Broadcasting, the Free Market and the Public Interest: is the Italian Path to Pluralism Viable?

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1. *The main argument*

In recent years, the clash between the promoters of the *pure market model* and those who favour a public regulation in the broad mass media sector has become more acute. This has happened in conjunction with a reform of the broadcasting system undertaken by most industrialised countries[1]. In particular, following the successful process of liberalization of the telecommunications industry, proposals have been adopted for a similar de-regulation reform in the television sector, which would gradually reduce some of the normative restraints and bring about a more autonomous and efficient market. The inspiring principle of such proposals is that the free market should be considered as the norm, the natural order from which any deviation should be justified[2].

The progressive abandonment of media regulation has deeply influenced both European law (with a series of directives on electronic communications of 2002) and national law. In the latter case, for example, one could quote the adjustment which derived from the combination of law no. 66/01 and law no. 112/04 (i.e. Gasparri). This legislation introduced a system of "general authorisation" for the network providers, a *trading* mechanism of the electromagnetic waves, and the privatisation of the public broadcaster (RAI). In Italy, it is the telecommunications industry which leads this trend: as a matter of fact, this is one of the few economic sectors which, in the past 6 years, has seen a decrease in consumer prices (-14%) and an increase in the presence of foreign firms[3].

The basic argument of this article is that there are certain principles of a non-economic nature, or at least not merely based on *consumer sovereignty*, which can not be guaranteed

[1] To quote just the most significant cases, in 2003 Great Britain concluded a wide-reaching media reform with the *Communications Act 2003*; in 2004 Italy, after a long legislative process, introduced the law no. 112/2004, rearranging the radio and television broadcasting system and, particularly, the public broadcaster (RAI-Radiotelevisione italiana) structure; in 2003 the *Federal Communication Commission* (FCC) introduced a radical revision of the property rules of the new media: but this law has been successfully challenged by some lobby groups (*Prometheus Radio Project v FCC* 373 F 3d 372, 2004), and, therefore, the FCC will have to define a new rulemaking process. In the meantime, on December 22nd 2005 the American Senate approved a much contested law on digital television broadcasting which sets February 17th 2009 as the *switch-off* date of all analogue broadcasting and for the returning to the State of all the analogue frequencies and property licences; in 2002 the Australian government proposed a wide reform of media ownership and control regulation, especially focused on the liberalization of *cross-ownership and foreign ownership*: the proposition has been rejected by the Senate but new proposals have recently been announced .

[2] In this way T. Gibbons, (*Regulating the Media*, Sweet and Maxwell, London, 1998, p. 9) describes the economic approach to regulation, distinguishing it from the political approach which is based on the concept of "regulatory space".

[3] See the Report by the Authority on means of communication (AGCom) presented on 21st July 2005.

by laws which only provide perfect competition among firms. In other words, "public interest" cannot be adequately guaranteed by a mere allocative mechanism of resources.

2. The demise of scarcity and the beginning of deregulation

Historically, two reasons explain television regulation: 1) the scarcity of radio waves used for the broadcasting of the audio signal; and 2) the idea that television has a strong influential and conditioning effect. Both these reasons have been questioned by the technological evolution and by the mutation of the media market.

By eliminating futile information and the excess of waves, digital technology compresses the signal and renders the use of the spectrum more efficient. Consequentially, thanks to the availability of more spectrum space the fundamental argument in favour of media ownership and control regulation, as well as content regulation of programmes, due to the spectrum scarcity (anti-trust laws, cross-ownership rules, content-based regulation), cannot be sustained further. Therefore, the historical definition by Reith of the broadcasting firm as a trustee of the public interest linked to the idea of spectrum scarcity and thus a "precious form of public property" [4], is no longer applicable.

Furthermore, the advent of new media (the Internet, for example) questions the idea of television as a specialist instrument for the diffusion of opinions. In the future, the Internet television (IPTV), the new broad band systems, the convergence of television and mobile communication (DVB-H), the satellite and cable television will render obsolete over-the-air television, received free of charge directly through our rooftop aerial (*free- to- air*).

The assumption seems to be that these developments reduce the need for (public) regulation, whilst "naturally" sustaining the argument for a free competitive television broadcasting market. Consequent to the effects of the media revolution, those in favour of deregulation maintain that the television market, if left to function freely and in the best conditions, would guarantee pluralism and diversity. This would render superfluous any government intervention. This position has encouraged the Italian government to invest heavily in the digital technology sector and in the Integrated System of Communication

[4] According to John Reith, the first Chief Executive of the BBC in the 20s, the communication sector represents a public interest which must be protected by the regulator. Such interest is partly due to the scarcity of frequencies for broadcasting and partly due to the belief that such a "new", powerful sector, vital in the transmission of knowledge and ideas, cannot be left to the market. This view is at the basis of the Reports published by the Sykes Committee (1923), which considers the electro-magnetic frequencies as a «*valuable form of public property*», and by the Crawford Committee (1925), which envisages for the BBC a public structure because of its role as a «*trustee for the national interest in broadcasting*». See Sykes Broadcasting Committee, *Report* (1923), Cmd. 1951, par 6.2; Crawford Broadcasting Committee, *Report* (1925), Cmd. 1951, par. 4.

(better known as SIC), which is a major example of mass media convergence. The declared idea is that the increase in availability of channels and spectrum will promote higher competition among firms and resolve the problem of weak pluralism and poor content diversity of the Italian radio and television industry.

But it is easy to predict that the high concentration of ownership, which characterises the Italian analogue television market, will probably translate itself into the digital television market, due to high start up costs; barriers to the entry of small firms; and, the absence of adequate asymmetric norms in favour of the new comers [5]. Furthermore, despite the demise of spectrum scarcity, it is likely that there will be new forms of scarcity in the field of content, cultural diversity, quality of the programmes, common culture and knowledge of the viewers and also concerning the software needed for accessing the broadcasts [6]. Despite all this, the basic problem lies at the source of these more practical conditions: neither free competition nor digital technology can resolve the problem of Italian television. Simply favouring the market forces cannot resolve a question, which is not of an economic nature. Television cannot be dealt with as a market commodity such as an "electric toaster with images"[7]. Television has a social and cultural value in the creation of a public conscience and a vital role in citizens' participation in contemporary life. In other words, television has an important "democratic" mission.

