

EUROPEAN COURT OF HUMAN RIGHTS
GRAND CHAMBER
CASE OF CENTRO EUROPA 7 S.R.L. AND DI STEFANO v. ITALY
(Application no. 38433/09)
JUDGMENT
STRASBOURG
7 June 2012

This judgment is final but may be subject to editorial revision.

In the case of *Centro Europa 7 S.r.l. and Di Stefano v. Italy*,
The European Court of Human Rights, sitting as a Grand Chamber composed of:

Françoise Tulkens, President,

Jean-Paul Costa,

Josep Casadevall,

Nina Vajić,

Dean Spielmann,

Corneliu Bîrsan,

Elisabeth Steiner,

Elisabet Fura,

Ljiljana Mijović,

David Thór Björgvinsson,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos,

Guido Raimondi,

Linos-Alexandre Sicilianos, judges,

and Vincent Berger, Jurisconsult,

Having deliberated in private on 12 October 2011 and 11 April 2012,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 38433/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian limited liability company, Centro Europa 7 S.r.l., and an Italian national, Mr Francescantonio Di Stefano (“the applicants”), on 16 July 2009.
2. The applicants were represented by Mr A. Pace, Mr R. Mastroianni, Mr O. Grandinetti and Mr F. Ferraro, lawyers practising in Rome. The Italian Government (“the Government”) were represented by their Agent, Ms E. Spatafora.
3. The applicants alleged that the failure to allocate the applicant company the necessary frequencies for television broadcasting had infringed their right to freedom of expression, and especially their freedom to impart information and ideas. They also complained of a violation of Article 14 and Article 6 § 1 of the Convention and Article 1 of Protocol No. 1.
4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 November 2009 the Second Section decided to give notice of the application to the Government. As provided for by former Article 29 § 3 of the Convention (current Article 29 § 1) and Rule 54A, it decided to examine the merits of the application at the same time as its admissibility. On 30 November 2010 a Chamber of that Section, composed of Françoise Tulkens, Danute Jočienė, Dragoljub Popović, András Sajó, Nona Tsotsoria, Kristina Pardalos, Guido Raimondi, judges, and Françoise Elens-Passos, Deputy Section Registrar, relinquished jurisdiction

in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. On 3 November 2011 Jean-Paul Costa's term as President of the Court came to an end. Françoise Tulkens took over the presidency of the Grand Chamber in the present case from that date (Rule 9 § 2). Jean-Paul Costa continued to sit following the expiry of his term of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4.

6. The applicants and the Government each filed further observations (Rule 59 § 1). In addition, third-party comments were received from the association Open Society Justice Initiative, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 October 2011 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

Mr M. REMUS, Adviser,

Mr P. GENTILI, State Counsel;

(b) for the applicants

Mr R. MASTROIANNI,

Mr O. GRANDINETTI,

Mr F. FERRARO, Counsel.

The Court heard addresses by Mr Remus, Mr Gentili, Mr Mastroianni and Mr Grandinetti, and also their replies to questions put by its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The first applicant, Centro Europa 7 S.r.l. ("the applicant company"), is a limited liability company operating in the television broadcasting sector, with its registered office in Rome. The second applicant, Mr Franciscantonio Di Stefano, is an Italian national who was born in 1953 and lives in Rome. He is the statutory representative of the applicant company.

9. By a ministerial decree of 28 July 1999 the appropriate authorities granted Centro Europa 7 S.r.l. a licence for nationwide terrestrial television broadcasting in accordance with Law no. 249/1997 (see paragraphs 56-61 below), authorising it to install and operate an analogue television network. The licence specified that the applicant company was entitled to three frequencies covering 80% of national territory. As regards the allocation of the frequencies, the licence referred to the national frequency allocation plan, adopted on 30 October 1998. It indicated that the installations should be brought into line with the requirements of the "assignment plan" (piano di assegnazione) within twenty-four months and that the measures taken to that end should conform to the adjustment programme (programma di adeguamento) drawn up by the Communications Regulatory Authority (Autorità per le garanzie nelle comunicazioni – hereinafter "AGCOM") in conjunction with the Ministry of Communications ("the Ministry"). It appears from the Consiglio di Stato's judgment no. 2624 of 31 May 2008 (see paragraph 14 below) that, under the terms of the licence, the allocation of frequencies was deferred until such time as the authorities had adopted the adjustment programme, on the basis of which the applicant company should have upgraded its own installations. The adjustment programme should, in turn, have taken into account the requirements of the national frequency allocation plan. However, the plan was not implemented. A succession of transitional schemes that benefited existing channels were applied at national level, with the result that even though it had a licence, the applicant company was unable to broadcast until June 2009 as it had not been allocated any frequencies.

10. The applicant company, through its statutory representative, made a number of applications to the administrative courts.

A. First set of administrative proceedings

11. In November 1999 the applicant company served formal notice on the Ministry to allocate frequencies to it. In a note of 22 December 1999 the Ministry refused its request.

1. Proceedings on the merits

12. In 2000 the applicant company lodged an application with the Lazio Regional Administrative Court against the Ministry and RTI (a network of Italian television channels controlled by the Mediaset group), complaining that the authorities had not allocated it any broadcasting frequencies. The application was also directed against RTI because the Retequattro channel had been authorised to broadcast on frequencies that should have been transferred to the applicant company.

13. On 16 September 2004 the Regional Administrative Court found in favour of the applicant company, holding that the authorities were required either to allocate the frequencies or to revoke the licence. Accordingly, it declared the note of 22 December 1999 void.

14. RTI appealed to the Consiglio di Stato. In judgment no. 2624 of 31 May 2008 the Consiglio di Stato dismissed the appeal and upheld the Regional Administrative Court's judgment. It noted that no deadline had been set in the licence for the authorities to adopt the adjustment programme drawn up by AGCOM in conjunction with the Ministry, but that the applicant company had been given twenty-four months to make improvements to its installations. Accordingly, the Consiglio di Stato found that the adjustment programme should have been approved promptly.

The Consiglio di Stato added that the Ministry had to give a decision on the applicant company's request to be allocated frequencies, in accordance with a judgment delivered in the meantime by the Court of Justice of the European Union¹ ("the CJEU" – see paragraphs 33-36 below).

2. Enforcement proceedings

15. On 23 October 2008 the applicant company, having still not obtained the frequencies, brought proceedings against the Ministry in the Consiglio di Stato, complaining that the judgment of 31 May 2008 had not been executed.

16. On 11 December 2008 the Ministry extended the validity of the licence granted in 1999 until the analogue switch-off date and allocated Centro Europa 7 S.r.l. a single channel with effect from 30 June 2009.

17. The Consiglio di Stato consequently held in judgment no. 243/09 of 20 January 2009 that the Ministry had properly executed its judgment of 31 May 2008.

18. On 18 February 2009 the applicant company brought a further application in the Regional Administrative Court, arguing that the decree of 11 December 2008 by which the frequencies had been allocated was insufficient in that, contrary to the terms of the licence, it concerned a single channel that did not cover 80% of national territory. In its application the company sought the annulment of the decree and an award of damages.

19. On 9 February 2010 the applicant company signed an agreement with the Ministry of Economic Development (the former Ministry of Communications), which undertook to assign it additional frequencies in accordance with the terms of the licence.

20. On 11 February 2010, pursuant to one of the clauses of that agreement, the applicant company asked for the proceedings pending before the Regional Administrative Court to be struck out.

21. On 8 March 2011 the applicant company applied to the Regional Administrative Court to restore the case to its list. It sought the annulment of the decree of 11 December 2008 by which the frequencies had been allocated, and an award of damages. It argued that the administrative authorities had not complied fully with its obligation to allocate additional frequencies and had failed to observe the agreement of 9 February 2010 and the decision of 11 December 2008.

22. Paragraph 6 of the agreement in question stated:

“Centro Europa 7 S.r.l. undertakes to request, by 11 February 2010, the striking out of application no. 1313/09 pending before the Lazio Regional Administrative Court, to allow it to lapse for failure to submit a fresh application to schedule a hearing within the statutory time-limit and, by the same date, to waive the claims for compensation brought in that application, provided that, by the date on which the case lapses, this agreement, the decision allocating the additional frequencies and the decision of 11 December 2008 have not in the meantime become invalid.

The Administration, for its part, undertakes to comply fully with its obligation to allocate additional frequencies, and with this agreement and the decision of 11 December 2008. Should it fail to do so, Centro Europa 7 and the opposing authorities shall regain full possession of their respective procedural prerogatives. In the event that the assignment of the additional frequencies becomes invalid, it is specified that Centro Europa 7 S.r.l. may reactivate application no. 1313/09 only if it would be impossible in this situation for Europa Way S.r.l. to operate one or more of the installations mentioned in Technical Attachment A.”

23. The proceedings are currently pending before the Regional Administrative Court.
B. Second set of administrative proceedings

1. Proceedings before the Regional Administrative Court

24. In the meantime, on 27 November 2003, while its initial application was still pending before the Regional Administrative Court, the applicant company had lodged a further application with the same court, seeking in particular an acknowledgment of its entitlement to have the frequencies allocated and compensation for the damage sustained.

25. In a judgment of 16 September 2004 the Regional Administrative Court dismissed the application, holding in particular that the applicant company had only a legitimate interest (*interesse legittimo*), that is, an individual position indirectly protected as far as was consistent with the public interest, and not a personal right (*diritto soggettivo*) to be allocated frequencies for analogue terrestrial television broadcasting.

2. Appeal to the Consiglio di Stato

26. The applicant company appealed to the Consiglio di Stato, arguing that since it had been granted a licence by the appropriate authorities, it did in fact have a personal right. In particular, it contended that Legislative Decree no. 352/2003 and Law no. 112/2004 did not comply with Community legislation (see paragraphs 65-67 below).

27. On 19 April 2005 the Consiglio di Stato decided to restrict its examination to the applicant company’s claim for damages and not to rule at that stage on the request for allocation of frequencies.

28. It nevertheless observed that the failure to allocate frequencies to Centro Europa 7 S.r.l. had been due to essentially legislative factors.

29. It noted that section 3(2) of Law no. 249/1997 (see paragraph 58 below) enabled the “de facto occupants” of radio frequencies authorised to operate under the previous system to continue broadcasting until new licences were awarded or applications for new licences were rejected, and in any event not after 30 April 1998.

30. It further noted that section 3(7) of Law no. 249/1997 (see paragraph 61 below) authorised the continuation of such broadcasts by entrusting AGCOM with the task of setting a deadline, on the sole condition that programmes were to be broadcast simultaneously on terrestrial frequencies and by satellite or cable. It pointed out that in the event of failure by AGCOM to set a deadline, the Constitutional Court had set 31 December 2003 as the date by which programmes broadcast by the “over-quota channels” (that is, existing national television channels exceeding the concentration restrictions imposed by section 2(6) of Law no. 249/1997) were to be broadcast by satellite or cable

only, with the result that the frequencies to be allocated to licence holders such as the applicant company would have been freed up. The Consiglio di Stato observed, however, that the deadline had not been complied with following the intervention of the national legislature: section 1 of Legislative Decree no. 352/2003, which had subsequently become Law no. 43 of 24 February 2004 (see paragraph 65 below), had prolonged the activities of the over-quota channels pending the completion of an AGCOM investigation into the development of digital television channels. It added that section 23(5) of Law no. 112/2004 (see paragraph 67 below) had subsequently, by a general authorisation mechanism, extended the possibility for over-quota channels to continue broadcasting on terrestrial frequencies until the national frequency allocation plan for digital television was implemented, with the result that those channels had not been required to free up the frequencies intended for allocation to licence holders, such as the applicant company.

31. Law no. 112/2004 had therefore had the effect, according to the Consiglio di Stato, of blocking the frequencies intended for allocation to holders of analogue licences and of preventing new operators from participating in digital television trials.

32. That being so, the Consiglio di Stato decided to stay the proceedings and requested the CJEU to give a preliminary ruling on the interpretation of the provisions of the Treaty on freedom to provide services and competition, Directive 2002/21/EC (“the Framework Directive”), Directive 2002/20/EC (“the Authorisation Directive”), Directive 2002/77/EC (“the Competition Directive”) and Article 10 of the European Convention on Human Rights, in so far as Article 6 of the Treaty on European Union referred to it.

3. Judgment of the CJEU

33. On 31 January 2008 the CJEU gave judgment. It declared two questions inadmissible, holding that it did not have sufficient information to give a ruling on them.

34. With regard to the question concerning Article 10 of the Convention, the CJEU concluded as follows:

“By its first question, the national court asks the Court, essentially, to state whether the provisions of Article 10 of the ECHR, in so far as Article 6 EU refers thereto, preclude, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights, such as *Centro Europa 7*, to broadcast without the grant of broadcasting radio frequencies.

...

By those questions, the national court is thus seeking to determine whether there are infringements of Community law for the purpose of ruling on an application for compensation for the losses flowing from such infringements.

... Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

That answer, by itself, thus enables the national court to rule on the application made by *Centro Europa 7* for compensation for the losses suffered.

Consequently, regard being had to the Court’s answer to the second, fourth and fifth questions, it is not necessary to rule on the first and third questions.”

35. As to the merits, the CJEU observed that the existing channels had been authorised to pursue their broadcasting activities as a result of a series of measures by the national legislature, to the detriment of new broadcasters which nevertheless held licences for terrestrial television broadcasting. It noted that these measures had entailed the successive application of transitional arrangements structured in favour of the incumbent networks, and that this had had the effect of preventing operators without broadcasting frequencies, such as the applicant company, from accessing the television broadcasting market even though they had a licence (granted, in the applicant company's case, in 1999). The CJEU held:

"... Law no. 112/2004 ... does not merely allocate to the incumbent operators a priority right to obtain radio frequencies, but reserves them that right exclusively, without restricting in time the privileged position assigned to those operators and without providing for any obligation to relinquish the radio frequencies in breach of the threshold after the transfer to digital television broadcasting."

36. The CJEU added that the application of the transitional schemes was not in accordance with the new common regulatory framework (NCRF), which implemented provisions of the Treaty, in particular those on freedom to provide services in the area of electronic communications networks and services. It observed in that connection that several provisions of the NCRF stated that the allocation and assignment of frequencies had to be based on objective, transparent, non-discriminatory and proportionate criteria. In the CJEU's view, such criteria had not been applied in the present case since the status of the existing channels had not been amended under the transitional schemes and they had continued their broadcasting activities to the detriment of operators such as the applicant company, which, not having been allocated any broadcasting frequencies, had been unable to exercise their rights and make use of their licence.

The CJEU therefore reached the following conclusions:

"... it must be stated that, in the area of television broadcasting, freedom to provide services, as enshrined in Article 49 EC and implemented in this area by the NCRF, requires not only the grant of broadcasting authorisations, but also the grant of broadcasting radio frequencies. An operator cannot exercise effectively the rights which it derives from Community law in terms of access to the television broadcasting market without broadcasting radio frequencies.

...

Article 49 EC and, from the date on which they became applicable, Article 9(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), and Article 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria."

4. Resumption of proceedings in the Consiglio di Stato

37. In decision no. 2622/08 of 31 May 2008 the Consiglio di Stato concluded that it could not allocate frequencies in the Government's place or compel the Government to do so. It ordered the

Government to deal with the applicant company's request for frequencies in a manner consistent with the criteria laid down by the CJEU. It made the following observations in particular: "The adoption by the authorities of a specific measure relates more to issues of performance and implementation than to damages: in cases involving an unlawful refusal to take an administrative measure that has been requested, the adoption of the measure does not amount to compensation, but rather to the performance of an obligation incumbent upon the authorities, unless the private party concerned has sustained any damage."

