

Media Pluralism and Competition in the Media Sector: The Italian Experience

by

Valeria Caforio*

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Abstract

In economic sectors where constitutional principles come to the fore, legislators must reconcile individual rights and freedoms with market principles, such as the arm's length principle, and economic freedoms, particularly the freedom to conduct

* Valeria Caforio, PHD Student in Legal Studies, Bocconi University, Milan; email: valeria.caforio@unibocconi.it; ORCID: <https://orcid.org/0009-0005-0778-9213>.

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business. This balance is particularly significant in the media sector, where the principle of media pluralism is paramount. Media pluralism, as acknowledged by the Italian Constitutional Court in 1988, encompasses two dimensions: internal pluralism, which secures citizens' access to diverse, objective, and impartial information (individual freedoms); and external pluralism, which prevents the concentration of resources among a limited group of economic actors (economic freedoms). Against this backdrop, this paper explores the following research questions: What regulatory measures best ensure media pluralism? Should the focus be on internal pluralism, external pluralism, or a combination of both? To address these questions, the paper critiques Italy's regulatory framework for fostering media pluralism, which has historically emphasized external pluralism. This approach, grounded in antitrust law, leads to considerable ambiguities and jurisdictional conflicts among national regulatory authorities. More broadly, the paper examines the effectiveness of an "anti-concentration" regulatory regime in promoting media pluralism, an issue that extends beyond simple economic considerations.

Résumé

Dans les secteurs économiques où les principes constitutionnels sont au premier plan, les législateurs doivent concilier les droits et libertés individuels avec les principes du marché, tels que le principe de pleine concurrence, et les libertés économiques, en particulier la liberté d'entreprendre. Cet équilibre est particulièrement important dans le secteur des médias, où le principe du pluralisme des médias est primordial. Le pluralisme des médias, tel qu'il a été reconnu par la Cour constitutionnelle italienne en 1988, comprend deux dimensions: le pluralisme interne, qui garantit l'accès des citoyens à des informations diverses, objectives et impartiales (libertés individuelles), et le pluralisme externe, qui empêche la concentration des ressources entre un groupe limité d'acteurs économiques (libertés économiques). Dans ce contexte, le présent document explore les questions de recherche suivantes: Quelles sont les mesures réglementaires qui garantissent le mieux le pluralisme des médias? L'accent doit-il être mis sur le pluralisme interne, le pluralisme externe ou une combinaison des deux? Pour répondre à ces questions, l'article critique le cadre réglementaire italien visant à favoriser le pluralisme des médias, qui a historiquement mis l'accent sur le pluralisme externe. Cette approche, fondée sur la législation antitrust, entraîne des ambiguïtés considérables et des conflits de compétence entre les autorités nationales de régulation. De manière plus générale, l'article examine l'efficacité d'un régime réglementaire «anti-concentration» dans la promotion du pluralisme des médias.

Keywords: competition law; regulation; freedom of expression; media pluralism.

JEL: K21; K23

I. Introduction

The media's function consists of the creation and distribution of information intended for a broad audience. It is widely acknowledged that mass media, in principle, can function as a means for democratizing modern state systems.¹ They are pivotal in delivering valuable information, and act as key arenas for shaping the political consciousness of citizens, who are nowadays increasingly drawn to digital media platforms and tools for social interaction, rather than traditional media like newspapers, radio, or television.

However, for the media to effectively fulfill this social role, they must ensure the provision of comprehensive, diverse, critical, objective, impartial, and reliable information. Additionally, within each specific medium, information should originate from a variety of content providers operating in a competitive environment. These represent the dual aspects of media pluralism, which constitute the fundamental value of a democratic information system.² On one hand, the first aspect, termed internal pluralism, requires the media to reflect the 'plurality of voices' present in society.³ On the other hand, the second aspect, known as external pluralism, refers to the importance of having a plurality of media players in the market, to prevent concentration of resources and the establishment of dominant positions in the media.⁴

Ensuring the protection of media pluralism in the mass information sector requires the adoption of a dedicated framework. This raises the question of which tools are suitable to ensure an adequate level of pluralism (both internal and external), and how one can determine whether an information system is indeed pluralistic.⁵

¹ See Danielle Raeijmaekers and Pieter Maesele, 'Media, pluralism and democracy: what's in a name?' (2015) 37 *Media, Culture & Society* 1042.

² Together with media freedom. Andrea Calderaro and Alina Dobрева, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' EUI RSCAS Policy Paper 2013/01 7. See also *Centro Europa 7 S.r.l. and Di Stefano v. Italy* ECHR 2012-III 261 para 129.