Thus, the economic relationship between the producer and the consumer must not be confused with the democratic relationships arising between the citizens and the media.[8] Nor should public interest be entirely handed over to the market. A free market only guides individual consumers' decisions and disregards the aspirations of individuals as citizens and members of a community.[9]

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[5] In Italy, 80% of the frequencies are owned by two incumbents: RAI (the public broadcaster) and Mediaset, which hold 3 out of the 5 active multiplexes. According to the statistics of various experts, the 18 multiplexes reserved by the National Programme to the digital frequencies are already occupied and, thus, the digital sector seems already closed to the entrance of new competitors (E. Grazzini, *Televisione: il nuovo Far West delle frequenze digitali*, *Corriere della Sera*, 9 January 2006).

[6] According to AGCom (Report of 21 July 2005), "we are going from low technological resources to low resources of contents. It should not be forgotten that the move to digital is eliminating certain barriers of the past, especially those in technology, but it is also creating new barriers (actually ancient barriers) especially in the economic sector. Even if in a new perspective, problems concerning the programmes, which should be both of good quality and attractive for the public, and concerning TV hosts, still remain. In this new context the problem of guaranteeing access to the network emerges".

[7] Quotation by Mark Fowler, at the time Director of the FCC, who fought strongly for the elimination of the *fairness doctrine* from the American legal code.

[8] T. Gibbons, *Regulating The Media*, cit., p. 63

[9] On the issue see the remarks made by the Puttnam Committee with respect to the 2003 bill in Great Britain. It concerned the need to introduce a *public interest test* for every transaction in the mass media sector Thanks to this test the Ofcom (the UK independent regulatory authority for communications) can estimate the impact of the transaction on public interest in order to always guarantee a certain amount of diversity in property of the media

3. *Market success and citizens' dissatisfaction*

Further elucidation could help clarify the argument. For instance, the (external) pluralism of opinions and the (internal) cultural variety of contents: free competition might assure the presence of a host of different television broadcasting groups, but this does not guarantee that these firms will offer a new and differentiated set of programmes. And even if the programmes were differentiated and the players managed to compensate one another by filling each other's gaps (especially the cultural ones), the spectator would nonetheless have to "consume" all the programmes broadcast by all the firms on the market in order to be able to appreciate the pluralism of opinions and the diversity of the programmes [10].

The real issue here is not market failure but market success; in other words, what one can rightly expect from the market. One cannot expect the broadcasting market (and the discipline of free competition) to promote pluralism of sources, diversity of opinions, and a sense of national identity. This not because there are market failures, but because these aims are not envisaged by the broadcasting industry. They do not deal with economic products, and thus the market disregards them.

The same situation can also be seen from the final-users' perspective. The receivers of the "goods" described above are not consumers but citizens. These are distinct subjects, who expect different benefits from the broadcasting system. The consumer expects commercial information but also expects to be entertained. Conversely, the citizen expects cultural enhancement and the delivery of political information in order to be able to participate in the democratic process (of the local, national and supra national community) with awareness. The former are part of a market system, together with firms and the government, whereas the latter are actors or participants of a democratic system, together with other citizens and institutions. The two systems have different objectives, do not use the same means and, furthermore, are not composed of the same actors.

The television and media in general, as has been insightfully observed, have a vital function in the creation of the democratic process, similar to that of institutions [11]. In fact, the well being of a democratic society not only depends on the protection of fundamental rights

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companies as well as impartiality of information and freedom of expression . As a matter of practice, it is likely that the test will only be applied to those mergers which would previously have been covered by ownership and control rules.

[10] See W. Hoffmann-Riem, *Regulating Media*, Guilford Press, New York, 1996.

[11] See Monroe E. Price, *Television, the Public Sphere, and National Identity*, Clarendon Press, Oxford, 1995, p. 21.

guaranteed by legislative, executive and judiciary powers, but also on the vitality of the debate which takes place in the so called "public sphere"[12].

4. *The anomalies of the television broadcasting market*

However, what has been said up to now does not exhaust the arguments against unrestrained liberalization of the television sector. To correct the problems of television by simply resorting to competition would be wrong not only from a democratic but also from an economic point of view. The television market is, in fact, an atypical market. First of all, the commodities of this sector are what in economic terms would be defined as a "public good". The benefits derived from such goods are utilized by the entire population or by specific sectors. Public goods have two specific characteristics: firstly, the use of such goods by a consumer does not limit the consumption of the same goods by other consumers. Secondly, it is impossible, or too costly, for the producer to exclude consumers who do not pay (and this explains the "free riding" issues which typically characterizes these goods)[13]. Furthermore, it concerns non-material and intangible goods (*cultural goods*), which do not wear out with consumption. By the same token, certain television programmes (for example news, cultural programmes and documentaries) are defined as *merit goods* because they possess an intrinsic value for society, irrespective of the interest that the single consumer might show.

Economic theory is based on the concept of the efficient allocation of scarce resources, to the point where the science of economics is also defined as "the study of how people make choices to cope with scarcity" [14]. In such a framework, economic theory assumes that market actors (firms and consumers) take rational decisions to achieve their aims and satisfy their needs. Yet, the commodities produced by the traditional television (*free-to-air*) are not characterised by scarcity, since they are open to all indiscriminately and their use by one individual does not impinge on their use by another. A movie, a quiz show and a newscast do not get consumed after being used by different consumers. They are public goods, immaterial goods, which can be consumed without limit and without any risk of being worn out by consumption or exhaustion. Therefore, in the television broadcasting market, the

[12] Quoting J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1962), Cambridge, Polity Press, 1989

[13] Regarding the issue see A. I. Ogus, *Regulation. Legal Form and Economic Theory*, Clarendon, Oxford, 1994, p. 33 ff.

[14] M. Parkin, M. Powell, K. Matthews, *Economics*, 3rd ed., London, Addison Wesley Longman, 1997, p. 8.

assumption of scarcity, on which all economic laws are based and from which the theories for an efficient allocation of resources derive, does not hold [15].

Nonetheless, the most peculiar characteristics of the television market are the price and double production mechanisms. In a "normal" market, the price is determined by demand and supply. In fact, the price mechanism does not allow for free broadcast (*free-to-air*), receivable through a rooftop aerial (*over-the-air*)[16]. In practice, there is no way to identify the listeners and charge them for the service; and, consequentially, exclude those who do not pay for it. For this reason some have described the impossibility of imposing a cost for distribution in the television activity as a market failure [17]. Two models can provide a solution to the difficulty of imposing a price on consumption and guaranteeing revenue for the television companies. The English model, based on the centrality of the public service broadcasting, is financed through the imposition of a levy on all owners of a television with signal reception, regardless of the actual usage of the television. The North American model, based on the centrality of commercial television broadcasting, is financed thanks to advertising and sponsorship of programmes. Both models surpass but do not resolve the above-mentioned failures of the television market [18].