38. With regard to the request for the allocation of frequencies, the Consiglio di Stato observed: "Where legitimate interests are at stake, however, it is not possible to envisage a specific means of redress because inaction, a delay or an unlawful refusal will always have an impact on a situation that was or remains unsatisfactory, with the result that there is nothing to restore; the issue in relation to such interests concerns the practical implementation of any ruling setting aside the measure complained of.

...

Applying these principles to the present case, the Consiglio finds that the appellant's request for an order requiring the authorities to allocate the network or frequencies is inadmissible."

5. Decision on the applicant company's claim for compensation

39. The Consiglio di Stato deferred until 16 December 2008 its final decision on the payment of compensation to the applicant company, holding that it was necessary to wait for the relevant regulations to be passed by the Government before assessing the amount.

40. The Consiglio di Stato requested both parties to comply with the following requirements by 16 December 2008. The Ministry was, firstly, to specify what frequencies had been available following the public tendering procedures in 1999 and why they had not been allocated to the applicant company and, secondly, to justify its assertion that the licence granted to the applicant company had expired in 2005.

41. The applicant company, for its part, was asked by the Consiglio di Stato to submit a report on its activities between 1999 and 2008, and also to explain why it had not taken part in the 2007 public tendering procedure for the allocation of frequencies.

42. The Consiglio di Stato also asked AGCOM to explain why the national frequency allocation plan for terrestrial television broadcasting had never been implemented. Lastly, it dismissed the applicant company's request for the suspension of the provisional authorisation granted to a channel belonging to the Mediaset group (Retequattro) for the use of the frequencies.

43. In its reply AGCOM explained to the Consiglio di Stato that the national frequency allocation plan had been implemented only on 13 November 2008. According to AGCOM, this delay was due to several factors. Firstly, the legal situation was complicated because it was difficult to identify the available broadcasting frequencies as a result of the court decisions in which the over-quota channels had been allowed to continue broadcasting. In addition, the transitional arrangements introduced by Law no. 66/2001 (see paragraphs 63-64 below), which had allowed the channels in question to continue broadcasting in analogue mode, had prevented the plan from being implemented on account of the incompatibility between the interests of the channels likely to be allowed to broadcast under the plan and the interests of the channels that were legally entitled to continue their existing operations.

44. The applicant company submitted an expert valuation by the commercial bank Unipol assessing the damage sustained at 2,175,213,345.00 euros (EUR). The valuation was based on the profits achieved by Retequattro, the over-quota channel which should have relinquished the frequencies allocated to the applicant company.

45. In a judgment of 20 January 2009 the Consiglio di Stato, on the basis of Article 2043 of the Civil Code (see paragraph 69 below), ordered the Ministry to pay the applicant company the sum of EUR 1,041,418 in compensation. It observed that over a period of ten years, the Ministry had acted negligently by having granted Centro Europa 7 S.r.l. a licence without assigning it any broadcasting frequencies.

46. The Consiglio di Stato found that there was a causal link between the conduct of the administrative authorities and the damage alleged, and that the award of the licence to Centro Europa 7 S.r.l. had not conferred on it the immediate right to pursue the corresponding economic activity; accordingly, the compensation should be calculated on the basis of the legitimate expectation of being allocated the frequencies by the appropriate authorities.

47. In the opinion of the Consiglio di Stato, the fact that the frequencies had not been allocated until 11 December 2008 was attributable to the authorities. Damage had thus been sustained as a result of an unlawful act for which the authorities incurred non-contractual liability, concerning both the breach of legitimate expectations and the delay in allocating the frequencies. The fact that the authorities had launched a public tendering procedure for the frequencies in 1999, although the situation in the broadcasting sector had not been clarified and there were outstanding technical issues, had been “risky”. The Consiglio di Stato considered that the question of redress for the damage sustained by the applicant company should take this context into account. The authorities’ conduct had not been characterised by “significant gravity” (notevole gravità) and the unlawful act was thus attributable to “negligent” and not intentional conduct on their part.

48. The Consiglio di Stato added that the pecuniary damage should be assessed with effect from 1 January 2004, since the Constitutional Court had ruled that the “transition period” after which legislation would have to be passed to allow licence holders to start broadcasting had expired on 31 December 2003 (see paragraph 62 below). As to the criteria for determining the damages to be awarded, the Consiglio di Stato pointed out that, as regards the losses sustained, the applicant company had been fully aware, at the time of the call for tenders, of the circumstances of the case and the conditions to which the licence was subject. Furthermore, the sequence of events that had prevented the frequencies from being allocated had been largely foreseeable. Accordingly, the applicant company should have known that it was unlikely to obtain the frequencies, at least in the short term. In addition, it could have purchased the frequencies under section 1 of Law no. 66 of 20 March 2001 (see paragraph 64 below).

Having regard to the above considerations, the Consiglio di Stato, without ordering an expert valuation, decided to award the applicant company EUR 391,418 for the losses sustained. As regards loss of earnings, it found that, from 1 January 2004, the applicant company could have achieved profits but had been unable to do so because of the delay in allocating the frequencies; the amount could be assessed at EUR 650,000. It refused to take into account the expert valuation submitted by the applicant company and held that it was unlikely that the company would have purchased shares in the market, even in the event that the over-quota channels had relinquished the frequencies. In the Consiglio di Stato’s view, the comparison between the applicant company and the two leading operators (Mediaset and RAI) was unjustified, especially as it did not take into account the other nationwide operator (La 7), which, although it had greater economic power than the applicant company, was nevertheless operating at a loss.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitutional Court judgment no. 225/1974

49. In judgment no. 225/1974 the Constitutional Court, on the basis of Article 43 of the Constitution, reaffirmed the principle of the monopoly enjoyed by the State television corporation RAI on public-interest grounds. It held that the technical limitations on the number of frequencies justified the monopoly, and also laid down the requirement of objectivity and impartiality in public-service broadcasting.

B. Law no. 103/1975

50. Law no. 103 of 14 April 1975 (Nuove norme in materia di diffusione radiofonica e televisiva) transferred control of public-service broadcasting from the executive to the legislature. A bicameral parliamentary committee was set up with responsibility for the general management and supervision of radio and television services. RAI's board of management was then appointed by Parliament. A third channel of the RAI network was launched in 1979, with particular emphasis on regional programmes.

C. Constitutional Court judgment no. 202/1976

51. In judgment no. 202 of 15 July 1976 the Constitutional Court declared unconstitutional the provisions of Law no. 103/1975 establishing a monopoly or oligopoly on local broadcasting. In the light of that decision, commercial operators were authorised to run local television channels.

52. The allocation and voluntary redistribution of local frequencies subsequently encouraged the development of large regional or national operators, including the Mediaset group. The group's first channel was Canale 5, which started broadcasting nationwide in 1980; by 1984, having taken over two other channels (Italia Uno and Retequattro), Mediaset had managed, together with RAI, to establish a "duopoly" of public and private operators.

D. Law no. 223/1990

53. Law no. 223 of 6 August 1990, entitled "Provisions governing the public and private broadcasting system" (Disciplina del sistema radiotelevisivo pubblico e privato), transferred the power to appoint members of RAI's board from the parliamentary committee to the Speakers of the Chamber of Deputies and the Senate.

E. Constitutional Court judgment no. 420/1994

54. In judgment no. 420 of 5 December 1994 the Constitutional Court declared unconstitutional the provisions allowing the three channels controlled by the Mediaset group (Canale 5, Italia Uno and Retequattro) to occupy a dominant position. It held that the provision whereby the same operator could hold several television broadcasting licences on condition that it did not exceed 25% of the total number of national channels – that is, three channels in all – was not sufficient to prevent concentration of television channels, and was accordingly in breach of Article 21 of the Constitution in that it did not make it possible to guarantee the plurality of information sources. The Constitutional Court considered that the existence of legislation to prevent dominant positions from being established was an essential requirement to justify the State's relinquishment of its monopoly on broadcasting. The creation of such dominant positions in this sector would not only have had the effect of changing the rules on competition but would also have led to the emergence of an oligopoly and would have breached the fundamental principle of plurality of information sources. The Constitutional Court thus held that the mere coexistence of a State-owned company and private companies (a mixed system) within the broadcasting sector was not sufficient to secure respect for the right to receive information from several competing sources. As it had previously stated in decision no. 826/1988, it reaffirmed that a State-owned company could not by itself ensure a balance precluding the establishment of a dominant position in the private sector.

55. On 11 June 1995, in a referendum, the Italian electorate rejected by a majority (57%) a proposal to amend existing legislation by prohibiting a private entrepreneur from controlling more than one television channel.

F. Law no. 249/1997

56. Law no. 249 of 31 July 1997, which came into force on 1 August 1998, established AGCOM (Autorità per le garanzie nelle comunicazioni). Section 2(6) of the Law imposed concentration restrictions in the television broadcasting sector, prohibiting the same operator from holding

licences to broadcast nationwide on more than 20% of the television channels operating on terrestrial frequencies.

57. Section 3(1) provided that operators authorised to broadcast under the previous legal framework could continue to transmit their programmes at national and local level until new licences were awarded or applications for new licences were rejected, but in any event not after 30 April 1998.

58. Section 3(2) provided that AGCOM was to adopt, by 31 January 1998 at the latest, a national frequency allocation plan for television broadcasting, on the basis of which new licences were to be awarded by 30 April 1998 at the latest.

59. In decision no. 68 of 30 October 1998 AGCOM adopted the national frequency allocation plan; subsequently, in decision no. 78 of 1 December 1998, it adopted regulations on the conditions and procedure for awarding licences for analogue terrestrial television broadcasting.

60. Section 3(6) of Law no. 249/1997 introduced a transitional scheme whereby existing national television channels exceeding the concentration restrictions imposed by section 2(6) (known as “over-quota channels”) could continue broadcasting on a temporary basis on terrestrial frequencies after 30 April 1998, provided that they complied with the obligations imposed on channels holding licences and that their programmes were broadcast simultaneously on satellite or cable.

61. Section 3(7) of the same Law entrusted AGCOM with the task of determining the date by which, in view of the real and significant increase in viewers of cable or satellite television, the over-quota channels were to broadcast by satellite or cable only, thus relinquishing terrestrial frequencies.

G. Constitutional Court judgment no. 466/2002

62. On 20 November 2002 the Constitutional Court delivered a judgment concerning section 3(7) of Law no. 249/1997. It held that the transition period laid down in that provision was acceptable, given that at the time the law was passed the alternative means of transmission in Italy could not be said to have been competitive in relation to traditional analogue broadcasting, hence the need to introduce a transition period to encourage the development of digital broadcasting. However, the Constitutional Court declared unconstitutional the failure to specify a fixed deadline for the expiry of the transition period. Referring to the technical conclusions set out in AGCOM’s decision no. 346/2001, resulting from a study of the number of cable and satellite television viewers in Italy, it ruled that 31 December 2003 was a reasonable date for the expiry of the transition period.

The Constitutional Court held, in particular:

“... the present Italian private television system operating at national level in analogue mode has grown out of situations of simple de facto occupation of frequencies (operation of installations without licences and authorisations), and not in relation to any desire for greater pluralism in the distribution of frequencies and for proper planning of terrestrial broadcasting ... This de facto situation does not therefore guarantee respect for external pluralism of information, which is an “essential requirement” laid down by the relevant constitutional case-law ... In this context, given the persistence (and aggravation) of a situation which was ruled illegal in judgment no. 420/1994 and the continued operation of channels considered ‘over quota’ by the legislature in 1997, a deadline must be set that is absolutely certain, definitive and hence binding, in order to ensure compatibility with constitutional rules ...”

H. Law no. 66/2001

63. Legislative Decree no. 5 of 23 January 2001, which, as amended, became Law no. 66 of 20 March 2001, authorised operators lawfully engaged in television broadcasting on terrestrial frequencies to continue broadcasting until the national frequency allocation plan for digital television was implemented.

64. Section 1 provided that operators which were not currently broadcasting but had been awarded a licence could purchase broadcasting installations and connections that were in lawful use on the date on which the Legislative Decree came into force.

Section 2 bis provides:

“In order to ensure the opening of the digital terrestrial television market, operators that are lawfully engaged in digital television broadcasting, via satellite or cable, may conduct trials by means of simultaneous repeats of programmes that have already been broadcast on analogue frequencies.”

I. Law no. 43 of 24 February 2004 and Law no. 112 of 3 May 2004

65. Section 1 of Legislative Decree no. 352 of 24 December 2003, which, as amended, became Law no. 43 of 24 February 2004, authorised the over-quota channels to continue broadcasting on analogue and digital television networks pending the completion of an investigation into the development of digital television channels.

66. Law no. 112 of 3 May 2004 (known as the “Gasparri Law”) specified the different stages for the launch of digital broadcasting on terrestrial frequencies.

67. Section 23 of the Law provides:

“1. Pending the implementation of the national frequency allocation plan for digital television, operators engaged in television broadcasting activities on any basis at national or local level which fulfil the conditions necessary to obtain authorisation for digital terrestrial broadcasting trials, in accordance with ... Legislative Decree no. 5 [of 23 January 2001], which, as amended, has become Law no. 66 [of 20 March 2001], may conduct such trials, including by simultaneous repeats of programmes already broadcast on analogue frequencies, until the conversion of the networks has been completed, and may apply, from the date of the entry into force of this Law, ... for the licences and authorisations necessary for digital terrestrial broadcasting.

2. Digital broadcasting trials may be conducted using installations lawfully broadcasting on analogue frequencies on the date of the entry into force of this Law.

3. In order to allow digital networks to be set up, transfers of installations or branches of undertakings between operators lawfully engaged in television broadcasting at national or local level shall be authorised, on condition that the acquisitions are intended for digital broadcasting.

...

5. With effect from the date of the entry into force of this Law, a licence to operate a television channel shall be granted, upon request, to persons lawfully engaged in television broadcasting by virtue of a licence or the general authorisation provided for in subsection (1) above, where they can show that they have attained coverage of at least 50% of the population or of the local catchment area.

...

9. In order to facilitate the conversion of the analogue system to the digital system, the broadcasting of television programmes shall be carried on through installations lawfully operating on the date of the entry into force of this Law ...”

68. AGCOM approved a “first-level” frequency allocation plan for national and regional channels on 29 January 2003 and the “integrated plan”, supplementing the “first-level plan” with a “second-level plan” (allocation of frequencies to local channels), on 12 November 2003.

J. Article 2043 of the Civil Code

69. This provision reads as follows:

“Any unlawful act which causes damage to another shall render the perpetrator liable in damages under the civil law.”

III. RELEVANT INTERNATIONAL MATERIAL

A. Council of Europe documents

1. Recommendation No. R (99) 1 of the Committee of Ministers to member States on measures to promote media pluralism

70. The relevant parts of this recommendation, adopted by the Committee of Ministers on 19 January 1999 at the 656th meeting of the Ministers’ Deputies, read as follows:

“The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

...

Stressing also that the media, and in particular the public service broadcasting sector, should enable different groups and interests in society – including linguistic, social, economic, cultural or political minorities – to express themselves;

Noting that the existence of a multiplicity of autonomous and independent media outlets at the national, regional and local levels generally enhances pluralism and democracy;

Recalling that the political and cultural diversity of media types and contents is central to media pluralism;

Stressing that States should promote political and cultural pluralism by developing their media policy in line with Article 10 of the European Convention on Human Rights, which guarantees freedom of expression and information, and with due respect for the principle of independence of the media;

...

