Regulatory TV and Children Code of Conduct* approved on 29 November 2002. According to art. 10 of Law n. 112 of 2004, broadcasters television stations *must* observe the provisions laid down in the Code.

- Finally, a Self - Regulation Code, concerning Tv sales, is in force since 2002. The Code's most significant innovation lies in a Surveillance Committee, a joint organisation made up of six representatives of television corporates either national and local or public and private, and of six delegates of both institutions and Regional Communications Committees (Corecom). This Code embodies a reliable auto - obligation for every broadcasting station transmitting sales and ads sales: its non - observance only involves a public negative appraisal of the behaviour of the operator violating the Code.

1.2. Regulatory authorities/bodies

1.2.1. Authority/ies

The Communications Regulatory Authority (Agcom) is an independent authority whose activity covers traditional and innovative media markets. The Communications Regulatory Authority is a "convergent" authority, since the Law attributed to Agcom a series of functions extending from telecommunications to audiovisuals and publishing. In this context, only competencies related to radio and television broadcasting are taken into account.

1.2.1.1. Legal basis

Agcom was established by Law n. 249 of 31 July 1997.

1.2.1.2. Functions/competencies

Agcom acts as a "guarantor" of proper functioning of the media markets. The two main tasks assigned to it by Law n.° 249 are to ensure equitable conditions for fair market competition and to protect individual fundamental rights.

According to the Law, Agcom holds the following main competencies in the media markets:

- rationalisation of resources in audiovisuals; application of antitrust rules in the field of communications, inquiries on dominant positions;
- organisation of the Registry of Communication Operators.
- control on quality and distribution of services and products, including advertising;
- fostering and safeguarding political, social and economic pluralism in broadcasting;
- protection of copyright of audio-visual and software products, by means of a Unit against piracy;

Violations of norms are punished by the Authority through economic sanctions, which vary according to the actual provisions. The specific sanctions are provided by the law, as in the case of infringement of advertising rules (Art.31, Law n. 223/1990), of rules concerning the protection of minors (Law n. 112 of 2004) or of rules concerning pluralism (Art.2, par. 7, Law n. 249 of 1997). In the latter case, the Authority can also impose other, more concrete measures such as obliging operators holding a dominant position to reduce market shares.

1.2.1.3. Organisation

Bodies of the Authority are: the President, the Commission for infrastructures and networks, the Commission for services and products, the Council. The President is designated by the Prime Minister, but the designation requires approval by the competent Parliamentary Committee with positive vote of at least 2/3 of its members. So in practice both the majority and the opposition in Parliament must accept the designation of the President. The other eight members are elected by the Parliament, four by the majority and four by the opposition).

Each Commission is a collegiate body, composed of the President and four Commissioners.

The Council is composed of the President and all Commissioners.

The Authority is financed by State resources and by contributes by the media operators.

1.2.2. Self- or Co-regulatory body/ies

The Institute for Advertising Self-Regulation (*Istituto dell'Autodisciplina pubblicitaria*) acts in the advertising field. The Institute main task is to make sure that all advertising be honest, truthful and proper and carried out as a service for the information of consumers.

1.2.2.1. Legal basis

Membership of the Institute is strictly on a voluntary basis. It has no legal basis and functions according to a Statute. It holds legal personality and is financed by the members.

1.2.2.2. Functions/competencies

The Istituto dell'Autodisciplina Pubblicitaria, as set out in its own Statute, is a non-profit organisation.

Amongst its main responsibilities are the formulation and updating of the rules of the Code of Self-Regulation (Codice di autodisciplina pubblicitaria), which was first published in 1966 and updated several times. The latest edition entered into force on July 2004. The rules contained in the Code define the behaviour to which the advertising industry must conform (so called Rules of Behaviour). These apply with reference to any advertising message whatever the medium or product/service offered. As to the content of the rules, they concern inter alia: the principle of loyalty in advertising, the prohibition for advertising to be misleading, the obligation to demonstrate the truthfulness of the messages and identification of advertising, the prohibition to exploit fear and credulity, for messages to be vulgar, violent or indecent, the respect of moral, civil, political convictions and religious beliefs besides the respect for dignity and the human being. The Code also enshrines a prohibition to imitate, confuse, or exploit the notoriety of others, prohibition to denigrate different companies or products, while it allows indirect comparison.