The problem lies in the fact that neither model allows programmes to be sold in exchange for money. For this reason broadcasting companies, in order to gain revenue, are forced to produce two different types of products: firstly, programmes organised or purchased by the broadcaster and offered to the consumers/listeners; and secondly, a product which is represented by the consumers/listeners themselves and is offered to the advertisers in exchange for money (efficiently defined as "eyeballs" as exchange goods [19]). The greater the number of consumers/listeners offered to advertisers, the higher the price which the broadcasters can charge for the sale of commercial space inside their programmes.

The critical issue is that the product which is requested by the advertisers might differ greatly from what the consumers/listeners are asking for. For example, the advertisers might oppose programmes which question the quality of the products they publicise; nonetheless, such programmes might be in the interest of the consumer. Advertisers might also oppose programmes which are too serious, too culturally oriented, and too complex, or those that

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[15] G. Doyle, *Understanding Media Economics*, Sage, London, 2002, p. 10
[16] *Ibidem*, p. 60
[17] J. Blumler, T. Nossiter (eds), *Broadcasting Finance in Transition*, Oxford, Oxford University Press, 1991, p. 18; R.Collins, N. Garnham, G. Locksley, *The Economics of Television: the UK Case*, London, Sage, 1988, p. 101.
[18] See again G. Doyle, *Understanding Media Economics*, ibid.
[19] C. Sunstein (*Television and the Public Interes*t, in *California Law Revie*w, 2000, p. 514) explicitly makes reference to '*eyeballs as the commodity*'.

deal with institutional issues, because they do not encourage sufficient consumption. Being the major sponsors of the business, advertisers will have a wider influence than consumers on the broadcasters to the point that the whole television programme schedule will be adapted to the needs of the former rather than the needs of the latter. It is only during the last stage of production that consumers/listeners are taken into account, as they have to bear the cost of publicity, since the final cost of the goods will include the advertising.

5. *The inadequacy of general competition law and the role of public regulation*

The solution to the double production anomaly lies in subscription-based television. Only the *pay-per-view* and the *pay-tv (or subscription tv)* allow the correct price mechanism to be worked out through the direct sale of the commodity to the consumer. In free market economies, in fact, most decisions concerning resource allocation are made through the price system. For that reason, if consumers are not required to pay a price for the goods, producers will ignore their preference and pay attention only to the ones who really pay for the service and cover the cost of production, i.e. the advertisers.

A subscription-based model for broadcasting would amend such market failure and bring the specific sector back to efficiency through the direct link between producers and consumers. Restoring the correct price mechanism would probably be the simplest way of dealing with the problem of limits to consumer choice and customers' dissatisfaction. But, nowadays, the subscription-based system does not seem to have the same importance as the traditional one, in terms of audience share: at present, free-to-air broadcasting, received without any direct payment from the viewers, is still the dominant system [20]. Notwithstanding the growth of subscription-based channels all over the world, the failure of the television broadcasting market in pursuing public interest objectives cannot be addressed simply by promoting efficiency in the allocation of resources, because of the existing anomalies in the allocative mechanism itself.

If the issues raised so far are true, then there is a need for a regulator to be charged with responsibility of guaranteeing the public interest. A similar conclusion was reached in the

[20] In Italy, satellite television reaches only 3 % of share, that is to say 3.1 million viewers in a population of 60 million, accounting for 19% of the market resources, while cable tv has only recently been introduced. In Europe as a whole, subscription-based television represents 29.5%, advertising 46.2%, and licence fees 24.3% of the total resources of the market; in Japan, subscription-based television reaches only 20.6% of the market. Only the US market registers a very high rate of subscriptions (over 45% of the market income is due to pay-tv), and public service broadcasting is almost non-existent. see annual report of the independent authority for communication (Autorità per le Garanzie nelle Comunicazioni- AGCom), 21st July 2005.

early period of liberalisation for telecommunication services, when all OECD countries decided to put in place a framework for universal services: in the process of becoming gradually free and de-regulated, markets need to be addressed by regulators in order to separate the public interest objectives from the commercial, for-profit ones[21].

Just like telecommunication, the broadcasting market also needs a framework to protect the public interest. Cultural and quality programmes, programmes that satisfy the interest of minorities and that spur a sense of national identity, cannot be supplied by general competition law but require a specific and conscious intervention by the regulator. This intervention does not necessarily need to be a rigid hierarchical one (i.e.*command-and-control*), based on a paternalistic approach to the correction of free market.

First, a public service broadcasting system (from now on PSB) should be created as a guarantee of public interest together with (or integrated with) commercial television. The PSB fills the gap left by commercial television and is characterised by the *universality of the service* and *cultural responsibility* of the information it supplies. Through the PSB, the regulator acknowledges the shortcomings of the consumer sovereignty model and satisfies the interest of the audience as citizens and electors. Therefore, the PSB embodies in itself the idea of public interest that underlies the broadcasting activity.

However, to allow the PSB to accomplish properly its "universal and cultural" mission, it is necessary to ensure favourable initial economic conditions in order to avoid excessive external pressures. For this reason complete public funding is indispensable: if not to the whole PSB, at least to the single firms or the single channels which supply the service so as to have a public interest oriented, pluralistic, diversified, reliable and independent broadcast [22]. The UK innovative experience of Channel Four demonstrates the variety of models available for the regulator to serve the public policy objectives [23].

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[21] See OECD Document (unclassified) "Telecommunication Regulatory Institutional Structures and Responsibilities", 11 January 2006.

[22]In Italy, the funding of the public broadcaster (RAI) comes from licence fees. The fee is determined by the Ministry of Communication and, even if much lower than the European average, it has remained unchanged for many years. Thus, ironically, the licence fee is characterized both by its low value and by a very high rate of evasion. The result is that the proceeds from the licence fee are constantly decreasing with respect to the proceeds from paid commercials. In 2004 the RAI saw a 10.5% increase in proceeds of sales, inverting the trend of 2003 when the profits had diminished by 3%.