Noting that there are already some cases of bottlenecks in the area of the new communications technologies and services, such as control over conditional access systems for digital television services;

Noting also that the establishment of dominant positions and the development of media concentrations might be furthered by the technological convergence between the broadcasting, telecommunications and computer sectors;

...

Convinced that transparency as regards the control of media enterprises, including content and service providers of the new communications services, can contribute to the existence of a pluralistic media landscape;

...

Recalling also the provisions on media pluralism contained in the Amending Protocol to the European Convention on Transfrontier Television;

Bearing in mind the work conducted within the framework of the European Union and other international organisations in the area of media concentrations and pluralism,

Recommends that the governments of the member States:

- i. examine the measures contained in the appendix to this recommendation and consider the inclusion of these in their domestic law or practice where appropriate, with a view to promoting media pluralism;
- ii. evaluate on a regular basis the effectiveness of their existing measures to promote pluralism and/or anti-concentration mechanisms and examine the possible need to revise them in the light of economic and technological developments in the media field.”

2. Recommendation Rec(2003)9 of the Committee of Ministers to member States on measures to promote the democratic and social contribution of digital broadcasting

71. The relevant parts of this recommendation, adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies, read as follows:

“...

Recalling that the existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions, as stated in its Declaration on the freedom of expression and information of 29 April 1982, is important for democratic societies;

Bearing in mind Resolution No.1 on the future of public service broadcasting adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994), and recalling its Recommendation No R (96) 10 on the guarantee of the independence of public service broadcasting;

Stressing the specific role of the broadcasting media, and in particular of public service broadcasting, in modern democratic societies, which is to support the values underlying the political, legal and social structures of democratic societies, and in particular respect for human rights, culture and political pluralism;

...

Noting that in parallel with the multiplication of the number of channels in the digital environment, concentration in the media sector is still accelerating, notably in the context of globalisation, and recalling to the member states the principles enunciated in Recommendation No R (99) 1 on measures to promote media pluralism, in particular those concerning media ownership rules, access to platforms and diversity of media content;

...

Recommends that the governments of the member states, taking account of the principles set out in the appendix:

a. create adequate legal and economic conditions for the development of digital broadcasting that guarantee the pluralism of broadcasting services and public access to an enlarged choice and variety of quality programmes, including the maintenance and, where possible, extension of the availability of transfrontier services;

b. protect and, if necessary, take positive measures to safeguard and promote media pluralism, in order to counterbalance the increasing concentration in this sector;

...”

3. Recommendation CM/Rec(2007)2 of the Committee of Ministers to member States on media pluralism and diversity of media content

72. The relevant parts of this recommendation, adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers’ Deputies, read as follows:

“...

Recalling Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), which guarantees freedom of expression and freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers;

Recalling its Declaration on the freedom of expression and information, adopted on 29 April 1982, which stresses that a free flow and wide circulation of information of all kinds across frontiers is an important factor for international understanding, for bringing peoples together and for the mutual enrichment of cultures;

Recalling its Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector and its Explanatory Memorandum, which stress the importance of the political, financial and operational independence of broadcasting regulators;

Recalling the opportunities provided by digital technologies as well as the potential risks related to them in modern society as stated in its Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting;

Recalling its Recommendation No. R (99) 1 on measures to promote media pluralism and its Recommendation No. R (94) 13 on measures to promote media transparency, the provisions of which should jointly apply to all media;

Noting that, since the adoption of Recommendations No. R (99) 1 and No. R (94) 13, important technological developments have taken place, which make a revision of these texts necessary in order to adapt them to the current situation of the media sector in Europe;

...

Reaffirming that media pluralism and diversity of media content are essential for the functioning of a democratic society and are the corollaries of the fundamental right to freedom of expression and information as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Considering that the demands which result from Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms will be fully satisfied only if each person is given the possibility to form his or her own opinion from diverse sources of information;

Recognising the crucial contribution of the media in fostering public debate, political pluralism and awareness of diverse opinions, notably by providing different groups in society – including cultural, linguistic, ethnic, religious or other minorities – with an opportunity to receive and impart information, to express themselves and to exchange ideas;

...

Reaffirming that, in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed;

...

Bearing in mind that national media policy may also be oriented to preserve the competitiveness of domestic media companies in the context of the globalisation of markets and that the transnational media concentration phenomena can have a negative impact on diversity of content,

Recommends that governments of member states:

- i. consider including in national law or practice the measures set out below;
- ii. evaluate at national level, on a regular basis, the effectiveness of existing measures to promote media pluralism and content diversity, and examine the possible need to revise them in the light of economic, technological and social developments on the media;
- iii. exchange information about the structure of media, domestic law and studies regarding concentration and media diversity.

Recommended measures

I. Measures promoting structural pluralism of the media

1. General principle

1.1. Member states should seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public, taking into account the characteristics of the media market, notably the specific commercial and competition aspects.

1.2. Where the application of general competition rules in the media sector and access regulation are not sufficient to guarantee the observance of the demands concerning cultural diversity and the pluralistic expressions of ideas and opinions, member states should adopt specific measures.

...

1.4. When adapting their regulatory framework, member states should pay particular attention to the need for effective and manifest separation between the exercise of political authority or influence and control of the media or decision making as regards media content.

...

4. Other media contributing to pluralism and diversity

Member states should encourage the development of other media capable of making a contribution to pluralism and diversity and providing a space for dialogue. These media could, for example, take the form of community, local, minority or social media. ...

II. Measures promoting content diversity

...

3. Allocation of broadcasting licences and must carry/must offer rules

3.1. Member states should consider introducing measures to promote and to monitor the production and provision of diverse content by media organisations. In respect of the broadcasting sector, such measures could be to require in broadcasting licences that a certain volume of original programmes, in particular as regards news and current affairs, is produced or commissioned by broadcasters.

3.2. Member states should consider the introduction of rules aimed at preserving a pluralistic local media landscape, ensuring in particular that syndication, understood as the centralised provision of programmes and related services, does not endanger pluralism.

3.3. Member states should envisage, where necessary, adopting must carry rules for other distribution means and delivery platforms than cable networks. Moreover, in the light of the digitisation process – especially the increased capacity of networks and proliferation of different networks – member states should periodically review their must carry rules in order to ensure that they continue to meet well-defined general interest objectives. Member states should explore the relevance of a must offer obligation in parallel to the must carry rules so as to encourage public service media and principal commercial media companies to make their channels available to network operators that wish to carry them. Any resulting measures should take into account copyright obligations.”

4. Parliamentary Assembly Resolution 1387 (2004) on monopolisation of the electronic media and possible abuse of power in Italy

73. This resolution, adopted by the Parliamentary Assembly on 24 June 2004, reads as follows:

“1. Italy is a founding member of the Council of Europe and strongly supports the ideals for which it stands. The Parliamentary Assembly is therefore concerned by the concentration of political, commercial and media power in the hands of one person, Prime Minister Silvio Berlusconi.

2. The Parliamentary Assembly cannot accept that this anomaly be minimised on the grounds that it only poses a potential problem. A democracy is judged not only by its day-to-day operations but by the principles the country upholds with regard to its own citizens and internationally. The Assembly recalls that, in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights, states

have a duty to protect and, when necessary, take positive measures to safeguard and promote media pluralism.

3. The Assembly deplores the fact that several consecutive Italian governments since 1994 have failed to resolve the problem of conflict of interest and that appropriate legislation has not yet been adopted by the present parliament. It disagrees that the leading principle of the Frattini Bill currently under consideration – that only managers, not owners, should be held responsible – provides a genuine and comprehensive solution to the conflict of interest concerning Mr Berlusconi.

4. Through Mediaset, Italy's main commercial communications and broadcasting group, and one of the largest in the world, Mr Berlusconi owns approximately half of the nationwide broadcasting in the country. His role as head of government also puts him in a position to influence indirectly the public broadcasting organisation, RAI, which is Mediaset's main competitor. As Mediaset and RAI command together about 90% of the television audience and over three quarters of the resources in this sector, Mr Berlusconi exercises unprecedented control over the most powerful media in Italy.

5. This duopoly in the television market is in itself an anomaly from an antitrust perspective. The status quo has been preserved even though legal provisions affecting media pluralism have twice been declared anti-constitutional and the competent authorities have established the dominant positions of RAI and the three television channels of Mediaset. An illustration of this situation was a recent decree of the Prime Minister, approved by parliament, which allowed the third channel of RAI and Mediaset's Retequattro to continue their operations in violation of the existing antitrust limits until the adoption of new legislation. Competition in the media sector is further distorted by the fact that the advertising company of Mediaset, Publitalia '80, has a dominant position in television advertising. The Assembly deplores the continued exclusion of a potential national broadcaster, Europa 7, winner of a 1999 government tender to broadcast on frequencies occupied by Mediaset's channel, Retequattro.

6. The Assembly believes that the newly-adopted 'Gasparri Law' on the reform of the broadcasting sector may not effectively guarantee greater pluralism simply through the multiplication of television channels in the course of digitalisation. At the same time, it manifestly allows Mediaset to expand even further, as it gives the market players the possibility to have a monopoly in a given sector without ever reaching the antitrust limit in the overall integrated system of communications (SIC). The Assembly notes that these concerns led the President of the Republic to oppose the previous version of the law.

7. The Assembly is particularly concerned by the situation of RAI, which is contrary to the principles of independence laid down in Assembly Recommendation 1641 (2004) on public service broadcasting. RAI has always been a mirror of the political system of the country and its internal pluralism has moved from the proportionate representation of the dominant political ideologies in the past to the winner takes all attitude reflecting the present political system. The Assembly notes with concern the resignations of the president of RAI and of one of the most popular journalists in the country in protest against the lack of balanced political representation in the Council of Administration and against the political influence over RAI's programming.

8. While the printed media in Italy has traditionally provided greater pluralism and political balance than the broadcasting sector, most Italians receive their news through the medium of television. The high cost of newspaper compared to television advertising is having a damaging effect on the Italian printed media. However, the Assembly wishes to record its approval of government measures to help small- and medium-sized newspapers and other measures to boost newspaper readership.

9. The Assembly 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 aimed at 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.

10. The Assembly points out that several international bodies, such as the OSCE representative on Freedom of the Media and, most recently, the European Parliament, have expressed concerns similar to its own. It welcomes the measures for safeguarding media pluralism proposed in the European Parliament resolution on the risks of violation, in the European Union and especially in Italy, of freedom of expression and information (Article 11 (2) of the Charter of Fundamental Rights) of 22 April 2004, namely that the protection of media diversity should become a priority of European Union competition law.

11. The Assembly therefore calls on the Italian Parliament:

i. to pass as a matter of urgency a law resolving the conflict of interest between ownership and control of companies and discharge of public office, and incorporating penalties for cases where there is a conflict of interest with the discharge of public office at the highest level;

ii. to ensure that legislation and other regulatory measures put an end to the long-standing practice of political interference in the media, taking into account in particular the Committee of Ministers' Declaration on freedom of political debate in the media, adopted on 12 February 2004;

iii. to amend the Gasparri Law in line with the principles set out in Committee of Ministers' Recommendation No. R (99) 1 on measures to promote media pluralism, in particular:

a. by avoiding the emergence of dominant positions in the relevant markets within the SIC;

b. by including specific measures to bring an end to the current RAI-Mediaset duopoly;

c. by including specific measures to ensure that digitalisation will guarantee pluralism of content.

12. The Assembly calls on the Italian Government:

i. to initiate measures to bring the functioning of RAI into line with Assembly Recommendation 1641 (2004) on public service broadcasting, with the declaration of the 4th European Ministerial Conference on Mass Media Policy in Prague and with Committee of Ministers' Recommendations No. R (96) 10 on the guarantee of the independence of public service broadcasting and Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting;

ii. to give a positive international example by proposing and supporting initiatives within the Council of Europe and the European Union aimed at promoting greater media pluralism at European level.

13. The Assembly asks the Venice Commission to give an opinion on the compatibility of the Gasparri Law and the Frattini Bill with the standards of the Council of Europe in the field of freedom of expression and media pluralism, especially in the light of the case-law of the European Court of Human Rights.”

5. Opinion of the Venice Commission on the compatibility of the “Gasparri” and “Frattini” laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media

74. The Venice Commission’s opinion, adopted at its 63rd Plenary Session (10-11 June 2005), reads as follows, in so far as relevant to the present case:

“The Parliamentary Assembly of the Council of Europe has requested the Venice Commission to give an opinion on whether or not the two Italian laws on the broadcasting system (‘the Gasparri Law’) and on the conflict of interest (‘the Frattini Law’) are in conformity with the Council of Europe standards in the fields of freedom of expression and pluralism of the media.

...

While the case-law of the European Court on Human Rights does not offer specific guidance on the matter, certain pertinent principles may nonetheless be derived from that case-law: in primis that freedom of expression has a fundamental role in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive, and that the State is the ultimate guarantor of pluralism, especially in relation to audio-visual media, whose programmes are often broadcast very widely.

...

Media pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views. In the Commission’s opinion, internal pluralism must be achieved in each media sector at the same time: it would not be acceptable, for example, if pluralism were guaranteed in the print media sector, but not in the television one. Plurality of the media does not only mean, in the Commission’s view, the existence of a plurality of actors and outlets, it also means the existence of a wide range of media, that is to say different kinds of media.

The Council of Europe instruments set out certain tools for promoting media pluralism, which include:

- a legislative framework establishing limits for media concentration; the instruments for achieving this include permissible thresholds (to be measured on the basis of one or of a combination of elements such as the audience share or the capital share or revenue limits) which a single media company is allowed to control in one or more relevant markets;
- specific media regulatory authorities with powers to act against concentration;
- specific measures against vertical integration (control of key elements of production, broadcasting, distribution and related activities by a single company or group);
- independence of regulatory authorities;
- transparency of the media;
- pro-active measures to promote the production and broadcasting of diverse content;

- granting, on the basis of objective and non-partisan criteria, within the framework of transparent procedures and subject to independent control, direct or indirect financial support to increase pluralism;
- self-regulatory instruments such as editorial guidelines and statutes setting out editorial independence.

In respect of the provisions in the Gasparri Law aiming at protecting media pluralism, the Commission considers at the outset that the mere increase in the number of channels which will be brought about by digital television is not sufficient in itself to guarantee media pluralism. Newly available channels may have very small audiences but with similar amounts of output. Finally, larger companies will enjoy greater purchasing power in a wide range of activities such as programme acquisitions, and will thus enjoy significant advantages over other national content providers.

The Commission considers therefore that the threshold of 20% of the channels is not a clear indicator of market share. It should be combined, for instance, with an audience share indicator.

As regards the second threshold set out in the Gasparri Law, that is 20% of the revenue in the Integrated Communications Systems (SIC), the Commission considers that SIC certainly reflects a modern trend but should not, at least in this very broad definition, be used already at this stage instead of the 'relevant market' criterion, as its effect is to dilute the effectiveness of the instruments aimed at protecting pluralism. Indeed, it may allow an individual company to enjoy extremely high degrees of revenue shares in individual markets, whilst at the same time remaining below the 20% threshold for the whole sector.