³ Decision n. 225/1974 (Italian Constitutional Court, 10 July 1974).

⁴ On the distinction between internal and external pluralism see, among many, Beata Klimkiewicz, 'Media Pluralism: European Regulatory Policies and the Case of Central Europe' EUI RSCAS Working Paper 2005/19, available at <<https://cadmus.eui.eu/handle/1814/3368>> (last accessed April 2023). See also European Commission, Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market and amending Directive 2010/13/EU, Part 1/3, SWD(2022) 286 final, 16.09.2022, footnote 22.

⁵ Mónica Ariño, 'Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps' (2004) 54 *Communications & Strategies* 97, 100–101.

The European Union (EU) has debated how to protect media pluralism and media freedom since the 1980s.⁶ Indeed, although the EU acknowledges the right to a free and plural media, it lacks direct competence to pursue media policy.⁷ Consequently, the EU has no harmonized legal framework for media pluralism, and instead has relied on alternative instruments within its competence,⁸ particularly competition law,⁹ to support media pluralism indirectly.¹⁰

⁶ For a historical overview of how the EU has dealt with the issue of media pluralism see Elda Brogi and Paula Gori, 'Legal Analysis of the EU Instruments to Foster Media Pluralism and Media Freedom' in RSCAS Policy Papers 2013/01, *European Union Competencies in Respect of Media Pluralism and Media Freedom* (CMPF 2013) 43.

⁷ On one hand, Article 10 of the European Convention of Human Rights and Fundamental Freedoms and Article 11(2) of the Charter of Fundamental Rights of the European Union enshrine, respectively, freedom of expression as well as media pluralism and media freedom. On the other hand, Article 167(2) and (5) TFEU establish that the EU has only a supporting role regarding Member States' actions in media policy, thereby preventing the harmonization of national laws and regulations in this area. This limitation acknowledges the unique national traditions of each Member State, positioning them as better suited to safeguard media pluralism and freedom through their own domestic legislation. See Marta Sznajder, 'European Media Freedom Act and its Implications for Both Merger Control and Media Pluralism: The Polish Perspective' (2024) 49 *European Law Review* 51.

⁸ Armando J. Garcia Pires, 'Media Pluralism and Competition' (2017) 43 *European Journal of Law and Economics* 255, 258.

⁹ Media pluralism can be fostered through competition law in two distinct ways. First, by incorporating non-economic considerations into the application of competition law. This has been the case, for instance, in certain merger cases within the broadcasting sector, despite decisions made by the Commission being overturned by the Union's Court of First Instance (Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole télévision and Other v Commission* [1996] ECR-II-649, paras 114–121). Second, the conventional enforcement of competition law could indirectly favor media pluralism, particularly in its external form, by addressing the establishment of dominant positions in the media, or mergers between media companies. Such conduct, indeed, besides contributing to a concentration of market resources, could also result in a reduction in the diversity of political and cultural viewpoints and expressions. However, as elucidated in this paper, this approach is susceptible to criticism since a variety of media outlets does not always equate to a variety of perspectives. See Brogi and Gori (n 7) 48; and Pires (n 9) 258–260.

¹⁰ *Ibidem*. See also Filippo Donati, 'Unione europea, libertà e pluralismo nei mezzi di informazione' (2022) 2–3 *Medialaws*, available at <<https://www.medialaws.eu/rivista/unione-europea-liberta-e-pluralismo-dei-mezzi-di-informazione/>> (last accessed October 2024). Even when specific harmonization measures have been implemented by the EU in the media sector, such as the Television without Frontiers Directive of 1989 later revised and renamed as the Audiovisual Media Services Directive (AVMS Directive), they have been justified primarily as measures for protecting the internal market to align with the principle of conferral. Indeed, the legal basis for the adoption of these laws have been the internal market freedoms and, specifically, Article 53(1) (freedom of establishment) and Article 62 (freedom to provide services) of the Treaty on the Functioning of the European Union (TFEU).