[23] Channel Four is the other free-to-air public broadcaster operating in UK. Apart from its size, Channel Four differs from the BBC because it is allowed to raise revenue from advertising; and, at the same time, it differs from other commercial broadcasters in being a non-profit making entity, owned and controlled by a statutory corporation. Channel Four was established in 1982 and among its objectives it includes a specific remit to be innovative and experimental, and to cater for a culturally diverse society. See Communications Act 2003 (UK), s 265 (3). For a comparative analysis of the US, UK, and Australian regulatory frameworks for public service broadcasting, see L. Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation*, Oxford, Hart Publishing, forthcoming 2006.

Still, the PSB on its own is not capable of providing the full realisation of the public interest in broadcasting. Being financed and controlled by the State, the PSB is particularly exposed to political and governmental influences: commercial television would therefore be vital in compensating and counterbalancing these external pressures. From this perspective, a second tool in the hands of the regulator is the promotion, on the commercial television side, of the abandonment of the tendency towards the maximisation of profits, so to persuade commercial broadcasters to dedicate a part of their programmes to satisfy cultural and collective needs. In dealing with such tasks, the constitutional liberties at the root of the broadcasting activity must be guaranteed. This can be done by using different forms of economic incentives, like subsidies for providing a certain type of programmes as well as a "play or pay" model, where the commercial broadcasters are given the choice of maintaining public interest obligations or paying a share of revenue to bypass these obligations [24]. Public interest expectations can also be met by using "soft" legislation (for example, self-regulatory or co-regulatory tools), which will persuade the private firms to serve the public as well as their own interests. Negotiated agreements, based on the voluntary acceptance by firms of obligations which serve the general interest, could be helpful to reduce the tension between constitutional liberties and the social goals which have to be pursued within entrepreneurial choices [25].

All these remedies are not exclusive but can be used jointly, in a cumulative way. Economic incentives, subsidies for providing quality programmes, and fines or compulsory payments to bypass public interest obligations can be put into effect at the same time, together with both the promotion of a public broadcasting service responsive to public expectations, and the fostering of an effective system of self-regulation for media industries and operators.

As a matter of fact, both commercial and public broadcasting should be expected to serve the public sphere[26]. This goal could be pursued as an integrated scenario, a sort of "regulatory space" in which each remedy fills gaps left by the others, with no single remedy

[24] See R.H. Coase, *The Market for Goods and the Market for Ideas*, in *Am. Econ. Rev. Papers and Proc.*, 1974, p. 384

[25] The negotiated solution is based on the voluntary acceptance of fundamental obligations in the name of public interests. This would happen through the specifications of a contract signed by the private firms. This kind of regulation is even less intrusive if the determinant of the obligations is an independent and neutral body (for example an authority). This body should be one of the contractors and have powers delegated by the State. In this way a sort of screen between the State and the firm is created that renders the dialectical problem between the powers of the State and the liberty of the individuals less severe.

[26] See L. Hitchens, *Broadcasting Pluralism and Diversity: A Comparative Study of Policy and Regulation*, Oxford, Hart Publishing, forthcoming 2006

being sufficient in itself to satisfy the public interest goals, but with all the remedies balancing and being complementary to one another [27]. In this perspective, market and public regulation are not opposites, but are mutually linked and dependent. the importance and the role to be given to each single remedy cannot be theoretically predicted, but has to be found in the economic, social and legal tradition of each jurisdiction relating to the protection of citizens' welfare and the public interest.

6. *The Italian case*.

In Italy public monopoly on television started in 1954, with the very beginning of broadcasting. RAI-Radiotelevisione Italiana was, and still remains, the only public broadcaster in Italy, entirely owned by the State [28].

The scarcity rationale has always been the main justification for the maintenance of the public monopoly: due to the risk of private oligopolies, a public broadcasting service was supposed to operate for the public interest, independently of those holding economic and political power. Although this was the underlying theoretical basis, the reality was different: as the European Parliament has recently pointed out there are serious "risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights)", namely, in the context of the protection of media pluralism and diversity, considered as a priority for EU competition law[29]. A brief overview of the broadcasting legal framework will be helpful for a better comprehension of the Italian anomaly.

The underlying causes of the problem with broadcasting activity are to be found in the incapacity of the Italian Parliament to regulate properly this sector. The role of the Italian Parliament has always been very marginal and, in many cases, inadequate to counterbalance

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[27] The metaphor of "regulatory space" has been broadly used to indicate that regulatory power and authority will not be held within a single formal body, but may be fragmented among a number of entities, both private and public, within the relevant space. For a much more sophisticated analysis of the concept, C. Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, in *Public Law*, 2001, p. 329. The metaphor of "regulatory space" has been broadly used to indicate that regulatory power and authority will not be held within a single formal body, but may be fragmented among a number of entities, both private and public, within the relevant space. For a much more sophisticated analysis of the concept, see C. Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, in *Public Law*, 2001, p. 329. The concept of *Regulatory Space* was originally Introduced by Hancer and Moran, *Organizing Regulatory Space*, in L. Hancer and M. Moran (Eds.), *Capitalism, Culture And Economic Regulation: Government - Industry Relations*, Oxford, Oxford Univ. Press, 1989. For an interesting application of the idea of regulatory space to the media environment, see also L. Hitchens, *Broadcasting Pluralism and Diversity*, cit..

[28] For an historical overview of the regulation of Italian broadcasting, see O. Grandinetti, *La Radiotelevisione*, in S. Cassese (ed.), *Trattato di diritto amministrativo*, Milano, Giuffré, 2003

[29] Resolution of the European Parliament, 22 April 2004

the market pressures. After two landmark decisions enacted by the Constitutional Court in 1974, the Parliament adopted the first Broadcasting Act (1975) in order to acknowledge the suggestions of the Constitutional Court. In this perspective, an important provision of the Broadcasting Act 1975 transferred the power to control the public broadcasting service from the executive branch to the legislature (in particular, to a Parliamentary Commission).

However, the Italian Parliament has in general remained inactive and unwilling to carry out its regulative function in this field. By contrast, the Constitutional Court has played a very important role in the development of the broadcasting framework, acting as a quasi-legislative body. It is worth mentioning that for over 40 years the Constitutional Court has been repeating that plurality of opinions and ideas on television is to be considered the *condicio sine qua non* for the maintenance of the public monopoly on broadcasting, but it seems that its message has not so far been heeded.

The end of the local public monopoly, determined by a decision of the Constitutional Court in 1976 [30], marked the beginning of what may be called the "wild west" period. In fact, the lack of any proper legal framework established by Parliament caused an unregulated and rather spontaneous redistribution of local frequencies. In addition to that, the expression used by the Constitutional Court ("the right to transmit") in opening the local broadcasting to commercial operators led to the rise of larger regional and even national operators, which could grow and expand their dimensions in the absence of any antitrust regulation. From that moment on, the spectrum was simply occupied by the broadcasters without any valid legal permission, a situation which was substantially contributed to by the inertia of the Italian Parliament. In this legal background a former property developer, Silvio Berlusconi, was able to establish what commentators afterwards would call a "duopoly system" of public and private operators.