Indeed, the Commission notes that the combined effect of the new framework set out in the Gasparri Law has relaxed the previous anti-concentration rules whose maximum permissible levels had been exceeded by Mediaset and RAI. Retequattro has accordingly been allowed to continue to occupy analogue frequencies.

The Commission considers therefore that the SIC criterion should be replaced by the previously used 'relevant market' criterion, as is the case in the other European countries.

...

As regards the provisions on migration of radio and television broadcasters from analogue to digital frequencies, the Commission has the impression that the Gasparri Law has taken the approach of attempting to hold back on finding a real solution to the problem of media concentration in the television market until some future point in time and it relies heavily on the point when digitalisation will come into full effect. In the Commission's view, this approach is not satisfactory, as, if the status quo is maintained, it is likely that Mediaset and RAI will remain the dominant actors in Italian television. In this respect, the Commission recalls that while general anti-trust measures against the abuse of dominant positions, in the media sector dominant positions are forbidden as such.

...

In respect of the privatisation of RAI, which should lead to a lesser degree of politicisation of the public broadcaster, the Commission notes that change at 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 its own three national television channels, the Prime Minister will have some control of the three public national television channels. The Commission expresses concern over the risk that this atypical situation may even strengthen the threat of monopolisation, which might constitute, in terms of the case-law of the European Court of Human Rights, an unjustified interference with freedom of expression.

...”

6. Issue Discussion Paper by the Commissioner for Human Rights on “Media pluralism and human rights”

75. The discussion paper of 6 December 2011 by the Commissioner for Human Rights, in so far as relevant to the present case, reads as follows:

“3.2 The case of Italy

The history of the so-called ‘Italian anomaly’ is illustrative of how broadcast monopolisation (through over-consolidation and super-mergers) can pose an acute danger even in older democracies.

Freedom of expression and press freedoms are in a healthy state in Italy. However, the television broadcasting market is regularly referred to as the ‘Italian anomaly’.

In the last two decades, no third force has been able to constrain the so-called duopoly: domination of the nationwide television channel market by the private owner, Mediaset, and the public owner Radiotelevisione Italiana, RAI. The duopoly was accompanied by a practical monopoly by Mediaset in the commercial television sector and the advertisement market. Before digitalisation, the duopoly’s audience share was around 90% (both owned three channels). Combined revenues and the advertisement market also provided evidence of the duopoly.

Italy also has an ongoing record of control over public service television by political parties and governments. As its Prime Minister Silvio Berlusconi co-owns Mediaset, the usual fears of governmental control of RAI are aggravated by worries of widespread governmental control of the nation’s most important source of information, television.

The so-called Gasparri and Frattini Laws of 2004 were supposed to provide guarantees for future pluralism of the media, and outlaw ‘two-hat’ situations, respectively. However, neither universal digitalisation nor equal competition rules alone can guarantee cultural diversity and political pluralism in the media, especially if the already existing media concentration is practically maintained or even enhanced by the law. The Gasparri Law’s rules of transition from analogue to digital, despite their innovative force, allow the duopoly to use its acquired economic might to expand into new digital markets.

European standards prohibit undue political or partisan ownership or control of private broadcasters in order to avoid government or political interference. Germany and the UK impose restrictions on direct ownership or control of broadcast media by political actors; EU countries also require broadcasters to maintain independence from political parties and politicians. Italy, despite its Frattini Law, does neither.”

B. European Parliament

76. The European Parliament's resolution on the risks of violation, in the European Union and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights (2003/2237(INI)) reads as follows, in so far as relevant to the present case: "Situation in Italy

... Notes that the level of concentration of the television market in Italy is currently the highest within Europe and that while Italian television offers twelve national channels and ten to fifteen regional and local channels, the market is characterised by the duopoly between RAI and MEDIASET where both operators together account for almost 90% of the total audience share and collect 96.8% of advertising resources, as against 88% for Germany, 82% for the United Kingdom, 77% for France and 58% for Spain;

Notes that the Mediaset group is the largest private television and communications group in Italy and one of the largest in the world and controls (inter alia) television networks (RTI S.p.A.) and advertising franchise holders (Publitalia '80), both of which have been formally found to hold a dominant position in breach of national law (Law no. 247/97) by the Communications Regulatory Authority (decision 226/03);

Notes that one of the sectors in which the conflict of interests is most obvious is advertising, given that in 2001 the Mediaset group was in receipt of two thirds of television advertising resources, amounting to a total of EUR 2,500 million, and that the main Italian companies have transferred much of their investment in advertising from printed matter to the Mediaset networks and from RAI to Mediaset;

Notes that the President of the Italian Council of Ministers has not resolved his conflict of interests as he had explicitly pledged, but on the contrary has increased his controlling shareholding in the company Mediaset (from 48.639% to 51.023%), thereby drastically reducing his own net debt through a marked increase in advertising revenue to the detriment of competitors' revenues (and ratings) and, above all, of advertising funding for the written press;

Regrets the repeated and documented instances of governmental interference, pressure and censorship in respect of the corporate structure and schedules (even as regards satirical programmes) of the RAI public television service, starting with the dismissal of three well-known professionals at the sensational public request of the President of the Italian Council of Ministers in April 2002 – in a context in which an absolute majority of the members of the RAI board of governors and the respective parliamentary control body are members of the governing parties, with this pressure then being extended to other media not under his ownership, leading inter alia to the resignation of the editor of *Corriere della Sera* in May 2003;

Notes, therefore, that the Italian system presents an anomaly owing to a unique combination of economic, political and media power in the hands of one man – the current President of the Italian Council of Ministers – and to the fact that the Italian Government is, directly or indirectly, in control of all national television channels;

Notes that in Italy the broadcasting system has been operating in extralegal circumstances for decades, as repeatedly recognised by the Constitutional Court, and in the face of which the efforts of the ordinary legislator and the competent institutions have proved ineffective in re-establishing a legal regime; RAI and Mediaset each continue to control three terrestrial analogue television broadcasters, despite the fact that the Constitutional Court in its judgment No 420 of 1994 has ruled it impermissible for one and the same entity to broadcast over 20% of the television programmes

transmitted domestically on terrestrial frequencies (i.e. more than two programmes) and has found the regulatory regime under Law no. 223/90 to be contrary to the Italian Constitution, despite being a 'transitional regime'; nor did Law no. 249/97 (establishing the Communications Guarantee Authority and rules on telecommunication and radio and television systems) abide by the prescriptions of the Constitutional Court which, in its judgment 466/02, declared the constitutional illegitimacy of Article 3(7) thereof, 'in so far as it does not provide for the establishing of a hard-and-fast deadline, in any event not exceeding 31 December 2003, by which the programmes transmitted by broadcasters exceeding the limits referred to in paragraph 6 of Article 3 must be broadcast exclusively via satellite or via cable';

Notes that the Italian Constitutional Court declared in November 2002 (Case 466/2002) that the present Italian private television system operating at national level and in analogue mode has grown out of situations of simple de facto occupation of frequencies (operation of installations without concessions and authorisations), and not in relation to any desire for greater pluralism in the distribution of frequencies and proper planning of broadcasting ... This de facto situation does not therefore guarantee respect for external pluralism of information, which is an essential requirement laid down by the relevant constitutional case-law ... In this context, given the continued existence (and aggravation) of the situation which was ruled illegal by Judgment No. 420 in 1994 and of networks considered 'surplus' by the 1997 legislature, a final deadline must be set that is absolutely certain, definitive and hence absolutely binding in order to ensure compatibility with constitutional rules; notes that, nonetheless, the deadline for the reform of the audiovisual sector has not been respected and that the law for the reform of the audiovisual sector has been sent back by the President of the Republic for a new examination by the Parliament due to the non-respect of the principles declared by the Constitutional Court;

...

Hopes that the legislative definition contained in the draft act for reform of the audiovisual sector (Article 2, point G of the Gasparri law) of the 'integrated system of communications' as the only relevant market does not conflict with Community competition rules within the meaning of Article 82 of the EC Treaty or with numerous judgments of the Court of Justice, and does not render impossible a clear and firm definition of the reference market;

Hopes also that the 'system for assigning frequencies' provided for in the draft Gasparri law does not constitute mere legitimisation of the de facto situation and does not conflict, in particular, with Directive 2002/21/EC, Article 7 of 2002/20/EC or Directive 2002/77/EC, which specify, inter alia, that the assigning of radio frequencies for electronic communication services must be based on objective, transparent, non-discriminatory and proportionate criteria;

Highlights its deep concern in relation to the non-application of the law and the non-implementation of the judgments of the Constitutional Court, in violation of the principle of legality and of the rule of law, and at the incapacity to reform the audiovisual sector, as a result of which the right of its citizens to pluralist information has been considerably weakened for decades; a right which is also recognised in the Charter of Fundamental Rights;

Is concerned that the situation in Italy could arise in other Member States and the accession countries if a media magnate chose to enter into politics;

Regrets that the Italian Parliament has yet to adopt a regulation resolving the conflict of interests of the President of the Italian Council of Ministers, which, it was promised, would take place within the first hundred days of his government;

Considers that the adoption of a general reform of the audiovisual sector could be facilitated if it were to contain specific and adequate safeguards to prevent actual or future conflicts of interest in the activities of local, regional or national executive members who have substantial interests in the private audiovisual sector;

Hopes, moreover, that the draft Frattini law on conflict of interests will not stop at de facto recognition of the premier's conflict of interests, but will provide for adequate mechanisms to prevent this situation from continuing;

Regrets that, if the obligations of the Member States to ensure pluralism in the media had been defined after the 1992 Green Paper on pluralism, the current situation in Italy could possibly have been avoided;

...

Invites the Italian Parliament:

- to accelerate its work on the reform of the audiovisual sector in accordance with the recommendations of the Italian constitutional court and the President of the Republic, taking account of the provisions in the Gasparri Bill which are incompatible with Community law, as noted by those authorities;
- to find a genuine and appropriate solution to the problem of a conflict of interest of the President of the Italian Council of Ministers who also directly controls the principal provider of private and, indirectly, public television, the main advertising franchise holder and many other activities connected with the audiovisual and media sector,
- to take measures to ensure the independence of the public service broadcaster.”

THE LAW

I. PRELIMINARY OBSERVATION

77. At the hearing on 12 October 2011 the applicants clarified the temporal scope of the case brought before the Court. In particular, they specified that their complaints related only to the period from 28 July 1999, the date of the ministerial decree in which Centro Europa 7 S.r.l. was granted a licence for nationwide television broadcasting (see paragraph 9 above), to 30 June 2009, the date from which it was authorised to use a single channel and was able to begin broadcasting (see paragraph 16 above). The Court will therefore confine itself to examining whether the applicants' fundamental rights were infringed during the above-mentioned period, and will not consider any similar infringements that might have occurred before 28 July 1999 or after 30 June 2009.

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The applicant company's victim status

78. The Government observed that the applicant company had been allocated the frequencies by virtue of a ministerial decree of 11 December 2008 (see paragraph 16 above) and contended that any disputes on this subject had been settled by the agreement of 9 February 2010 (see paragraph 19 above). Moreover, on 20 January 2009 the Consiglio di Stato had awarded the applicant company

EUR 1,041,418 in compensation (see paragraph 45 above). The Government argued that, having regard to those measures as a whole, Centro Europa 7 S.r.l. could not claim to be the victim of the acts of which it complained (citing, *mutatis mutandis*, *Scordino v. Italy* (no. 1) [GC], no. 36813/97, § 179, ECHR 2006-V).

79. The applicant company submitted that although the frequencies had now been allocated almost ten years after the licence had been granted, it could still claim to be the victim of the alleged violations because the compensation awarded by the Consiglio di Stato was insufficient in relation to the damage sustained and did not reflect its real impact. As regards the agreement of 9 February 2010, it related to the assignment of additional frequencies to those allocated in the decree of December 2008 and therefore did not come within the scope of the present application.

80. The Court reiterates that it falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention (see *Burdov v. Russia*, no. 59498/00, § 30, ECHR 2002-III).

81. The Court further reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of “victim” status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Eckle v. Germany*, 15 July 1982, §§ 69 et seq., Series A no. 51; *Amuur v. France*, 25 June 1996, § 36, Reports of Judgments and Decisions 1996-III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Jensen v. Denmark* (dec.), no. 48470/99, ECHR 2001-X).

82. The issue as to whether a person may still claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an *ex post facto* examination of his or her situation (see *Scordino* (no. 1), cited above, § 181).

83. In the instant case the applicant company was allocated the broadcasting frequencies in December 2008 and was able to broadcast from 30 June 2009 (see paragraph 16 above). The allocation of the frequencies put an end to the situation complained of by the applicant company in its application. However, in the Court’s view this did not constitute either an implicit acknowledgment of a breach of the Convention, or redress for the period during which Centro Europa 7 S.r.l. was prevented from broadcasting.

84. The Court further considers that there was no acknowledgment, either explicitly or in substance, of a violation of Article 10 of the Convention and Article 1 of Protocol No. 1 in the context of the domestic proceedings. It notes in this connection that in 2005 the Consiglio di Stato decided to suspend its examination of the applicant company’s appeal and asked the CJEU to give a preliminary ruling on the interpretation of the provisions of the Treaty on freedom to provide services and competition, Directive 2002/21/EC (“the Framework Directive”), Directive 2002/20/EC (“the Authorisation Directive”), Directive 2002/77/EC (“the Competition Directive”) and Article 10 of the European Convention on Human Rights, in so far as Article 6 of the Treaty on European Union referred to it (see paragraph 32 above). The CJEU held that it was not necessary to rule on the question of Article 10 of the Convention since its answer concerning Article 49 EC and, from the date on which they had become applicable, Article 9(1) of the Framework Directive, Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and Article 4 of the Competition Directive enabled the national court to rule on the application made by the applicant company (see paragraph 34 above).

85. In its decisions of 31 May 2008 and 20 January 2009 the Consiglio di Stato held that the failure to allocate frequencies to the applicant company had been due to essentially legislative factors and that there had been negligent conduct on the authorities’ part. Accordingly, it awarded compensation to the applicant company under Article 2043 of Civil Code (see paragraphs 37-38 and 45-48 above).

86. In the Court’s opinion, the Consiglio di Stato confined itself in those decisions to finding that the authorities incurred non-contractual liability under the general provision of the Civil Code (see paragraph 69 above) to the effect that any intentional or negligent conduct which causes undue

damage renders the perpetrator liable in damages. There is no indication in the decisions in question that, as well as having caused damage, the authorities' conduct contravened the principles established by the Court in relation to freedom of expression or the right to peaceful enjoyment of possessions, or both. It should be noted in this connection that the Consiglio di Stato made no reference to those principles.

87. Lastly, before the Court the Government did not acknowledge that there had been any violation of the Convention. In those circumstances, and in the absence of any such acknowledgment, the Court considers that the applicant company can still claim to be the victim of the violations alleged.

88. Even assuming that the compensation awarded by the Consiglio di Stato was sufficient and appropriate, the Court considers that this cannot remedy the lack of acknowledgment of the alleged violations.

89. The Court therefore dismisses the Government's objection.

B. The second applicant's victim status

90. The Government argued that the second applicant, Mr Francescantonio Di Stefano, could not be regarded as having locus standi before the Court. He had not explained what his role was in Centro Europa 7 S.r.l. or how he qualified as a victim. The Government further observed that he was not the sole shareholder of the company in question and that all the administrative decisions had been given in respect of the company alone.