1.2.2.3. Organisation

The activities within the system of Advertising Self-Regulation are carried out by two organs: the Review Board (*Comitato di controllo*) and the Jury (*Giuri*). These are backed by a Secretariat, responsible for the organisation in general and for first screening.

On request of an interested party, the Review Board can provide an advice on items of advertising submitted to it as to their conformity with the rules of the Code. The Review Board may demand changes to be made to items of advertising which it considers to be in contrast with the Code and it may issue desist orders. In dealing with more complex cases it may revert the matter to the Jury either *motu proprio* or in support of complaints received (from individual citizens, associations, Public Bodies).

The Jury, consisting of 9 to 15 members, designated by the Istituto and chosen from among academics, professionals and information experts, independent from the advertising industry, examines the material submitted and issues adjudications in accordance with the Code.

As to the effect of these decisions, signatory associations commit themselves to observe the rules of the Code and its Regulations and to have them accepted by their members, to make the decision of the Jury adequately known, and to adopt appropriate measures regarding those members who do not comply with or use to break the decisions of the Jury.

In case of violation of the Code, the decisions of the Jury contains an order to desist, whose (very rare) non observance has no further sanctions. The Jury may decide to publish its decisions on press organs.

2. Press

2.1. Regulatory framework

2.1.1. Legal provisions

The press sector received a first general regulation with law n. 47 of 1948, dedicated to the abolition of any administrative requirement for new press initiatives. Publishers must only register their publication before the competent Tribunal. The same law introduced a right of reply and the crime of libel. As to the latter, the director of the publication (newspaper, magazine) is objectively liable for the content of the published articles, together with the author of the article.

Law n. 416 of 1987 (modified by Law n. 67 of 1987) introduced for the first time general rules on press activities in the interest of the public. It required *inter alia* transparency of property and imposed some pro-pluralism rules which are still in force. This acts aims at avoiding the formation of dominant positions by imposing for any operator in the newspapers market a threshold of 20% of the copies distributed in the Italian territory. Other antitrust rules concern advertising concessionaires.

No specific legal provisions concern the protection of minors in the press. In any event, general rules in the penal code apply in case of indecent publications.

As to the amount of advertising, the law imposes no specific threshold. Law n. 416 of 1981, as modified by Law n. 62 of 2001, provides for the loss of some indirect public funds if the number of pages annually dedicated to advertising is more that 45% of the total amount of pages.

The content of advertising in the press is subject to few statutory provisions. The general rule of Decree n. 50 of 1992 applies also to misleading and comparative advertising in the press. A law of 1962 prohibits any direct or indirect advertisements of tobacco products.

2.1.2. Administrative regulation/rules

Subjects operating in the press sector are required to register in the general *Registro degli operatori della comunicazione* (ROC) according to law n. 249 of 1997.

2.1.3. Other provisions, especially co-regulatory or self-regulatory measures, codes of conduct, etc.

Press publications, as well as television and radio broadcasting, may be subject to the general self-regulatory system of the IAP/Institute for Advertising Self-Regulation) (see above).

2.2. Regulatory authorities/bodies

2.2.1. Authority/ies

2.2.1.1. Legal basis

The only Authority holding competencies in the press sector is the above mentioned AGCOM. The legal basis for its intervention is again Law n. 249 of 1997

2.2.1.2. Functions/competencies

AGCOM guarantees transparency in the control of companies operating in the press market. According to Law n. 416 of 1981, as modified, it also controls the respect of the antitrust thresholds specifically dedicated to the press market.

2.2.1.3. Organisation (composition of the authority/members of the board, etc.)

See above.

2.2.2. Self- or co-regulatory body/ies

2.2.2.1. Legal basis

The IAP/Institute for Advertising Self-Regulation functions according to consent form the operators (publishers, advertising agencies).

2.2.2.2. Functions/competencies

As to advertising, including that directed to minors, the IAP/Institute for Advertising Self-Regulation holds in the press market the same competencies as in the broadcasting market.

2.2.2.3. Organisation (composition of the authority/members of the board, etc.)

See above.