In 1990, the public monopoly was broken by a parliamentary Act which authorised private broadcasting activity on a national scale. The Broadcasting Act 1990 allowed 12 national networks to operate in the country, while several restrictions were established in the Act regarding the concentration of the media ownership. The Act 1990 has been heavily criticised because of its loose property limits; in particular, the limit regarding ownership by a single entity was under discussion (20% per cent of the total number of networks operating at the national level), being considered in violation of the concept of pluralism.

[30] Constitutional Court, decision of 15th July 1976, n. 202

Four years after its enactment some parts of the Act of 1990 were held to be invalid by the Constitutional Court [31]. Meanwhile, in April 1994 Mr Silvio Berlusconi had entered the political arena, after having formed a brand new political party. With his company-type party, called Forza Italia, Berlusconi won the national elections and led the winning centre-right coalition as Prime Minister. His government almost immediately collapsed, but the question of the potential conflict of interest between his private interests and his public function arose and became evident to public observers.

The Italian Parliament tried to acknowledge the suggestions of the Constitutional Court on media pluralism and diversity with the approval of the Broadcasting Act 1997: although containing stricter antitrust criteria for media ownership and revenue, it still represented a weak remedy for the Italian anomaly. The Broadcasting Act 1997 made the deadline by which broadcasters exceeding the 20% limit should be required to transfer to satellite or cable dependent on the "effective and significant increase of the audience of the cable and satellite systems". This provision has allowed broadcasters to continue their improper activities for an unlimited period. As a result of the Broadcasting Act 1997, the existing broadcasters were *legitimately* allowed to operate channels in excess of the statutory limits, while awaiting technological developments.

In addition, four years later an emergency Act (2001) came into force to provide for a transitory phase during which "in order to promote the roll out of the Digital Terrestrial Television markets, persons who legitimately operate as broadcasters (analogue, cable, satellite) are qualified to experiment with television transmission by digital technology". The same year, in April 2001 Mr Berlusconi was elected for the second time as Prime Minister of a right-wing government. Apart from the great influence exerted on the electorate by Mr Berlusconi's media, the hot issue concerns his conflict of interest: Mr Berlusconi owns about half of the nationwide broadcasting in the country (Mediaset Group), along with several newspapers and magazines. At the same time his role as Head of Government allows him to influence the Public Service Broadcasting, which is Mediaset's main competitor[32]. It is worth recalling that Mediaset and RAI have about 90% of the audience share and over 85% of resources in the sector.

[31] Constitutional Court, decision of 7th December 1994, n. 420

[32] Parliamentary Assembly of the Council of Europe, n. 1387 (2004) on "Monopolisation of media and possible abuse of power in Italy"

Upon his election, Berlusconi committed himself to solving the issue of conflict of interest within 100 days, but in fact no action was taken for the following three years[33].

In November 2002 the Court declared some provisions of the Broadcasting Act 1997 unconstitutional[34]. The argument for that conclusion was that the Act of 1997 did not set a precise deadline by which broadcasters exceeding the 20% limit should be transferred to satellite or cable. The Constitutional Court emphasised that the situation formerly declared unconstitutional in 1994 had been aggravated by the 1997 provisions and, for that reason, took the decision itself to set a final deadline for December 31, 2003 for the transfer of those networks exceeding the limit (i.e. Retequattro).

At the end of 2003 the Government submitted a Bill to the Parliament in order to reform the entire communications system. Asked for his formal acknowledgment, President Ciampi refused to sign the Bill and returned it to the Parliament. The final version was ultimately adopted by the Parliament in May 2004 (the Broadcasting Act 2004, so called Gasparri Law), after certain changes had been made, notably to the ownership threshold.

Many criticisms have been made of this new legislative framework for broadcasting. The Act of 2004 tried to resolve the problem of lack of pluralism simply by relying on the increase in the number of channels brought about by digital terrestrial technology (DTT): using the idea of convergence, the Act of 2004 merged nearly all media into an overall integrated system of communications (SIC). In this perspective, it established the ownership threshold of 20% of channels (whether analogue or digital) owned by the same subject, and, at the same time, it fixed a resources limit for any individual operator of 20% of the revenue of the integrated system of communications.

According to the opinion of the critics, the Act of 2004 does not effectively guarantee a greater degree of pluralism or of content diversity as a result of the new TV channels created through digitalisation, which in many cases are mere duplications of the analogue ones and basically not comparable with the latter in audience share. In joining together very different outlets, the SIC has had the effect of avoiding and ignoring the European "relevant market" criterion and, therefore, has breached the very basic assumption of general competition law. To put it in other words, it has been observed that the effects of "convergence" introduced by

[33] According to the Resolution 1387 (2004), the Parliamentary Assembly of the Council of Europe "is extremely concerned that the negative image that Italy is portraying internationally, because of the conflict of interest concerning Mr Berlusconi, could hamper the efforts of the Council of Europe in promoting independent and unbiased media in the new democracies. It considers that Italy, as one of the strongest contributors to the functioning of the Organisation, has a particular responsibility in this respect".

[34] Constitutional Court, decision of 20th November 2002, n. 466

SIC have been not to promote pluralism, but rather to increase the size of the communication market and allow Mediaset and RAI to expand even further.

7. *The public broadcasting service in Italy: two reasons for an anomaly*

Despite the rationale of its creation, since the very beginning RAI has been strongly influenced by government and political forces[35]. In the words of the Council of Europe, the Italian public service broadcaster has always been "a mirror of the political system of the country" [36], reflecting the policy of the government of the day.

At present, the problems affecting the public service broadcaster can be summarised in two points. On the one hand, the dependence on the market makes it difficult to pursue the goal of protecting the public interest. The dual-funding system allows a combination of State funds and private ones; this has increased the importance of the private funding, which is greatly influencing corporate planning. With 40% of total revenue of RAI coming from advertising and commercial sources, Italy does not meet with the European standards: other countries either have no commercial income for public service broadcasting (that is, a single funding system, like Great Britain, Sweden, Norway, Israel and Denmark) or a very low level of private funding (Germany: ZDF 8%, ARD 3%; Belgium: RTBF 19%; France: France TV 28%). Only Spain has a public service broadcasting system which since the early 70's has been completely dependent on advertising and government subsidies, with an increasing debt (8 billion euro).