91. The applicants submitted that in accordance with the Court's case-law (referring to *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, no. 14134/02, § 41, 11 October 2007, and *Groppera Radio AG and Others v. Switzerland*, 28 March 1990, § 49, Series A no. 173), the sole shareholder and statutory representative of a company could also be regarded as a victim of a prohibition on broadcasting.

92. The Court reiterates that the term "victim" used in Article 34 of the Convention denotes the person directly affected by the act or omission which is at issue (see, among other authorities, *Vatan v. Russia*, no. 47978/99, § 48, 7 October 2004). It further reiterates that a person cannot complain of a violation of his or her rights in proceedings to which he or she was not a party, even if he or she was a shareholder and/or director of a company which was party to the proceedings (see, among other authorities, *F. Santos, Lda. and Fachadas v. Portugal* (dec.), no. 49020/99, ECHR 2000-X, and *Nosov v. Russia* (dec.), no. 30877/02, 20 October 2005). Furthermore, while in certain circumstances the sole owner of a company can claim to be a "victim" within the meaning of Article 34 of the Convention where the impugned measures were taken in respect of his or her company (see, among other authorities, *Ankarcrona v. Sweden* (dec.), no. 35178/97, ECHR 2000-VI, and *Glas Nadezhda EOOD and Anatoliy Elenkov*, cited above, § 40), when that is not the case the disregarding of a company's legal personality can be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators (see *Meltex Ltd and Movsesyan v. Armenia*, no. 32283/04, § 66, 17 June 2008; see also *Agrotexim and Others v. Greece*, 24 October 1995, § 66, Series A no. 330-A; *CDI Holding Aktiengesellschaft and Others v. Slovakia* (dec.), no. 37398/97, 18 October 2001; and *Amat-G Ltd and Mebaghishvili v. Georgia*, no. 2507/03, § 33, ECHR 2005-VIII).

93. The Court observes at the outset that no such exceptional circumstances have been established in the instant case (see, by contrast, *G.J. v. Luxembourg*, no. 21156/93, § 24, 26 October 2000). It further notes that the second applicant did not produce any evidence to show that he was in fact the sole shareholder of Centro Europa 7 S.r.l. All the material in the Court's possession indicates that it was the applicant company alone, as a legal entity, which took part in the call for tenders and was granted a television broadcasting licence; furthermore, all the decisions of the Italian courts during the domestic proceedings concerned the applicant company alone (see *Meltex Ltd and Movsesyan*, cited above, § 67). The Court thus infers that the refusal to allocate the frequencies and the ensuing

court proceedings affected only the interests of the applicant company. Accordingly, it cannot regard the second applicant as a “victim”, within the meaning of Article 34 of the Convention, of the acts of which he complained.

94. Having regard to the foregoing, the Court concludes that the application, in so far as it was lodged by the second applicant, is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

95. The Court will therefore confine itself to examining the complaints brought on behalf of the applicant company.

C. Abuse of the right of individual petition

96. The Government submitted that the applicant company had abused its right of individual petition. They argued that the company had not informed the Court of the enforcement proceedings concerning the allocation of frequencies, which had led to the case being struck out as a result of the agreement between *Centro Europa 7 S.r.l.* and the Government (see paragraphs 19-20 above). The applicant company had thus neglected to inform the Court of elements in its possession that were essential for the examination of the case (*Kerechashvili v. Georgia* (dec.), no. 5667/02, ECHR 2006-V).

97. The Court reiterates that an application may be rejected as an abuse of the right of application if it was knowingly based on untrue facts with the intention of misleading the Court (see *Varbanov v. Bulgaria*, no. 31365/96, § 36, ECHR 2000-X). The same applies where new, significant developments occur during the proceedings before the Court and where – despite being expressly required to do so by Rule 47 § 6 of the Rules of Court – the applicant fails to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts (see *Hadrabová and Others v. the Czech Republic* (dec.), nos. 42165/02 and 466/03, 25 September 2007, and *Predescu v. Romania*, no. 21447/03, §§ 25-27, 2 December 2008). However, even in such cases, the applicant’s intention to mislead the Court must always be established with sufficient certainty (see, *mutatis mutandis*, *Melnik v. Ukraine*, no. 72286/01, §§ 58-60, 28 March 2006, and *Nold v. Germany*, no. 27250/02, § 87, 29 June 2006).

98. In the present case the Court notes that the applicant company’s complaints concern its inability to broadcast during the period from 28 July 1999 to 30 June 2009 (see paragraph 77 above) and that in the application form, the company stated that it had obtained the frequencies in 2008 and had been allowed to broadcast from June 2009.

99. In those circumstances, it cannot be concluded that the applicant company neglected to inform the Court from the start of the proceedings of one or more essential elements for the examination of the case. It should also be noted that the agreement with the Ministry and the application for the case to be restored to the Regional Administrative Court’s list are events which occurred on 9 February 2010 and 8 March 2011 respectively (see paragraphs 19-22 above), well after the end of the period to which the application in the present case relates. Accordingly, there is no basis for finding that the applicant company abused its right of individual petition in the present case.

100. The Government’s objection cannot therefore be upheld.

D. Late submission of the application

101. At the hearing on 12 October 2011 the Government objected that the six-month rule laid down in Article 35 § 1 of the Convention had not been complied with on the ground that the final domestic decision was the Consiglio di Stato’s decision no. 2622, deposited with its registry on 31 May 2008. They argued that in that decision the Consiglio di Stato, upholding the Regional Administrative Court’s judgment, had declared inadmissible, with final effect, the request for the allocation of frequencies. The application of 20 July 2009 had therefore been lodged out of time.

102. The Court reiterates that the six-month rule cannot be interpreted as requiring applicants to lodge a complaint with the Court before their position in connection with the matter has been finally

settled at the domestic level (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 157, ECHR 2009). If the applicant complains of a continuing situation, the six-month period begins to run once that situation ends (see, among many other authorities, *Ortolani v. Italy* (dec.), no. 46283/99, 31 May 2001, and *Pianese v. Italy and the Netherlands* (dec.), no. 14929/08, § 59, 27 September 2011).

103. In the instant case, in its decision of 31 May 2008 the Consiglio di Stato refused the applicant company's request for the allocation of frequencies, holding that the courts were not empowered to take the measure requested in place of the administrative authorities. It ruled that the Ministry had to give a decision on the applicant company's request for the frequencies by applying the judgment delivered in the meantime by the CJEU, and deferred its decision on the compensation to be awarded to the company (see paragraphs 37-39 above).

104. It follows that even after the Consiglio di Stato's decision no. 2622 of 31 May 2008, the applicant company was still awaiting an answer from the authorities to its request for the allocation of frequencies. Since that decision was not final, it did not settle all the applicant company's claims. In particular, the issues of whether the company had sustained damage, whether such damage was attributable to the authorities and whether it was entitled to compensation remained open. The Consiglio di Stato determined them only in its judgment of 20 January 2009, in which it ordered the Ministry to pay the applicant company the sum of EUR 1,041,418 in compensation. Only in the latter judgment did the Consiglio di Stato acknowledge that the Ministry's conduct had been negligent in that, firstly, it had granted *Centro Europa 7 S.r.l.* a licence without allocating it any broadcasting frequencies and, secondly, there was a causal link between the authorities' conduct and the alleged damage (see paragraph 45-48 above).

In addition, the Court notes that the situation of which the applicant company complained before it, namely its inability to broadcast television programmes, did not end until 30 June 2009 (see paragraph 16 above), just twenty days before the application was lodged.

105. In those circumstances, the Government's objection that the application was out of time cannot be upheld.

E. Failure to exhaust domestic remedies

106. In the Government's submission, the applicant company had not exhausted domestic remedies since it had not raised, "at least in substance", its complaint under Article 10 of the Convention in its application of 18 February 2009 to the Regional Administrative Court challenging the decree of 11 December 2008 by which the frequencies had been allocated (see paragraph 18 above).

107. The applicant company disputed the Government's argument and asserted that the case it had brought in the Regional Administrative Court concerned a period outside the scope of its application to the Court.

108. The general principles on exhaustion of domestic remedies are set out in *Sejdovic v. Italy* ([GC], no. 56581/00, §§ 43-46, ECHR 2006-II). The Court notes that the proceedings to which the Government referred, which are still pending in the domestic courts (see paragraph 23 above), concern the decree of 11 December 2008 by which the frequencies were allocated. The decree in question put an end to the situation complained of by the applicant company before the Court, since it formed the legal basis on which it was able to broadcast from 30 June 2009 (see paragraph 16 above). It follows that, in the context of the present application, the applicant company cannot be obliged to await the outcome of those proceedings before the merits of its complaints are considered by the Court.

109. Accordingly, the Government's preliminary objection of failure to exhaust domestic remedies must be dismissed.

III. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

110. The applicant company alleged a violation of its right to freedom of expression, and especially its freedom to impart information and ideas. It complained in particular that for a period of almost

ten years the Government had not allocated it any frequencies for analogue terrestrial television broadcasting. It submitted that the failure to apply Law no. 249/1997 (see paragraph 56 above), the failure to enforce the Constitutional Court's judgments nos. 420/1994 and 466/2002 (see paragraphs 54 and 62 above) and the duopoly existing in the Italian television market were in breach of Article 10 of the Convention, which provides:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

111. The Government contested that argument.

A. Admissibility

112. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties and the third-party intervener

(a) The applicant company

113. The applicant company submitted that it had been unable to broadcast television programmes despite having been granted a licence to do so following a public tendering procedure. This infringement of its rights resulted from various legislative, administrative and judicial measures by the Italian State, acting through different bodies and instruments. The interferences with its right to freedom of expression had been neither justified nor necessary in a democratic society.

114. In the applicant company's submission, the enactment of a series of transitional laws had endorsed a provisional practice that favoured existing operators, preventing it from effectively asserting its rights. It referred to the Court's finding in *Meltex Ltd and Movsesyan* (cited above) and noted that, unlike in that case, the violation in its own case did not stem simply from the denial of a right in a one-off decision but from the refusal, for more than ten years, to give effect to a licence awarded as a result of a public tendering procedure.

115. The applicant company submitted that the refusal to allocate it any broadcasting frequencies amounted to interference with the exercise of its rights under Article 10 § 1 of the Convention (*Meltex Ltd and Movsesyan*, cited above, and *Glas Nadezhda EOOD and Anatoliy Elenkov*, cited above). The interference had not been prescribed by law, as required by the Convention, on account of the unforeseeability of the transitional legislation passed by the national parliament. The applicant company further pointed out that the Italian courts had applied the legislation in question and had found that compensation should be calculated with effect from 1 December 2004, contrary to what the CJEU had held in its judgment.

(b) The Government

116. The Government observed that in 1999 the applicant company had been awarded a licence which had not ipso facto conferred the right to be allocated frequencies. In accordance with Legislative Decree no. 5 of 23 January 2001, as amended by Law no. 66 of 20 March 2001 (see paragraphs 63-64 above), the applicant company could have purchased the necessary frequencies to transmit programmes. However, it had not availed itself of that option and had not taken part in the fresh call for tenders issued in 2007.

117. In the Government's submission, the applicant company had not been allocated frequencies because of the general reorganisation of national and local analogue frequencies in a context of limited availability, and because several companies that had submitted unsuccessful bids in 1999 had appealed to the national courts and been allowed to continue broadcasting without a licence on the basis of the former rules.

118. The Government stated that the purpose of the 1999 call for tenders had been to select the operators to be included in the AGCOM plan. Accordingly, the aim had not been to allocate frequencies directly since the installation adjustment programme had yet to be drawn up. In that connection, they pointed out that the Ministry had not awarded any other licences under the same conditions in 1999.

119. The Government explained that, following the failure of cable television in Italy, Law no. 66/2001 had envisaged that the transition to digital terrestrial television would take place by 2006 at the latest. Subsequently, Legislative Decree no. 352/2003 and Law no. 112/2004 (see paragraphs 65-67 above) had specified that the transitional provisions would cease to apply once digital coverage had exceeded 50% of all users, a level attained on 27 May 2004.

120. The Government further noted that the CJEU had held that it was not necessary to examine whether there had been a violation of Article 10 of the Convention. Furthermore, in judgments nos. 242 and 243/2009 the Consiglio di Stato had held that national television was not a transfrontier service and that the applicant company, as a licence holder, was entitled to take part in competitive, non-discriminatory procedures for the allocation of frequencies from 1 January 2008. This result had been achieved with the ministerial decree of 11 December 2008 (see paragraph 16 above), in which the applicant company had been allocated channel 8 on the VHF III frequency band, which had become available as a result of the transition to digital broadcasting.

121. The Government pointed out that Italy had gradually had to bring national and local channels into line and that it had been essential to reconcile the vested rights of existing operators with the interests of new operators and, above all, to avoid any risk of sliding towards a monopoly or, conversely, into chaos. The transition had, in particular, allowed the existing operators to continue broadcasting and the new licence holders to develop a network by purchasing frequencies.

122. The Government pointed out that, according to the Court's case-law, regulation of the activities of television companies was compatible with Article 10 of the Convention, which did not prevent States from examining the technical aspects, the rights and needs of a specific audience, the nature and objectives of channels, their potential audience at national and local level, and the obligations deriving from international undertakings (*Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276).

123. The Government explained that the licence granted to the applicant company meant that it was in a legally protected position and could purchase frequencies, use other operators' digital transmission capacity and benefit from "the co-location of the two operators RAI and [Mediaset]".

124. The Government observed that the applicant company currently offered its customers a series of channels broadcasting varied content, including horror films and adult films. In practical terms, it operated a limited system, since its programmes could be viewed only by using a decoder which it supplied to its customers. This served to illustrate the manner and scope of the benefit drawn by the applicant company from its freedom to impart information and ideas in a democratic society.

125. Lastly, the Government submitted that the circumstances of the case were in no way comparable to those of *Meltex Ltd and Movsesyan* (cited above).

(c) The third-party intervener

126. Open Society Justice Initiative began by giving an overview of the “Guiding Principles on Broadcast Media Pluralism”. It then referred to the laws and practices of three European countries of a similar size to Italy (France, Germany and the United Kingdom), before discussing European standards, which recognised that the duty to ensure pluralism necessitated limits on media ownership, especially in broadcasting.

127. It also examined political control of broadcasters and noted that many European countries had adopted legal systems that specifically banned and/or restricted the ability of leading politicians and political parties to control broadcasting entities and their programming.

128. In the third party’s submission, the circumstances of the present case were to be seen in the context of a greater and older malaise in the Italian broadcasting and information sector. Open Society Justice Initiative submitted that, should the Court find an Article 10 violation in this case, it should consider ordering the Italian State to implement measures of a general and systemic nature with a view to guaranteeing the pluralism of its broadcasting system.

2. The Court’s assessment

(a) General principles concerning pluralism in the audiovisual media

129. The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself (see *Manole and Others v. Moldova*, no. 13936/02, § 95, ECHR 2009 (extracts), and *Socialist Party and Others v. Turkey*, 25 May 1998, §§ 41, 45 and 47, Reports 1998-III).

130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.

131. Freedom of expression, as secured in Article 10 § 1, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress (see *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103). Freedom of the press and other news media affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and *Lingens*, cited above, §§ 41-42).

132. The audiovisual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages through sound and images, such media have a more immediate and powerful effect than print (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Pedersen and Baadsgaard v. Denmark [GC]*, no. 49017/99, § 79, ECHR 2004-XI). The function of television and radio as familiar sources of entertainment in the intimacy of the listener’s or viewer’s home further reinforces their impact (see *Murphy v. Ireland*, no. 44179/98, § 74, ECHR 2003-IX).