In recent years, however, the EU has responded to a rapidly evolving media landscape – characterized by the emergence of digital platforms alongside traditional media, and new forms of information dissemination and consumption – by actively promoting media pluralism and the freedom of information. Major initiatives include the Digital Services Act (hereinafter: **DSA**)¹¹ and, most notably, the European Media Freedom Act (hereinafter: **EMFA**),¹² effective from May 2024, which is the EU's first harmonized media sector framework. However, the EMFA has stirred debate regarding its legal basis, as it was adopted under Article 114 TFEU, which aims to unify laws for the internal market, despite the limited relevance of the EMFA's focus to the internal market.¹³ While some argue this legal foundation may conflict with the principle of conferral (EU action limited to competences conferred by the Treaties), others support the EU's involvement, citing broader treaty principles supporting democracy and media independence.¹⁴

Despite these developments, media pluralism remains a primary responsibility of Member States, resulting in a somewhat fragmented approach across the EU.¹⁵

However, a common trait can nevertheless be identified. National legal systems exhibit a tendency to prioritize the protection of external pluralism over internal pluralism. This choice stems from the belief that a market featuring information from a diverse array of sources signifies an adequate level of media pluralism, encompassing content, opinion, and cultural diversity.¹⁶

¹¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

¹² Regulation (EU) 2024/1083 of the European Parliament and of the Council establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act) [2024] OJ L 2024/1083.

¹³ Sznajder (n 8).

¹⁴ These include Article 2, 10 and 14(3), which uphold democracy as a fundamental principle within the EU legal order. See Donati (n 12) 8–10. The author argues that threats to the foundational democratic principles of the EU, including media pluralism, can warrant an EU legislative intervention, even in areas traditionally beyond its competence. This approach has also been introduced in other domains, such as justice, where Article 19 TEU has been used as a legal basis to review Member States' judicial organizations with respect to judicial independence. See also in this respect Roberto Mastroianni, 'Freedom and pluralism of the media: an European value awaiting to be discovered?' (2022) 1, available at <<https://www.medialaws.eu/rivista/freedom-and-pluralism-of-the-media-an-european-value-waiting-to-be-discovered/>> (last accessed October 2024).

¹⁵ Petra Bárd and Judit Bayer, 'A comparative analysis of media freedom and pluralism in the EU Member States. Study for the Libe Commette' (2016) available at <<http://www.europarl.europa.eu/supporting-analyses>> (last accessed October 2024).

¹⁶ C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press 2006).

The protection of external pluralism is pursued through specific rules aimed at preventing and countering the concentration of economic resources in the hands of a few media operators, often referred to as “antimonopoly legislations”.¹⁷ These laws typically employ concepts and tools derived from general antitrust law, including the notion of dominance, the focus on merger cases, and the definition of relevant markets. However, in principle, they should remain distinct from competition law, as the value of external pluralism should not be conflated with the principle of free competition. This illustrates that despite Member States having their own media regulations, they have not fully distanced themselves from the antitrust approach described above.

Against this backdrop, this paper intends to critically examine the intersection between external pluralism and competition law, with a focus on the Italian legislation protecting media pluralism in the audiovisual sector. The analysis seeks to illustrate three distinct points: (i) the employment of antitrust concepts and tools by antimonopoly legislations gives rise to ambiguities; (ii) this also raises coordination issues among national regulatory authorities operating within the media sector; and (iii) the approach is ultimately inadequate in ensuring media pluralism, both external and internal.

It is also important to delineate the scope of this analysis with two clarifications. First, although media pluralism is a value relevant to all forms of information, this article does not address specific regulations concerning the press, focusing instead on audiovisual services. Second, while acknowledging the presence of national laws targeting internal pluralism in the audiovisual sector, this paper centers on antimonopoly legislation aimed at safeguarding external pluralism.

The structure of the paper unfolds as follows. In Section II, the concept of media pluralism is examined through the lens of the Italian Constitutional Court’s case law. The paper highlights how, instead of the legislature, the Court’s rulings related to radio and television have shaped the rules of the media sector at its initial stage. Section III then outlines the relevant antimonopoly rules in force before 2021 (III.1). Notably, emphasis is placed on the legislative leaning towards safeguarding external pluralism, and on the substantive and procedural challenges that antimonopoly rules pose (Sections III.2 and III.3). Section IV analyzes the ruling of the Court of Justice of the European Union (CJEU) in the Mediaset-Vivendi case, which has declared some of the Italian rules contrary to EU law. Section V comments on the new Italian rules adopted in 2021, which have partly deviated from

¹⁷ Or, also, “sector-specific anti-concentration regulations” in that they also address concentrations in the media sector. See Antonio Manganelli and Maria Luce Mariniello, ‘La valutazione delle concentrazioni per la tutela del pluralismo informativo’ (2024) 6 *Rivista italiana di informatica e diritto* 14.

the previous approach. Finally, Section VI concludes by raising questions about the choice to assign the safeguarding of media pluralism to specialized antimonopoly rules.