At the same time, the cost of the Italian TV licence is the lowest in Europe (99,60 euro), compared to much higher rates applied in Germany (193,80 euro), Great Britain (167,48 euro), France (116,5 euro). This "price-capping" policy has probably had the aim of maintaining a higher percentage of revenues from commercial activities and of encouraging the citizens to pay the licence fee. It is worth noting however that, nothwithstanding the low cost, Italy has one of the highest percentages of broadcasting service fee evasion in Europe.

The coexistence of State funds and commercial revenue has caused a split in the original remit of the public broadcaster. Italian public service broadcasting, it has been observed, "is suffering an identity crisis, as it is in many instances striving to combine its public service obligations" (i.e. providing the society with information, culture, education and entertainment; enhancing social, political and cultural citizenship and promoting social

[35] See A. Pace, *La televisione pubblica in Italia*, in *Foro it*., 1995, V, 245
[36] Parliamentary Assembly of the Council of Europe**,** Resolution 1387 (2004)

cohesion) "with chasing ratings in the communication marketplace and securing an audience to attract advertising revenue"[37].

Predictably, this situation will get worse after the privatisation of RAI, as provided for in the reform of the broadcasting system (Gasparri Law, n. 112/2004). Under this Act, the public broadcasting franchise may be awarded to any broadcasting organisation (which however has to have the legal form of a joint-stock company), rather than only to a publicly owned company, as was the case under the former legislation. It is easy to predict that shareholders will tend to require the maximisation of profits of the stock company, increasing the broadcasting of popular genres, regardless of the public service obligations.

On the other hand, RAI suffers from its dependence on political parties. RAI has always been subject to political pressure, caused by a unique division of the three Italian public channels between the main political parties[38]. This situation has been made worse by the Berlusconi Government: with regard to privatisation of RAI, in the medium term it could lead to a higher – and not a lower - degree of politicisation. The Act of 2004 provides for the sale of State shares in the company, while an upper purchase limit of one percent of shareholdings (carrying voting rights) has been imposed. Until 10 percent of RAI's shareholding has been sold, 7 out of 9 members of the RAI's Board of Administration are appointed by a Parliamentary Commission, and 2 (including the chairman) by the majority shareholder, i.e. the Ministry of Economics Affairs. The Gasparri law also states that only highly qualified, professionally skilled and independent persons are to be appointed as members of RAI Board of Administration. However, the members appointed so far (including the Presidents) have been representatives of political parties or politically engaged journalists.

As the European Commission for Democracy through Law (the so called Venice Commission) pointed out, "change in RAI will allow for government control over the public broadcaster for an unforeseeable period of time. For as long as the present Government stays in office, this will mean that, in addition to being in control of his own three national television channels, the Prime Minister will have some control of the three public national television channels" [39].

[37] Quoting the Resolution 1641 (2004) of the Parliamentary Assembly of the Council of Europe
[38] Parliamentary Assembly of the Council of Europe**,** Resolution 1641 (2004), cit.
[39] Opinion n. 309/2004, 11-13 june 2005

8. *The Italian path to pluralism*

As noted above, the solution chosen by the Italian legislator to solve the problem of the lack of pluralism in the broadcasting market is based entirely on new technology and on the re-launch of competition. However, the data on the transition from analogue to digital broadcasting, even at a comparative level, is not encouraging and, once again, suggests that this is unlikely to be the right way to protect the public interest.

In Italy, the diffusion of digital terrestrial technology (DTT) is increasing both commercially and culturally. Up to 2005, 2 million decoders have been sold, 24 digital television channels with national coverage have been broadcast free-to-air, several channels in *pay per view* have been offered by two DTT operators (Mediaset and La7). While waiting for the digital frequencies plan to be adopted, two regions (Sardinia and Val d'Aosta) have decided to bring forward the *switch off* date to January 31st 2006 (then extended to March 15th 2006).

Digital television is very risky. In the last few years the Italian government has put a lot of political and economic effort into launching this technology. The move to the DTT has been made obligatory by law, with a very close deadline (end 2006, now end 2008) and has been heavily financed (10 million euros to buy retail the decoders). In practice, there is no guarantee of the success of this technology, given the advantages and expansive potential of the DVB-H, the Internet TV and satellite television. In Australia, where the DTT was launched in 2001, such technology is used only by 12% of the population and the switch off of analogue transmissions has therefore been postponed to 2009. There is a similar situation in the USA where, since 1997, the FCC had set 2006 as the year of abandonment of the analogue technology but then had to reset it for 2009. At present, only 14% of the American population watches the DTT, compared to the 89% who watch satellite and cable television (subscription service). In England, the approach to the DTT has been quick and enthusiastic: in 1995, the government had already given high priority to digital television and reserved a set of frequencies for this kind of broadcasting. In 2002, ITV digital, created to offer a digital television service by subscription, went bankrupt. In 2002 Freeview partially controlled by the BBC, was created and digital technology has increased considerably so far (5 million users). Nonetheless, the switch off date is set for 2012.

Considering the fact that a decoder allows users to watch the DTT only through the television to which it is connected, there a tangible risk of creating a world where 80% of the population will have access both to digital as well as analogue broadcasting. In any case,

leaving aside the question of the type of technology used, in the majority of industrialised countries the public continues to prefer over-the-air television, because it is free of charge. This fact appears to undermine the general assumption about the demise of scarcity in the future [40].

Technology, in itself, does not represent an appropriate solution to the problem of lack of pluralism. This is true especially in Italy, where the digital sector continues to be characterised by high entry barriers and great levels of concentration. The aggressive conquest of the frequencies limits the entrance into the market by new firms, except through the transfer of property rights from already existing broadcasting companies. Frequency trading is in fact reserved to the firms which already possess a broadcasting licence for analogue technology (law no. 66/01). This system is reinforced by law no. 112/04 which obliges entrepreneurial groups to take over existing authorised companies in order to enter or to assert themselves in the digital market. Recent examples are the take-over of Rete A by the entrepreneurial group L'Espresso, the take over of Elefante TV (Telemarket) by Telecom Italia and the take over of Home Shopping Europe by Mediaset.

The first necessary step in the switch over to digital is thus a census of the available frequencies in order to avoid the potential monopoly on the sector by the stronger firms. The analogue frequencies are valuable because they cover long distances and the costs of building booster stations are low. Their signals are easily reached by households and firms. However, there has never been a balanced distribution of these frequencies and the users and modalities of usage remain unknown. Before opening the frequencies trade it would be advisable to know the nature of distribution and placement of these precious resources.