133. A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to

receive (see *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, §§ 73 and 75, ECHR 2001-VI; see also *De Geillustreerde v. the Netherlands*, no. 5178/71, Commission decision of 6 July 1976, § 86, Decisions and Reports 8, p. 13). This is true also where the position of dominance is held by a State or public broadcaster. Thus, the Court has held that, because of its restrictive nature, a licensing regime which allows the public broadcaster a monopoly over the available frequencies cannot be justified unless it can be demonstrated that there is a pressing need for it (see *Informationsverein Lentia and Others*, cited above, § 39).

134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.

With this in mind, it should be noted that in Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content (see paragraph 72 above) the Committee of Ministers reaffirmed that “in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed”.

135. The question arising in the instant case is whether there has been interference by the public authorities with the applicant company’s right to “impart information and ideas” and, if so, whether the interference was “prescribed by law”, pursued one or more legitimate aims and was “necessary in a democratic society” for achieving them (see *RTBF v. Belgium*, no. 50084/06, § 117, ECHR 2011 (extracts)).

(b) Whether there was interference

136. The Court has held that the refusal to grant a broadcasting licence constitutes interference with the exercise of the rights guaranteed by Article 10 § 1 of the Convention (see, among other authorities, *Informationsverein Lentia and Others*, cited above, § 27; *Radio ABC v. Austria*, 20 October 1997, § 27, Reports 1997-VI; *Leveque v. France* (dec.), no. 35591/97, 23 November 1999; *United Christian Broadcasters Ltd v. the United Kingdom* (dec.), no. 44802/98, 7 November 2000; *Demuth v. Switzerland*, no. 38743/97, § 30, ECHR 2002-IX; and *Glas Nadezhda EOOD and Anatoliy Elenkov*, cited above, § 42). It is of little consequence whether the licence is refused following an individual application or participation in a call for tenders (see *Meltex Ltd and Movsesyan*, cited above, § 74).

137. The Court observes that the present case differs from those cited in the preceding paragraph in that it does not concern a refusal to grant a licence. On the contrary, following a call for tenders, the applicant company was granted a licence on 28 July 1999 for analogue terrestrial television broadcasting (see paragraph 9 above). However, since it was not allocated any broadcasting frequencies, it was unable to transmit programmes until 30 June 2009.

138. The Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). The failure to allocate frequencies to the applicant company deprived the licence of all practical purpose since the activity it authorised was de facto impossible to carry out for nearly ten years. This accordingly constituted a substantial obstacle to, and hence an interference with, the applicant company’s exercise of its right to impart information and ideas.

(c) Whether the interference was “prescribed by law”

(i) General principles

139. The third sentence of Article 10 § 1 entitles States to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. The granting of a licence may also be made conditional on other considerations, such as the nature and objectives of a proposed channel, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments (see *United Christian Broadcasters Ltd*, cited above, and *Demuth*, cited above, §§ 33-35). Such regulation must have a basis in “law”.

140. The expression “prescribed by law” in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *VgT Verein gegen Tierfabriken*, cited above, § 52; *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Gawęda v. Poland*, no. 26229/95, § 39, ECHR 2002-II; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A, and *Kopp v. Switzerland*, 25 March 1998, § 59, Reports 1998-II).

141. One of the requirements flowing from the expression “prescribed by law” is foreseeability. Thus, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable citizens to regulate their conduct; they must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Such consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 49, Series A no. 30; *Kokkinakis v. Greece*, 25 May 1993, § 40, Series A no. 260-A; and *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

142. The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *RTBF v. Belgium*, cited above, § 104; *Rekvényi*, cited above, § 34; and *Vogt v. Germany*, 26 September 1995, § 48, Series A no. 323).

143. In particular, a rule is “foreseeable” when it affords a measure of protection against arbitrary interferences by the public authorities (see *Tourancheau and July v. France*, no. 53886/00, § 54, 24 November 2005) and against the extensive application of a restriction to any party’s detriment (see, *mutatis mutandis*, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 36, ECHR 1999-IV).

(ii) Application of the above principles in the instant case

144. In the instant case, therefore, the Court must determine whether Italian legislation laid down with sufficient precision the conditions and procedure whereby the applicant company could have been allocated broadcasting frequencies in accordance with the licence it had been granted. This is especially important in a case such as the present one, in which the relevant legislation concerned the conditions of access to the audiovisual market.

145. The Court notes that on 28 July 1999 the appropriate authorities granted the applicant company a licence for nationwide terrestrial television broadcasting in accordance with Law no. 249/1997, authorising it to install and operate an analogue television network. As regards the allocation of frequencies, the licence referred to the national frequency allocation plan, adopted on 30 October 1998, and gave the applicant company twenty-four months to bring its installations into line with the relevant requirements (see paragraph 9 above). However, as is clear from the decisions of the domestic courts (see paragraph 14 above), that obligation could not be satisfied by the

applicant company until such time as the authorities had adopted the adjustment programme and implemented the frequency allocation plan. The Court considers that in such circumstances the applicant company could reasonably have expected the authorities to adopt, within the twenty-four months following 28 July 1999 at the latest, the instruments needed to regulate its terrestrial broadcasting activities. Provided that it upgraded its installations as it was required to do, the applicant company should then have been entitled to transmit television programmes.

146. However, the frequency allocation plan was not implemented until December 2008 and the applicant company was allocated a channel to broadcast its programmes with effect from 30 June 2009 only (see paragraph 16 above). In the meantime, several channels had continued on a provisional basis to use various frequencies that were supposed to have been allocated under the plan. The Consiglio di Stato held (see paragraph 28 above) that this state of affairs was due to essentially legislative factors. The Court will briefly examine those factors.

147. It notes firstly that section 3(1) of Law no. 249/1997 provided that the “over-quota” channels (see paragraph 60 above) could continue to broadcast at both national and local level until new licences were awarded or applications for new licences were rejected but, in any event, not after 30 April 1998 (see paragraph 57 above). However, section 3(6) of the same Law established a transitional scheme whereby the over-quota channels could continue broadcasting on terrestrial frequencies on a temporary basis after 30 April 1998, provided that they complied with the obligations imposed on channels holding licences and that their programmes were broadcast simultaneously on satellite or cable (see paragraph 60 above).

148. The applicant company could have inferred from the above-mentioned legislative framework applicable at the time the licence was granted that from 30 April 1998 the possibility for the over-quota channels to continue broadcasting would not affect the rights of new licence holders. However, this framework was amended by Law no. 66 of 20 March 2001, which regulated the transition from analogue to digital television and, once again, authorised over-quota channels to continue broadcasting on terrestrial frequencies pending the implementation of the national frequency allocation plan for digital television (see paragraph 63 above).

149. On 20 November 2002, by which time the plan had still not been implemented, the Constitutional Court held that the transition from terrestrial frequencies to cable or satellite broadcasting for over-quota channels should be completed by 31 December 2003 at the latest, irrespective of the stage reached in the development of digital television (see paragraph 62 above). In the light of that judgment, the applicant company could have expected that the frequencies which should have been allocated to it would be freed up by the start of 2004. However, a further extension was ordered as a result of national legislation.

150. Section 1 of Legislative Decree no. 352/2003 allowed the over-quota channels to continue operating pending the completion of an AGCOM investigation into the development of digital television channels. Subsequently, Law no. 112/2004 (section 23(5)), by a general authorisation mechanism, extended the possibility for over-quota channels to continue broadcasting on terrestrial frequencies until the national frequency allocation plan for digital television was implemented (see paragraphs 65-67 above), with the result that those channels were no longer required to free up the frequencies that should have been transferred to operators holding licences, such as the applicant company.

151. The Court observes that the successive application of these laws had the effect of blocking the frequencies and preventing operators other than the over-quota channels from participating in the early stages of digital television. In particular, the laws in question postponed the expiry of the transitional scheme until the completion of an AGCOM investigation into the development of digital television channels and until the implementation of the national frequency allocation plan, that is to say, with reference to events occurring on dates which were impossible to foresee. In this connection, the Court agrees with the CJEU’s finding to the effect that:

“... Law no. 112/2004 does not merely allocate to the incumbent operators a priority right to obtain radio frequencies, but reserves them that right exclusively, without restricting in time the privileged

position assigned to those operators and without providing for any obligation to relinquish the radio frequencies in breach of the threshold after the transfer to digital television broadcasting.”

152. The Court therefore considers that the laws in question were couched in vague terms which did not define with sufficient precision and clarity the scope and duration of the transitional scheme.

153. In addition, the CJEU, to which the matter had been referred by the Consiglio di Stato, noted that these measures by the national legislature had entailed the successive application of transitional arrangements structured in favour of the incumbent networks, and that this had had the effect of preventing operators without broadcasting frequencies, such as Centro Europa 7 S.r.l., from accessing the television broadcasting market even though they had a licence (granted, in the applicant company’s case, in 1999 – see paragraph 35 above).

154. Having regard to the foregoing, the Court considers that the domestic legislative framework lacked clarity and precision and did not enable the applicant company to foresee, with sufficient certainty, the point at which it might be allocated the frequencies and be able to start performing the activity for which it had been granted a licence, this notwithstanding the successive findings of the Constitutional Court and the CJEU. It follows that the laws in question did not satisfy the foreseeability requirements established by the Court in its case-law.

155. The Court further notes that the authorities did not observe the deadlines set in the licence, as resulting from Law no. 249/1997 and the judgments of the Constitutional Court, thereby frustrating the applicant company’s expectations. The Government have not shown that the company had effective means at its disposal to compel the authorities to abide by the law and the Constitutional Court’s judgments. Accordingly, it was not afforded sufficient guarantees against arbitrariness.

(d) Conclusion

156. In conclusion, the Court considers that the legislative framework, as applied to the applicant company, which was unable to operate in the television broadcasting sector for more than ten years despite having been granted a licence in a public tendering procedure, did not satisfy the foreseeability requirement under the Convention and deprived the company of the measure of protection against arbitrariness required by the rule of law in a democratic society. This shortcoming resulted, among other things, in reduced competition in the audiovisual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism (see paragraph 134 above).

157. These findings are sufficient to conclude that there has been a violation of Article 10 of the Convention in the instant case.

158. The above conclusion dispenses the Court from examining whether the other requirements of paragraph 2 of Article 10 of the Convention were complied with in the instant case, namely whether the laws prolonging the transitional scheme pursued a legitimate aim and were necessary in a democratic society for achieving that aim.

IV. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 10 OF THE CONVENTION

159. The applicant company asserted that it had been discriminated against in relation to the Mediaset group in the enjoyment of its right to freedom of expression.

It relied on Article 14 of the Convention, which provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

160. In the applicant company's submission, the Italian system had afforded preferential treatment to the Mediaset group, which had benefited from discriminatory legislative and administrative measures adopted in circumstances involving a conflict of interests. It also alleged that it had suffered discrimination in relation to other operators and had been prevented as a result from entering the market.

161. The Government submitted that a political approach to the case should be avoided. They reiterated the reasons set out in their observations under Article 10 as to why the applicant company had been unable to obtain the frequencies, denied that there was any link between the situations of Centro Europa 7 S.r.l. and Mediaset, and submitted that there had been no preferential treatment of any particular channel over the applicant company in the present case.

162. The Court observes that this complaint is closely linked to the complaint under Article 10 of the Convention and must likewise be declared admissible. Having regard to its conclusions under Article 10 (see paragraph 156 above), the Court does not consider it necessary to examine separately the complaint under Article 14 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

163. The applicant company complained of an infringement of its right to the peaceful enjoyment of its possessions as enshrined in Article 1 of Protocol No. 1, which provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

164. The applicant company submitted that, for nearly ten years, it had been unable to exercise its rights under the licence it had been granted for nationwide television broadcasting, and that the compensation awarded to it by the domestic courts did not reflect the full value of its “possession”.

165. The Government contested that argument.

A. Admissibility

166. The Court must first determine whether the applicant company had a “possession” within the meaning of Article 1 of Protocol No. 1 and whether that Article is consequently applicable in the instant case.

1. The parties' submissions

(a) The Government

167. As their main submission, the Government disputed that there had been a “possession” and pointed out that the licence awarded in 1999 to the applicant company had not ipso facto conferred an entitlement to have frequencies allocated by the Ministry; accordingly, it had not had a legitimate expectation of obtaining any frequencies. In addition, the domestic courts had declared inadmissible the applicant company's request for the allocation of the frequencies.

168. The Government further noted that the Convention did not protect non-existent rights lacking any legal basis. According to the Court's case-law, neither a “genuine dispute” nor an “arguable claim” satisfied the requirements of a “possession” within the meaning of the Convention. No “legitimate expectation” protected by the Convention arose where there had been a dispute as to the correct interpretation and application of domestic law and where the applicants' submissions had been rejected by the national courts (*Kopecný v. Slovakia* [GC], no. 44912/98, § 50, ECHR 2004-IX).

169. In addition, the applicant company could have purchased the frequencies on the market under section 1 of Law no. 66 of 20 March 2001 (see paragraph 63 above). In the Government's submission, the subject of the application was not the allocation of the frequencies but the allegedly insufficient amount of compensation awarded at national level. Lastly, the Government noted that the licence had never been withdrawn or revoked.

(b) The applicant company

170. The applicant company contested the Government's arguments and submitted that the right of access to and use of broadcasting frequencies, allowing the exercise of freedom of expression and the pursuit of an economic activity, constituted an asset and thus fell within the scope of a "possession" within the meaning of Article 1 of Protocol No. 1.

2. The Court's assessment

(a) General principles

171. The Court reiterates that the concept of "possessions" in the first paragraph of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II; *Beyeler v. Italy* [GC], no. 33202/96, § 100, ECHR 2000-I; and *Broniowski v. Poland* [GC], no. 31443/96, § 129, ECHR 2004-V).

172. Article 1 of Protocol No. 1 applies only to a person's existing possessions. Thus, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable. Further, the hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition (see *Gratzinger and Gratzingerova v. the Czech Republic (dec.)* [GC], no. 39794/98, § 69, ECHR 2002-VII).

173. However, in certain circumstances, a "legitimate expectation" of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence. However, no "legitimate expectation" can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (see *Kopecký*, cited above, § 50).

(b) Application of the above principles in the instant case

174. The Court observes at the outset that from 28 July 1999 the applicant company held a licence for nationwide terrestrial television broadcasting. The licence authorised it to install and operate an analogue television network (see paragraph 9 above). The Italian administrative courts found that this did not confer on the applicant company a personal right (*diritto soggettivo*) to be allocated broadcasting frequencies but only a legitimate interest (*interesse legittimo*), that is, an individual position indirectly protected as far as was consistent with the public interest. Accordingly, the applicant company's sole entitlement was to have its request for frequencies dealt with by the Government in a manner consistent with the criteria laid down by domestic law and the CJEU (see the Regional Administrative Court's judgment of 16 September 2004, paragraph 25 above, and the Consiglio di Stato's decision no. 2622/08 of 31 May 2008, paragraph 37 above).