II. Media pluralism in the Italian Constitutional Court's case law

In Italy, the concept of media pluralism is not explicitly defined by legislation but, rather, it emerges from the Constitutional Court's (hereinafter also: "the Court") interpretation of Article 21 of the Constitution, which safeguards the freedom of expression.¹⁸ Dating back to the second half of the 20th Century, this jurisprudence might appear outdated today. However, the principles set forth by the Court influenced the early development of Italy's broadcasting system, and the transition from a state monopoly to the current mixed public-private system. Therefore, a comprehensive understanding of the history of broadcasting in Italy and its regulatory framework requires a previous analysis of the Constitutional Court's rulings on media pluralism.¹⁹

Article 21 of the Italian Constitution, which served as the foundation of media pluralism, ensures individuals' right to freely express their thoughts through speech, writing, and any other means. While the provision specifically mentions the press, its broad language allowed the Court to extend its scope to broadcasting and other media.

Furthermore, while Article 21 primarily focuses on individual freedoms, it also indirectly addresses the collective dimension, concerning mass media. Indeed, by interpreting the freedom of expression, the Court recognized a conceptualization of the right to information that encompasses both the active right to impart information, and the passive right to receive it. This passive right ensures access to clear, objective, and reliable information from diverse sources. In particular, the Court stressed the importance of a plurality of information sources for effective exercise of the right to receive information, allowing citizens to access diverse points of view.

Within this framework, the notion of media pluralism has come to the forefront. This concept was first articulated in a 1960 ruling, marking

¹⁸ See Carlo Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano* (Giuffrè 1958).

¹⁹ For a comprehensive examination of this jurisprudence see also Enzo Cheli, 'Libertà di informazione e pluralismo informativo negli indirizzi della giurisprudenza costituzionale', in *Giurisprudenza costituzionale ed evoluzione dell'ordinamento italiano, Atti dei Convegni dei Lincei* (Bardi Editore, 2007).

an important milestone in understating media pluralism.²⁰ To grasp its significance, one must contextualize it within the landscape of Italian radio and television during that era.

Until the mid-1970s, broadcasting was monopolized by the State-operated RAI Radiotelevisione Italiana. The decision to centralize broadcasting was motivated by the technical limitations of available frequencies. In a competitive environment, the radio and television markets would likely have been dominated by a single entity, limiting access to diverse views. On the other hand, private entities contested this arrangement, arguing that it contradicted the constitutional freedom to conduct business.

In its 1960 ruling, the Court upheld the State's monopoly on broadcasting, citing the intrinsic scarcity of frequencies. It argued that the State, as the guardian of general interests, was best suited to ensure impartial, comprehensive, and continuous service delivery, thereby promoting media pluralism. Thus, safeguarding media pluralism served as the rationale for justifying State control over broadcasting activities.

From the 1970s onward, technological advancements gradually undermined the rationale behind the State's broadcasting monopoly, leading the Court to declare it illegitimate, at least at the local level.²¹ At the national level, however, a duopoly emerged, with one private operator alongside the public incumbent. Faced with legislative inaction, the Constitutional Court expressed concerns that this situation could impede the freedom of expression.

In a landmark 1988 ruling, the Court established the conditions under which a private operator could legitimately engage in radio and television activities, clarifying the distinction between "external" and "internal" pluralism, applicable to private operators and to the State (through public television), respectively.²² This ruling represents the most comprehensive discussion of the concept of media pluralism by the Italian Constitutional Court.

The Court emphasized that external pluralism requires a variety of information sources and economic operators, in order to prevent the formation and consolidation of dominant positions. This necessitates regulations that promote the participation of numerous private operators in the market. Conversely, public television is subject to the principle of internal pluralism, understood as a dialogue among the various cultural, ideological, political, and religious components within the same media outlet.

With this ruling, the Court clarified the fundamental principles governing the Italian information system: external pluralism, which applies to private

²⁰ Decision n. 59/1960 (Italian Constitutional Court, 6 July 1960).

²¹ Decision n. 202/1976 (Italian Constitutional Court, 28 July 1976).

²² Decision n. 826/1988 (Italian Constitutional Court, 14 July 1988).

television, and internal pluralism, concerning public services. In doing so, Italy aligns itself with other EU Member States that recognize the value of both external and internal pluralism, despite their diverse historical backgrounds.