The second step is the protection of local broadcasting companies, which often cannot afford the transformation of their plants and the transfer to digital technology. The negative drawback of frequencies trading is that, due to the high start up costs, the smaller groups, especially the local ones, are forced to give their frequencies to bigger firms. Thus, the market tends to be more consolidated and this weakens – and does not strengthen, contrary to what the legislator had predicted – the degree of pluralism at local level. Local broadcasting, as signalled by the industry associations, is witnessing a contraction as a consequence of the transition to digital. A process of concentration of around 500 local broadcasting companies

[40] This is particularly true in Italy where satellite digital technology is not so widespread (3.5 million subscribers) and cable television is almost non-existent. The Italian market, in particular, seems to offer wide possibilities of growth in the *free to air* broadcasting sector. In fact investment in advertising counts for a much lower portion of the GDP than in any other industrialised country. It is therefore open to *free to air* digital television to take advantage of this unexploited need in communication, thereby overcoming the other broadcasting technological options.

is underway. It is characterised by the merging of local broadcasters and the take-over of other local companies by the main national broadcasting firms.

It should be noted that the existence of many local televisions has always represented a sort of compensation (and justification) for the lack of pluralism at national level. The present move towards digital technology is provoking the merger of local firms which are forced to do so in order to reach a sufficient size to compete in the market. This results in a decrease in the range of opinions and in the degree of local pluralism, which had flourished since the 80s and was a distinguishing feature of the system [41]. The alternative for the local operators is that of specialising in the supply of net services to other firms, without any direct influence on content providing; or starting experimental interactive, commercial or public interest services [42].

It would appear evident that future legislation concerning the transition to digital broadcasting ought to be the result of a unitary decision, taken at the national level, and not left to the discretional power of the Regions. This decision will affect certain fundamental rights (such as popular sovereignty, the right to vote and democratic participation), the individual liberties (freedom of expression of individuals and freedom of enterprise) and the respect of civil and social rights that must be guaranteed throughout national territory.[43] In this context, it is significant that federal states such as the USA and Australia leave the regulation of the broadcasting sector to the federal legislator.

9. *Local television and sectoral pluralism*

The issue mentioned above inspires further considerations concerning the role of local and regional government to address both analogue and digital broadcasting towards the public interest.

Italy is very different to other countries where local broadcasting is protected and promoted due to the fact that it serves a public interest. Community broadcasting is present in the United States, in Australia and, with radio broadcasting, in Great Britain. In general, community broadcasting is a non-profit business and is meant to meet, as the word itself implies, the interests of the local community. Most of the time it is free of charge and it

[41] In certain cases the local broadcasting companies register high shares: for example, in Lombardy, Venetia, and Apulia the first 10 broadcasting stations register more than 10 million contacts a day.

[42] See for example: the Piedmont on Air case, the Pesaro Commune which offers a local network and the Emilia-Romagna region with its service television called Camper.

[43] Regarding the need for a unitary system in the electronic communication sector see the decision by the Constitutional Court, 12 April 2005, no. 151, and 14 July 2005, no. 336, in www.cortecostituzionale.it.

promotes direct participation of the local population. It is publicly financed but it also may rely heavily on a mixture of resources including donations, sponsorship and membership. Community broadcasting has a limited audience and therefore, although this attracts less revenue and challenges its survival because of low profits, it is less exposed to market pressure. Furthermore, community broadcasters are often prohibited from broadcasting advertisements for money. These companies can only broadcast sponsored programmes, considered less intrusive because they only "identify and they do not promote" the product [44]. Because of their capacity to satisfy local community public interest, a certain share of frequencies is generally reserved for community broadcasters (as well as for public service broadcasters). In this way it is possible to overcome the problem of competition by the commercial broadcasters, which have higher financial capacities and tend to occupy all the air spectrum [45].

In Italy, through law no. 223/90 (the so called "Mammì" law, from the name of the Minister who proposed the bill) it is possible to create community television stations in opposition to commercial television stations, both on a national and local scale.[46] However, the impact of such a law on the Italian media system has been lower than expected especially if compared to other countries.[47] After the amendment to the Constitution concerning

[44] FCC, *Memorandum Opinion and Order, In the Matter of Commission Policy Concerning the Non-commercial Nature of Educational Stations*, 97 FCC 2d 255 (1984).

[45] In Australia, for instance, the Ministry of Communications can rely on the Regulatory Authority (ACMA) to reserve a certain amount of frequency bands for public service (*national broadcasting services*) and community services (*community broadcasting services*). Cfr. Broadcasting Services Act 1992, section 31

[46] Art. 16, par. 5, law no. 223/90 reads: "Community broadcasting is a non-profit activity and it is exerted by foundations as well as certified and non-certified associations which are expressions of particular cultural, ethnic, political and religious instances. Community broadcasting is also done by cooperative companies drawn up under art. 2511 of the civil code and which have as their objective the radio broadcasting of culturally, ethnically, politically or religiously based programmes (…). The licence is granted without any deposit, both at national and local level, to the above subjects who make a commitment toward the realization of original and self produced programmes for at least 50 per cent of the daily transmission schedule from 7am to 9pm (...)". Recently, the law on radio and television (d.lgs. no. 177/05) has abolished par. 16 of the art. 16 of the 223/90 law, which enshrined a reserved space for these kinds of broadcasting stations ("Licences are granted to community radio broadcastings up to 25% of the total available licences in each domain, relative to the total availability of frequencies").