175. As the Court has noted in relation to Article 10 of the Convention, in view of the terms of the licence and the legislative framework in place at the time, the applicant company could reasonably have expected the authorities, within the twenty-four months following 28 July 1999, to take the necessary legal measures to regulate its terrestrial broadcasting activities. Provided that it upgraded its installations as it was required to do, the applicant company should then have been entitled to transmit television programmes (see paragraph 145 above). It therefore had a “legitimate expectation” in that regard. It is true that, as the Government noted, the administrative courts refused the applicant company’s requests to be allocated frequencies. However, that decision did not entail a rejection of the applicant company’s request on the merits but resulted from the general rule in Italian law to the effect that the administrative courts cannot take certain measures in place of the administrative authorities (see paragraph 37 above).

176. Furthermore, in its judgment of 31 January 2008 the CJEU held as follows:

“... On that point, it must be stated that, in the area of television broadcasting, freedom to provide services, as enshrined in Article 49 EC and implemented in this area by the NCRF, requires not only the grant of broadcasting authorisations, but also the grant of broadcasting radio frequencies. An operator cannot exercise effectively the rights which it derives from Community law in terms of access to the television broadcasting market without broadcasting radio frequencies.”

177. The Court agrees with this analysis. It further notes that, as it has previously held, the withdrawal of a licence to carry on business activities amounts to interference with the right to peaceful enjoyment of possessions as enshrined in Article 1 of Protocol No. 1 to the Convention (see *Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159; *Capital Bank AD v. Bulgaria*, no. 49429/99, § 130, ECHR 2005-XII; *Rosenzweig and Bonded Warehouses Ltd v. Poland*, no. 51728/99, § 49, 28 July 2005; and *Bimer S.A. v. Moldova*, no. 15084/03, § 49, 10 July 2007). Although the licence was not in fact withdrawn in the instant case, the Court considers that, without the allocation of broadcasting frequencies, it was deprived of its substance.

178. The Court thus considers that the interests associated with exploiting the licence constituted property interests attracting the protection of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Tre Traktörer AB*, cited above, § 53).

179. It therefore finds that the applicant company’s legitimate expectation, which was linked to property interests such as the operation of an analogue television network by virtue of the licence, had a sufficient basis to constitute a substantive interest and hence a “possession” within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1, which is therefore applicable in the present case (see, *mutatis mutandis*, *Stretch v. the United Kingdom*, no. 44277/98, §§ 32-35, 24 June 2003, and *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey* (no. 2), nos. 7646/03, 37665/03, 37992/03, 37993/03, 37996/03, 37998/03, 37999/03 and 38000/03, § 50, 6 October 2009).

180. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties’ submissions

(a) The applicant company

181. The applicant company submitted that the Government’s conduct amounted to an expropriation of possessions for the purposes of Article 1 of Protocol No. 1, in so far as the Government had not only unjustifiably failed to allocate the frequencies but had also refused to give effect to the licence awarded following a lawful public tendering procedure.

182. The applicant company contended that the expropriation had no connection with the public interest but had served Mediaset's private interests by using frequencies that should have been relinquished in its favour as the legitimate licence holder. Moreover, the expropriation had not been "subject to the conditions provided for by law". Pursuant to Law no. 249/1997, the relevant frequencies should have been relinquished in favour of the successful bidder in the tendering procedure, namely Centro Europa 7 S.r.l. However, a number of transitional legislative measures had prevented the company from having access to the frequencies.

183. The applicant company further submitted that the compensation awarded at national level did not reflect the value of the expropriated property. To determine the loss of earnings resulting from lost opportunities, the Court should consider not only the delay in allocating the frequencies, but also the fact that it had been impossible to compete with other companies in 1999, at a time when the market had been more limited than today. The applicant company further noted that the Consiglio di Stato, referring to the Constitutional Court's finding that 31 December 2003 constituted a reasonable date for the expiry of the transition period, had taken into account only the damage sustained after 2004, thereby disregarding five years of the violation. Lastly, the applicant company noted that, according to the Consiglio di Stato's finding, the award of the licence had not conferred the immediate right to engage in the corresponding economic activity, and that the compensation should therefore have been calculated on the basis of the legitimate expectation of being allocated frequencies by the appropriate authorities.

(b) The Government

184. The Government contested the applicant company's arguments and objected to the "financial" nature of the application.

2. The Court's assessment

185. Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: "the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest ... The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule" (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98, and *Beyeler*, cited above, § 98).

186. The applicant company submitted that it had been "deprived of its possessions" in the present case. However, the Court cannot accept that argument. There has been no expropriation of the applicant company's substantive interest in operating an analogue television network, as is shown by the fact that it is now able to broadcast television programmes. Nevertheless, the possibility of engaging in the activity corresponding to the licence was affected by several measures which, in essence, were aimed at delaying the start-up date; this, in the Court's view, represents a means of controlling the use of property, to be examined from the standpoint of the second paragraph of Article 1 of Protocol No. 1.

187. The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see *Iatridis*, cited above, § 58, and *Beyeler*, cited above, § 108). In particular, the second paragraph recognises that States have the right to control the use of property, provided that they exercise this right by enforcing "laws". The principle of lawfulness also presupposes that the relevant provisions of domestic law are sufficiently accessible, precise and foreseeable in their application (see, *mutatis mutandis*, *Broniowski*, cited above, § 147).

188. However, the Court has already held under Article 10 of the Convention that the interference with the applicant company's rights did not have a sufficiently foreseeable legal basis within the meaning of its case-law (see paragraph 156 above). It can only reach the same finding in relation to Article 1 of Protocol No. 1, and this is sufficient to conclude that there has been a violation of that Article.

189. The above conclusion dispenses the Court from reviewing whether the other requirements of Article 1 of Protocol No. 1 were satisfied in the present case, in particular whether the control of the use of the applicant company's "property" was "in accordance with the general interest".

VI. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

190. The applicant company alleged a violation of its right to a fair hearing. It relied on Article 6 § 1 of the Convention, the relevant parts of which provide:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

A. The parties' submissions

1. The Government

191. The Government asserted that this complaint was manifestly ill-founded, since it was not the Court's task to deal with errors of fact or law allegedly committed by a domestic court and it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation.

192. In particular, Laws nos. 43/2004 and 112/2004 had not been taken into account by the Regional Administrative Court, and the Consiglio di Stato had referred to those laws in finding that the applicant company was entitled to compensation. The Consiglio di Stato's judgment awarding it financial compensation proved, moreover, that the State was independent and that the judgment of the CJEU had been taken into account. The Government further noted that in judicial proceedings it was possible for parties with common interests to submit observations to the court drafted in partly similar terms, and the drafting of technical submissions by a lawyer did not mean that they were approved by the Government.

193. Lastly, the Government observed that the Consiglio di Stato had refused the applicant company's request for an expert valuation, holding that the burden of proof rested with the company and that a court-ordered expert assessment could not compensate for a failure to adduce evidence.

2. The applicant company

194. The applicant company asserted that the various legislative amendments in the course of the proceedings had infringed its right to a fair hearing; it added that the law had not been correctly applied and that the Constitutional Court's judgments had not been enforced. Furthermore, in the proceedings before the Consiglio di Stato the Government had favoured the Mediaset group, thus demonstrating the State's lack of independence. In the applicant company's submission, this was illustrated by the fact that the Government's memorial had been based on the one produced by the Mediaset group.

195. The applicant company submitted that the Italian State had failed to set up a clear and comprehensive regulatory framework, thereby infringing the principles of lawfulness, transparency, non-discrimination, free competition, impartiality and the rule of law. Lastly, the Consiglio di Stato had failed to compensate it for the damage it had actually sustained and to order an expert assessment of the amount it was due.

B. The Court's assessment

196. The Court considers that part of the applicant company's grievances (in particular, those concerning the lack of a clear regulatory framework, the legislative amendments and the failure to enforce the Constitutional Court's judgments) cover largely the same ground as the complaint under Article 10 of the Convention. It is therefore unnecessary to examine them separately under Article 6.

197. With regard to the specific complaints concerning the proceedings in the Consiglio di Stato, the Court reiterates that its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it agrees with the Government that it is not its function to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I). In particular, the Court cannot itself assess the facts which have led a national court to adopt one decision rather than another; otherwise, it would be acting as a court of fourth instance and would disregard the limits imposed on its action (see, *mutatis mutandis*, *Kemmache v. France* (no. 3), 24 November 1994, § 44, Series A no. 296-C). The Court's sole task in connection with Article 6 of the Convention is to examine applications alleging that the domestic courts have failed to observe specific procedural safeguards laid down in that Article or that the conduct of the proceedings as a whole did not guarantee the applicant a fair hearing (see, among many other authorities, *Donadze v. Georgia*, no. 74644/01, §§ 30-31, 7 March 2006).

198. In the instant case, the Court can see no evidence to suggest the proceedings in the Consiglio di Stato were not conducted in accordance with the requirements of a fair hearing. It further reiterates that the requirements of independence and impartiality in Article 6 of the Convention concern the court determining the merits of the case and not the parties to the proceedings (see *Forcellini v. San Marino* (dec.), no. 34657/97, 28 May 2002, and *Previti v. Italy* (dec.), no. 45291/06, § 255, 8 December 2009), and that it is for the national courts to assess the relevance of proposed evidence (see, *mutatis mutandis* and in relation to criminal proceedings, *Previti*, cited above, § 221, and *Bracci v. Italy*, no. 36822/02, § 65, 13 October 2005).

199. It follows that this complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

200. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. The parties' submissions

1. Pecuniary damage

(a) The applicant company

201. The applicant company submitted that the damages awarded to it were insufficient. It noted that the Consiglio di Stato had found that compensation was payable in respect of a very limited part of the immense damage suffered, had disregarded expert evidence adduced by it and had failed to appoint independent experts. Thus, the Consiglio di Stato had dismissed almost the entire claim for compensation, declaring that neither legal costs nor start-up expenses could be reimbursed.

202. As regards start-up expenses, the applicant company observed that after being awarded the broadcasting licence, it had quickly set up an efficient and effective structure in order to become a serious player in the commercial broadcasting market. In particular, it had leased more than 20,000 square metres of television studios, equipped with cutting-edge technology, which had been

purchased in advance so that it could start broadcasting promptly. It had also borne the costs of setting up an audiovisual library by producing its own programmes, as required by the licensing regulations.

203. As regards loss of earnings, the inadequacy of the damages awarded by the Consiglio di Stato was clear from a comparison of that amount with the profits achieved by Retequattro, the over-quota channel which should have relinquished the broadcasting frequencies allocated to the applicant company. In assessing loss of earnings, the Court should also take into account the fact that Centro Europa 7 S.r.l. had only recently entered the commercial broadcasting market, at a time when analogue broadcasting was about to be entirely superseded by digital terrestrial television and other broadcasting techniques. Changes in the market since 1999 should therefore be taken into consideration. The applicant company argued that it had been illegally kept out of the commercial broadcasting market for a considerable time, which had also harmed its prospects of promoting its brand and reputation and acquiring expertise, audiovisual content and other advantages associated with analogue broadcasting.

204. In the light of the foregoing, and on the basis of documentary evidence, the applicant company claimed EUR 2,174,130,492.55 (EUR 129,957,485.60 for losses sustained and EUR 2,045,214,475.00 for loss of earnings) – the sum it had sought in the national proceedings – less the amount awarded by the Consiglio di Stato, or a different amount, to be determined on an equitable basis. Statutory interest should be payable on the compensation.

(b) The Government

205. The Government objected to the applicant company's claims, which they considered excessive. They pointed out that the Consiglio di Stato had awarded it compensation. Moreover, the claims were a matter of speculation and had no causal link with the alleged violations of the Convention (Informationsverein Lentia and Others, cited above, § 46; Radio ABC, cited above, § 41; and Meltex Ltd and Movsesyan, cited above, § 102).

206. The Government further submitted that the applicant company had not set up any installations for digital television broadcasting in the period from December 2008 to January 2009. The relevant equipment had not been purchased until after 2009.

2. Non-pecuniary damage

(a) The applicant company

207. The applicant company claimed EUR 10,000,000 in respect of non-pecuniary damage.

208. It submitted that the Court should consider the following factors in particular: (a) the considerable time that had elapsed; (b) the fact that the applicant company could reasonably have expected the Italian Government to give effect to the television broadcasting licence within the relevant time-limits; (c) the frustration and anxiety arising from being a powerless witness to the development of the television broadcasting market without being able to be a stakeholder in it, and the loss of a number of profitable opportunities; (d) the substantial financial implications; (e) the harm to the company's reputation on account of the position of the persons involved; (f) the company's serious concerns at being unable to catch up with its competitors, which had consolidated their position in the analogue broadcasting and related markets; (g) the conditions of uncertainty in which the applicant company had had to take strategic decisions; (h) the obstacles and hurdles that its manager had had to overcome; and (i) the frustration arising from the Government's repeated and blatant disregard of the judgments of the Constitutional Court and the CJEU and of the demands of the European institutions.

(b) The Government

209. The Government objected to the applicant company's claims, which they considered excessive.

3. Costs and expenses

(a) The applicant company

210. Submitting documentary evidence, the applicant company sought the reimbursement of the legal costs incurred at both national and European level in seeking to give effect to the licence and to be able to engage properly in economic activities in the television broadcasting market.

211. It pointed out that it had had to contend not only with the dominant commercial broadcaster in Italy, but also with the Italian Government itself for over ten years, since during that period, the owner of Mediaset – the broadcasting group to which the over-quota channel Retequattro belonged – had also served several terms as Prime Minister.

212. Accordingly, the applicant company claimed EUR 1,023,706.35 for the costs incurred at national level and EUR 200,000 for those incurred before the Court.

(b) The Government

213. The Government objected to the applicant company's claims.

B. The Court's assessment

1. Pecuniary and non-pecuniary damage

214. The Court observes that it has found two violations in the present case. Firstly, the interference with the applicant company's exercise of its right to impart information and ideas within the meaning of Article 10 of the Convention resulted from legislative measures which did not satisfy either the foreseeability requirement or the State's obligation to guarantee effective pluralism (see paragraph 156 above). Secondly, the applicant company could legitimately have expected the authorities, within the twenty-four months following 28 July 1999, to take the necessary legal measures to regulate its television broadcasting activities, thereby enabling it to transmit programmes (see paragraph 175 above). For the purposes of Article 1 of Protocol No. 1, that expectation constituted a "possession" (see paragraph 178 above), the use of which was controlled by the same laws found to have been insufficiently foreseeable in relation to Article 10 (see paragraph 188 above). However, the Court has not examined whether the regulations in issue were "in accordance with the general interest" (see paragraph 189 above) and whether the interference with the applicant company's right to impart information and ideas pursued a legitimate aim and was necessary in a democratic society for achieving that aim (see paragraph 158 above).

215. In the instant case, the Court is unable to establish the precise extent to which the violations it has found affected the applicant company's property rights, having regard, in particular, to the specific features of the Italian audiovisual market and the absence of a comparable commercial situation in the market in question.

216. The Court further notes that the applicant company sustained damage on account of the prolonged uncertainty, resulting from the lack of precision of the domestic legal framework, as to the date on which it could be allocated the frequencies and, as a result, start operating on the commercial television broadcasting market. The applicant company nevertheless made certain investments on the basis of the licence. The Court considers that the compensation awarded by the Consiglio di Stato, covering solely the period from 2004 to 2009, cannot be regarded as sufficient, especially as no expert valuation was ordered by the domestic courts to quantify the losses sustained and the loss of earnings.

217. The Court observes that the Government simply contested the applicant company's claims by describing them as excessive.