3. Online Services

On 23rd November 2003 a Self – Regulation Code of Conduct “ Internet and Children” was signed with the auspices of the Ministry of Communications. It concerns subjects operating on the web and works on a complete voluntary basis. It creates no legal obligations, since the participation of the Ministry is only a political declaration.

The Code aims at protecting minors from unlawful or harmful content which can prove detrimental to his or her psychic or moral integrity.

More in particular, according to its Preamble, the Code aims to:

- a) Direct adults, children and families towards a correct and attentive use of the Internet, bearing in mind the needs of children;
- b) Provide appropriate protection against the risk of minors coming into contact with content that is unlawful or harmful for their development;
- c) Give minors, in accordance with national and international law, equal opportunities for accessing the resources of information technology, and promote secure access to the same;
- d) Protect the child’s right to privacy and ensure correct processing of personal data;
- e) Collaborate fully, in accordance with current legislation, with the competent authorities in the prevention, restriction and repression of cyber-crime, especially with regard to the exploitation of children through prostitution, pornography and sexual tourism on the Internet;
- f) Facilitate the protection of minors, in accordance with article 9 of the Legislative Decree of 9 April 2003, no. 70 (Implementation of Directive 2000/31/EC concerning certain legal aspects of the services offered by the information society, especially electronic commerce, in the internal market), from the potential risks of unsolicited commercial information, and the exploitation of the vulnerability of children, as referred to in article 130 of the Legislative Decree of 30 June 2003, no. 196 concerning unwanted information;
- g) Propagate the contents of the self-regulation code to operators and families.

Article 1 of the Code qualifies as potential "Adherent" any subject conducting Internet business activities, even when this does not directly involve commercial considerations for clients and users, agreeing to accept the Code either directly or through an association.

According to Article 2, as to membership, the Code applies to all operators that underwrite it either directly or through an association of operators.

As to the obligations of the Members, the voluntary adherence to the Self-Regulation Code entails a commitment to:

- accept integrally the contents of the code itself and, in particular, to accept the surveillance activities and sanctions therein;

- adapt the contractual conditions of the services provided to the provisions of the present code.

Article 3 includes the *Instruments for the protection of minors*, one of which is combating on-line pornography and paedophilia: the Adherent, in accordance with current laws regarding use of personal data, agrees to keep the User's IP number for accessing content publication functions, even if hosted free of charge. The Adherent will take any necessary steps to further collaboration with the competent authorities, and in particular the Post and Communications Police, to help identify the assignees of network resources utilised for the publication of contents hosted on his or her servers, as emerging from their respective contracts or equivalent documents, within, and no later than, three working days after receiving notification from the authorities in question.

As to responsibilities, the Code provides in Article 5 for different rules according to the nature of the operators: access providers, Housing/hosting providers, Content Provider, Internet Point Administrators.

With regard to supervision on the application of the Code, a Guarantee Committee, as referred to in article 6, is responsible for supervising the correct application of the Code. The Committee is made up of eleven experts appointed by a ministerial decree issued by the Minister for Communications, namely:

- four representatives of the Adherents, designated by the signatory associations;
- two members, including the Committee President, representing the Ministry for Communications;
- two members representing the Presidency of the Council of Ministers – Department of Innovation and technology;
- three members designated by the associations for the protection of minors and the National Users Council.

The Ministry for Communications provide secretarial assistance to the Committee. Appointments, including that of the president, have a three-year duration.

4. Film-Interactive Games

The distribution of films in Italy is substantially free of legislative measures. A decision on the rating of films for the protection of minors can determine limits to access to theatres. Decisions are taken by Commissions operating at the Ministry of Cultural Affairs and created by a Ministerial Decree of 19 February 2001 implementing Law 30 May 1995, n. 203.

Any of the eight Commissions is made up of nine members: the President (a Professor of Law) two Representatives of producers and distributors, two representatives of parents' associations, two experts of cinema, one psychologist.

The Commissions may declare with binding effects whether the diffusion of the film should meet some limitations, namely access to theatres is possible only for adults or to people over 14 years of age. The decision is communicated to the distributors of the given movie, which

may ask for review within 20 days or accept cuts to fit the movie for any public. If the appeal is accepted, the Commission modifies its rating. Against the final decision of the Commission the distributor may appeal to the Administrative Tribunal or in last resort to the Council of State.