[47] In Europe and in North America different forms of proximity, community or city television have existed for decades and are called *Open Channel* or *Community Television*. These televisions often have a non profit statute and have only minor contacts with the commercial market. Examples might be *SALTO* (Syndicate of the Amsterdam, Holland, televisions), *Offener Kanal Wien* (Open Channel in Vienna, Austria), *Offener Kanal Berlin* (Open Channel in Berlin, Germany), *Free Speech TV* (United States), *Open Channel* (Community TV Network, Sweden), *Barcelonatv* (Community Channel of the municipalities of Barcellona, Spain). In Italy, there are no such examples. The civil television of the Council of Siena, which broadcasts on the city's optical fibers, could be considered as a kind of community television. But is has a closed programme schedule, still at an experimental stage, which is managed by the council and not by the community. (Cfr. V. Di Marco, *Urban TV. La televisione dei cittadini*, in *Nuove emittenti* no. 2/2004, p. 103). A phenomenon only partly similar to community television is the road television (*telestreet*), in which micro broadcasting stations use very low range signals. But these are just spontaneous and unregulated initiatives.

regional competences, approved by the Italian parliament in 2001, it will be up to the Regions to intervene with legal and financial measures in order to encourage community broadcasting which is deeply linked to the interests of the local population and of the territory.[48]

At the national level it would be also advisable to rethink the ban for public bodies to get a broadcasting licence, along the lines of the *Communications Act 2003* in the United Kingdom.[49] Once the State television monopoly has been broken, there is no reason why territorial entities should not be given a chance to run their own broadcasting stations. This could be done with regional laws, which in accordance with the principles of national legislation could create a television service which addresses local demands.[50] Moreover, the lack of external pluralism justifies this kind of legislation: in terms of cultural variety and information, the advantages of having a host of local broadcasting stations exceeds any possible doubts regarding the impartiality of a public body in running a broadcasting activity.

10. *Closing comments*

As noted above, the media and in particular free-to-air broadcasting have an important role in providing information, promoting public debate and citizens' participation in the democratic process.

In the process of becoming free and open to competition, one cannot expect the broadcasting market (and the discipline of free competition) to promote pluralism of sources, diversity of opinions, and a sense of national identity. This is not only because of a market failure, but also for the non economic nature of such goods: television, as has been

[48] One should not forget that, under art. 12, par. 1, d.lgs. no. 177 of 2005, Regions have "concurrent legislative power in the radio and television broadcasting sector at the regional and the provincial level". They would have this competence even if the most recent proposal to amend the constitution is passed. In fact the State has an exclusive competence in the communications sector but with regard to "all communication of regional interest, including regional broadcasting" legislative power is shared between the State and the Regions (Reform Bill approved by the Senate 23 March 2005, entitled "Amendment to articles of Part II of the Constitution").

[49] Art. 16, par. 12 law no. 223/90 reads: "Licences cannot be granted to public bodies, economic bodies, public companies or banks". A similar ban once existed in Great Britain, but it was abolished after the introduction of the *Communications Act 2003* (s. 349). Following this reform, television property rights for local entities, public agencies and religious bodies were liberalised. In particular, with regard to local bodies, licences are granted only to radio and television broadcasters of local interest local government authorities, for the purpose of broadcasting local information and information relating to the functions of the local authority. .

[50] On the issue see also P. Caretti, *Stato, Regioni, Enti Locali tra innovazione e continuità*, Torino, Giappichelli, 2003, p. 134.

insightfully observed, plays a vital function in the creation of the democratic process, and cannot be considered a simple market commodity such as an "electric toaster with images". Cultural and quality programmes, that satisfy the interest of minorities and encourage a variety of opinions, cannot be supplied by general competition law, but require a specific (public) regulation for the protection of public interest.

A first remedy lies in the creation of a public service free from political and economical pressures. In order to reach this goal, public service broadcasting must be guaranteed a higher level of State funding, so as to foster the full emancipation of the public broadcaster from "market and audience slavery". This is particularly evident in Italy, with 40% of total revenue of RAI coming from advertising and commercial sources and a steadily decreasing percentage of resources deriving from licence fees. The independence of the RAI – or a part of it, for instance a specific company or a channel totally financed by public money - from the advertisers necessary for the proper fulfilment of its public service obligations: the growing commercialisation of RAI, with the resulting drop in quality, otherwise vindicates those who criticise the use of public money to fund a broadcasting service. For this purpose, the annual fee for public service broadcasting should not be fixed by the Government, but should be determined by an independent body. However, RAI's commercial activities must be fully separated from those relating to its public obligations in support of public service broadcasting (as happens in UK with BBC commercial arms, like BBC World, BBC Prime, BBC America).

A second remedy is directly connected with the editorial independence and impartiality of RAI. In Italy, public service broadcasting continues to be under strict political control and, after the Gasparri Law, under governmental control. Instead the corporate structure and planning should be guided by quality and efficiency. At the same time, the Parliament (through a parliamentary commission) should not have any specific control over RAI, apart from the establishment of guidelines and solutions to certain problems of public opinion. In particular, Parliament should not interfere with the editorial work of the public broadcaster or – what is worse - with the appointment and dismissal of journalists. At the same time self-regulatory instruments, such as editorial guidelines and statutes setting out editorial independence, should be developed and fostered. As a structural proposal for a more secure form of independence, the governance of RAI could be entrusted to a foundation,

independent from political influence and from the ideology of "winners take all", so to ensure good practices and efficiency in the corporate editorial planning[51].

A third remedy is directed to involve the commercial broadcasters in pursuing public interest goals. In that perspective, private operators could be encouraged to reduce their profit maximisation in favour of citizens' satisfaction by using different types of economic incentives, like subsidies for providing quality programmes, tax reduction as well as "play or pay" models. Both commercial and public broadcasting contribute to create the "public sphere", understood as a vital space for the formation of public opinion and debate, which in turn facilitates the democratic process: as a result, both of them should be expected to serve the public interest.

A fourth remedy focuses on the enhancement of the role of local broadcasting. The character of "proximity" (i.e. focused on territorial interests), its specificity and its democratic aspiration render territorial broadcasting an essential element in the realization of the public interest as defined above. Thanks to regional, local and community broadcasting stations it is possible to promote a sort of *sectoral pluralism,* founded on a territorial scale, which compensates for the gaps in commercial and public national broadcasting. In this way the Regions would also be given a more effective role in the broadcasting system and community interest.

This is the hard path that ought to be taken in order to amend the traditional lack of pluralism in Italy and to put an end to a long lasting anomaly. Liberalization of the market to promote higher competition among firms, relaxation or abandonment of ownership rules, privatization of RAI for a better governance of the public broadcasting service, and development of digital broadcasting technology for a greater availability of channels and spectrum will not resolve the problem of weak pluralism and poor content diversity of the Italian radio and television industry. Since the problem is not solely economic in nature, the solution cannot be entrusted to the correct functioning of the free marketplace through general competition law, but requires the regulator to put in place a specific legal framework for the public interest.

[51] This seems to be the aim of the new Italian Minister of communication, Paolo Gentiloni, who has recently declared his intention to split the RAI into two different companies, one funded by public money and the other one funded by advertising and commercial revenues, and to entrust the governance of RAI corporation to an independent foundation. See the interview which appeared in *La Repubblica*, 22 May 2006