218. With regard to the losses sustained, the Court notes that the applicant company has not shown that all the investments it made were necessary to operate under the licence it had been granted. As

to the alleged loss of earnings, the Court finds that the applicant company did indeed suffer a loss of this nature as a result of its inability to derive any profit whatsoever from the licence over a period of many years. It considers, however, that the circumstances of the case do not lend themselves to a precise assessment of pecuniary damage, since this type of damage involves many uncertain factors, making it impossible to calculate the exact amounts capable of affording fair compensation.

219. Without speculating on the profits which the applicant company would have achieved if the violations of the Convention had not occurred and if it had been able to broadcast from 2001, the Court observes that the company suffered a real loss of opportunities (see, *mutatis mutandis*, *Gawęda*, cited above, § 54). It should also be noted that the applicant company intended to embark on an entirely new commercial venture, the potential success of which was dependent on a variety of factors whose assessment falls outside the Court's jurisdiction. It notes in this connection that where a loss of earnings (*lucrum cessans*) is alleged, it must be conclusively established and must not be based on mere conjecture or probability.

220. In those circumstances, the Court considers it appropriate to award a lump sum in compensation for the losses sustained and the loss of earnings resulting from the impossibility of making use of the licence. It must also take into account the fact that the applicant company was awarded compensation at domestic level in respect of part of the period concerned (see paragraph 48 above).

221. In addition, the Court considers that the violations it has found of Article 10 of the Convention and Article 1 of Protocol No. 1 in the instant case must have caused the applicant company prolonged uncertainty in the conduct of its business and feelings of helplessness and frustration (see, *mutatis mutandis*, *Rock Ruby Hotels Ltd v. Turkey* (just satisfaction), no. 46159/99, § 36, 26 October 2010). In this connection, it reiterates that it may award pecuniary compensation for non-pecuniary damage to a commercial company. Non-pecuniary damage suffered by such companies may include aspects that are to a greater or lesser extent "objective" or "subjective". Aspects that may be taken into account include the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team (see *Comingersoll S.A. v. Portugal*, [GC], no. 35382/97, § 35, ECHR 2000-IV).

222. Having regard to all the above factors, and making its assessment on an equitable basis, the Court considers it reasonable to award the applicant company an aggregate sum of EUR 10,000,000, covering all heads of damage, plus any tax that may be chargeable on that amount.

2. Costs and expenses

223. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and to be reasonable as to quantum are recoverable under Article 41 of the Convention (see *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II).

224. With regard to the costs incurred in the domestic proceedings, the Court observes that before applying to the Convention institutions, the applicant company exhausted the domestic remedies available to it under Italian law, since it instituted two sets of proceedings in the administrative courts, the complexity and length of which must be emphasised. The Court therefore accepts that the applicant company incurred expenses in seeking redress for the violations of the Convention through the domestic legal system (see, *mutatis mutandis*, *Rojas Morales v. Italy*, no. 39676/98, § 42, 16 November 2000).

225. With regard to the expenses relating to the proceedings before it, the Court notes that the present case is of some complexity, since it required examination by the Grand Chamber, several sets of observations and a hearing. It also raises important legal issues.

226. Having regard to the material in its possession and its relevant practice, the Court considers it reasonable to award the applicant company an aggregate sum of EUR 100,000 in respect of all costs and expenses.

3. Default interest

227. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. Upholds, unanimously, the Government's preliminary objection that the application is incompatible *ratione personae* with the provisions of the Convention in so far as it was lodged by Mr Di Stefano and accordingly declares this part of the application inadmissible;
 2. Dismisses, by a majority, the Government's preliminary objection that the application was out of time;
 3. Dismisses, by a majority, the Government's other preliminary objections;
 4. Declares, by a majority, the application by the applicant company admissible as regards the complaints under Articles 10 and 14 of the Convention;
 5. Declares, by a majority, the application by the applicant company admissible as regards the complaint under Article 1 of Protocol No. 1;
 6. Declares, unanimously, the remainder of the application by the applicant company inadmissible;
 7. Holds, by sixteen votes to one, that there has been a violation of Article 10 of the Convention;
 8. Holds, unanimously, that it is not necessary to examine separately the complaint under Article 14 of the Convention in conjunction with Article 10;
 9. Holds, by fourteen votes to three, that there has been a violation of Article 1 of Protocol No. 1;
 10. Holds, by nine votes to eight, that the respondent State is to pay the applicant company, within three months, EUR 10,000,000 (ten million euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
 11. Holds, unanimously, that the respondent State is to pay the applicant company, within three months, EUR 100,000 (one hundred thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
 12. Holds, unanimously, that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
 13. Dismisses, unanimously, the remainder of the applicant company's claim for just satisfaction.
- Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 June 2012.

Vincent Berger
Françoise Tulkens
Jurisconsult President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Concurring opinion of Judge Vajić;
- (b) Joint partly dissenting opinion of Judges Sajó, Karakaş, and Tsotsoria, joined in part by Judge Steiner;
- (c) Joint partly dissenting opinion of Judges Popović and Mijović;
- (d) Dissenting opinion of Judge Steiner.

F.T.

V.B.

CONCURRING OPINION OF JUDGE VAJIĆ

I have voted with the majority in favour of finding a violation of Article 1 of Protocol No. 1 to the Convention. However, I do not agree with the interpretation of "legitimate expectation" as set out in the judgment, in particular in paragraph 173. With all due respect, I think that the following passage of this paragraph is misleading (see *Kopecný v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX):

“However, in certain circumstances, a ‘legitimate expectation’ of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a ‘legitimate expectation’ if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence.”

According to the established case-law, if a person has a proprietary interest in the nature of a claim which has a sufficient basis in national law, he or she has an asset capable of attracting the protection of Article 1 of Protocol No. 1 (see Kopecký, cited above, § 42). It is therefore unnecessary to introduce the notion of legitimate expectation, which, on the basis of *Pine Valley Developments Ltd and Others v. Ireland* (29 November 1991, Series A no. 222) and *Stretch v. the United Kingdom* (no. 44277/98, 24 June 2003), applies in a far more limited set of circumstances. Moreover, the judgment actually states at paragraph 178:

“The Court thus considers that the interests associated with exploiting the licence constituted property interests attracting the protection of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Tre Traktörer AB*, cited above, § 53).”

Therefore, I do not see the need to refer in addition to a legitimate expectation.

JOINT PARTLY DISSENTING OPINION OF JUDGES SAJÓ, KARAKAŞ AND TSOTSORIA,
JOINED IN PART BY JUDGE STEINER

We are in full agreement with the present judgment except as to the award of just satisfaction. We do not think that the award is excessive, nor do we find it insufficient. Instead, we consider that the question of the application of Article 41 is not ready for decision.

While the Consiglio di Stato found that there was a causal link between the conduct of the administrative authorities and the damage alleged by the applicant company, it considered that the compensation should be calculated on the basis of the legitimate expectation of being allocated the broadcasting frequencies by the appropriate authorities. For this reason, in determining the losses sustained the Consiglio di Stato considered that the applicant company should have known that it was unlikely to obtain the frequencies in question and it did not order an expert valuation. This approach was rejected by the Court (see paragraph 175 of the judgment). The Court found that the licence granted to the applicant company had been deprived of its substance. Furthermore, the Court itself found the refusal to order an expert valuation to be unacceptable (see paragraph 216 *in fine*). The applicant company indicated that it had incurred expenses including the renting of studios and the equipment needed to pursue the corresponding economic activity, and it submitted an expert assessment of its loss of profits based on the profits achieved by Retequattro, the over-quota channel which should have relinquished the frequencies allocated to the applicant company. In the absence of an expert opinion which would have shed at least some light on the necessity and pertinence of the alleged expenses and the expected loss of profit, we find it impossible to determine the damage sustained by the applicant company. Such an expert opinion, subject to an appropriate possibility for the parties to challenge it, would have enabled us to calculate at least the approximate amounts capable of redressing the damage. Moreover, this procedure would have opened the way for a friendly settlement which would have satisfied the requirements of fair compensation.

JOINT PARTLY DISSENTING OPINION OF JUDGES POPOVIĆ AND MIJOVIĆ

We respectfully disagree with the majority on two major points. Firstly, we consider that the first applicant in this case, the limited liability company *Centro Europa 7 S.r.l.*, did not have victim status. Secondly, the applicant company was on no account entitled to bring a case before the Court for the sole purpose of rectifying the amount it had been awarded at domestic level. Our reasons are the following.

The majority of our colleagues stated in paragraph 45 of the judgment that in a judgment of 20 January 2009 the Consiglio di Stato awarded the applicant company the amount of EUR 1,041,418 in compensation. This clearly proves that the loss sustained by the applicant company has been compensated. There were therefore no grounds for applying to the Court, which the applicant company did on 16 July 2009. The applicant company lost its victim status because it had been afforded compensation at the national level. Its application lodged with the Court had the goal of rectifying the amount awarded by the national court.

The Court laid down the rule concerning the amount of compensation as early as in 1986, in the case of *Lithgow and Others v. the United Kingdom* (8 July 1986, § 102, Series A no. 102). The rule says that the amount of compensation falls within the margin of appreciation of the member State, unless the amount in question may be considered “grossly inadequate”.

In its subsequent case-law the Court clarified the rule, stating that even a sum which was grossly inadequate (and might in extreme cases amount to zero!) could be found acceptable where there were exceptional circumstances (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 94, ECHR 2005-VI).

In the present case the applicant company’s intention was to counter the general rule set forth in *Lithgow and Others* by referring to the rule laid down in *Scordino v. Italy* (no. 1) ([GC], no. 36813/97, § 103, ECHR 2006-V), *Cocchiarella v. Italy* ([GC], no. 64886/01, ECHR 2006-V) and *Musci v. Italy* ([GC], no. 64699/01, ECHR 2006-V). The latter rule, however, falls within the scope of the main rule stemming from *Lithgow and Others*, for the Court held in *Scordino* (no. 1) (cited above, § 103) that the compensation awarded “was inadequate”. It is therefore clear that the rule in *Scordino* (no. 1) merely followed the previous case-law, that is, the rule in *Lithgow and Others*, which in our view applies to the present case.

The assessment of the facts in *Scordino* (no. 1) was different from the assessment in *Lithgow and Others*, but the rule remained unaltered. In other words, the term “inadequate” in the *Scordino* (no. 1) judgment (cited above, § 103) can only be understood in the light of the *Lithgow* rule, that is, attaining the standard of “grossly inadequate” in respect of proportionality. The Court basically took the same stance in paragraph 98 of *Scordino* (no. 1), where it referred, inter alia, to *Lithgow and Others*, invoking the general rule on the proportionality of compensation.

Besides, there is no reason whatsoever to find that the compensation in the present case was inadequate. In our view, the present case can be distinguished from *Scordino* (no. 1). The latter case concerned the expropriation of land, whereas the case at hand is about a broadcasting licence for television programmes. The fluctuations of market prices for the two goods mentioned may be comparable, but they are not identical and the domestic judiciary is better placed than an international court to assess the amount due in compensation. The applicants in *Scordino* (no. 1) (cited above, § 85) relied on the fact that the flats built on the expropriated land could subsequently be sold and therefore bring a profit to private individuals. However, in the present case there is not enough reason to hold that the sum awarded in compensation to the applicant company at domestic level was inadequate.

We would also underline the fact that the amount of money awarded in compensation to the applicant company at domestic level was indeed considerable. It could by no means be labelled as “grossly inadequate”. The Court cannot speculate on the applicant company’s potential success in business, the fact on which the sum awarded in compensation could allegedly have depended. The applicant company’s position was properly assessed by the national court of law, which found in its favour. What is more, the majority did not base their ruling on an expert valuation of the loss allegedly sustained by the applicant company, but merely awarded it a lump sum. Therefore, even if the applicant company could have been considered to have preserved its victim status – a position which we do not find to be justified – we believe that the Court should have observed the margin of appreciation of a member State.

DISSENTING OPINION OF JUDGE STEINER

(Translation)

I am unable to share the opinion of the majority on the two fundamental aspects of this case: the alleged violations of Article 10 and of Article 1 of Protocol No. 1.

The factual situations underlying the applicant company's complaints are, in my view, clearly distinct.

As regards the first of these situations, relating to the alleged inability to broadcast on the basis of the 1999 decision of principle, it falls outside the Court's jurisdiction since it does not comply with the six-month rule.

According to the Government, in its decision of 31 May 2008 the Consiglio di Stato settled with final effect the issue arising from the failure to allocate frequencies on the basis of the 1999 decision.

A careful reading of the reasoning and, above all, the operative provisions of the Consiglio di Stato's decision appears to support that argument. Furthermore, the judgment of January 2009 confirms this approach to the issue, since it deals only with the residual aspect of the applicant company's claim in relation to Article 1 of Protocol No. 1.

On this point, the Grand Chamber's judgment (see paragraphs 100-104) does not appear to reflect the reality of the legal situation.

Firstly, in my view we are not dealing with a continuing situation since, as I have mentioned, the situation in issue had been clarified by the decision of 31 May 2008. From that date it had become obvious that the applicant company was no longer lawfully entitled to contest the merits of the non-allocation of the frequencies envisaged by the 1999 decision.

It was accordingly required to lodge its application in relation to this issue within the six-month time-limit.

I would point out that there is consistent and long-established case-law on the subject.

Thus, not only does the six-month rule result from a special provision and constitute an element of legal stability, it is also a matter of public policy and cannot be disregarded by States on their own initiative.

The six-month rule is, according to our case-law, a question which is linked to observance of the European public order and which can be raised by the Court of its own motion at any stage of the proceedings.

The subsidiarity principle, which is constantly mentioned as the guiding principle of the supervisory system, requires the national courts to be given precedence in the interpretation of domestic law.

I would emphasise in this connection that the Court's "jurisdiction to verify that domestic law has been correctly interpreted and applied is limited" and that "it is not its function to take the place of the national courts, its role being rather to ensure that the decisions of those courts are not flawed by arbitrariness or otherwise manifestly unreasonable" (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I).

What holds true for the assessment of compliance with domestic law also applies to the determination of what was the final domestic decision in respect of a particular complaint, unless the decision of the Consiglio di Stato in the present case is found to have been arbitrary or manifestly unreasonable.

Next, I consider that the judgment wrongly mixes up two distinct aspects.

The assessment of the amount to be awarded to the applicant company in damages concerned the quantification of the damage suffered and not the allocation of frequencies, that issue having been *res judicata* since 31 May 2008.

As regards the second factual situation, relating to respect for the right of property, the question seems clear to me. The reasons given by the Consiglio di Stato in its judgment of 20 January 2009 are convincing and reasonable.

The Consiglio di Stato found the State liable for the lengthy delay in allocating the frequencies. It awarded damages on that account for the "losses sustained". It took care to draw attention to the

conduct of the applicant company, which should have taken the context into account and been cautious in its investments pending the allocation of the frequencies.

As to the damage corresponding to “loss of earnings”, the Consiglio di Stato observed that there was not the slightest evidence to support the assumptions and hypotheses put forward by the applicant company. Nevertheless, it made an award to the company under this head, determined on an equitable basis.

I consider that, more than in any other circumstances, the State should be afforded a wide margin of appreciation in determining the damage resulting from an “unlawful act”, in accordance with the principles governing non-contractual liability.

As regard the question of the application of Article 41, I join the partly dissenting opinion of Judges Sajó, Karakaş, and Tsotsoria.

1 At the material time, the Court of Justice of the European Communities.

1 CENTRO EUROPA 7 S.R.L. AND DI STEFANO v. ITALY JUDGMENT