III. The Italian antimonopoly legislation of the media sector before 2021

In terms of legislative practice, however, the Italian legal system has historically placed greater emphasis on safeguarding external pluralism over internal pluralism.²³ This is evident in sector-specific regulations aimed at countering dominant positions in media markets, and preventing the consolidation of economic power among a select few players.²⁴ In line with the precedents set by the Constitutional Court, the Italian Parliament introduced in 1990 its first antimonopoly provisions regulating the media.²⁵ These, and subsequent legislative measures extending up to 2021, have consistently exhibited a shared characteristic: the integration of concepts and instruments drawn from general antitrust frameworks into the realm of media regulation.²⁶

Clearly, there are differences between antimonopoly rules and competition law. First, while both antimonopoly regulations and competition law aim to foster healthy market dynamics, they diverge in their primary objectives. Antimonopoly rules are tailored to safeguard media pluralism, ensuring a diverse and vibrant media landscape, whereas competition law is geared towards promoting market efficiency and consumer welfare.²⁷ Moreover, unlike competition law, which falls under the purview of the National Competition Authority (hereinafter: **AGCM**), antimonopoly regulations are overseen by a distinct regulatory body, the Italian National Regulatory Authority *Garante per le Comunicazioni* (hereinafter: **AGCOM**).

Perhaps the most notable distinction lies in their approach to dominant market positions. While antimonopoly rules outright prohibit the acquisition of such positions, competition law primarily targets abusive behavior by dominant

²³ Antonio Gentili, 'La disciplina antitrust. Telecomunicazioni, editoria, radiotelevisione, fra disciplina generale e disciplina specifica' in Giuseppe Santaniello (ed), *Trattato di diritto amministrativo*, vol. 28 Informazione e telecomunicazione (Cedam 1999) 213, 219.

²⁴ Augusto Preta, 'La tutela del pluralismo nell'ecosistema digitale' (2023) 3 *Medialaws*, available at <<https://www.medialaws.eu/rivista/la-tutela-del-pluralismo-nellecosistema-digitale/>> (last accessed October 2024).

²⁵ See law n. 223 of 6 August 1990 (so-called "*Legge Mammi*" from the name of its sponsor).

²⁶ Preta (n 35).

²⁷ Ernesto Apa, 'Il nodo di Gordio: informazione televisiva, pluralismo e Costituzione' (2004) 2 *Quaderni costituzionali* 339–340.

entities.²⁸ However, despite these differences, the Italian regulatory approach presents both substantive and procedural challenges when juxtaposed with general antitrust law. Following an examination of the provisions outlined in the previous iteration of the Italian Consolidated Law on Radio and Television, containing antimonopoly rules, the ensuing discussion will delve deeper into these challenges and explore their broader implications.

1. The ex-ante approach against the creation of monopolies in media markets

As electronic communications underwent a liberalization process across the EU, and television broadcasting gradually transitioned from analog to digital terrestrial techniques in the early 2000s, Italy recognized the need to modernize its broadcasting regulations. Thus, in 2005, the Parliament enacted the Consolidated Law on Radio and Television, commonly known as “TUSMAR”. Among its various provisions, TUSMAR introduced specific ex-ante antimonopoly rules aimed at thwarting the establishment of dominant positions resulting from agreements or mergers among media companies.²⁹

Central to these rules was Article 43, titled ‘Dominant Positions in the Integrated Communications System’ (hereinafter: **SIC**), which conceptualized a fictional basket aggregating revenues from diverse media-related activities, namely daily and periodical press, annual and electronic publishing (including online), radio and audiovisual media services, cinema, outdoor advertising, product and service promotional initiatives, and sponsorships.³⁰ Article 43 implemented a twofold strategy: firstly, it imposed a general prohibition on acquiring dominant positions within the individual relevant markets of the SIC;³¹ secondly, it introduced antimonopoly thresholds, the surpassing of which automatically indicated the formation of a prohibited dominant position across the entire SIC.³² In essence, while the former scenario forbade dominance in individual markets as defined by antitrust law, the latter established dominance based on surpassing specific thresholds within the entire system.

²⁸ Federico Ghezzi and Mario Notari, ‘La disciplina della concorrenza nei settori dell’informazione, del credito e delle assicurazioni’, (1993) 1 *Rivista delle società* 126

²⁹ Enrico Albanesi, Alessandra Valastro and Roberto Zaccaria *Diritto dell’informazione e della comunicazione* (12th ed., CEDAM 2023) 241.

³⁰ See Article 2(1)(s) TUSMAR. The economic value of the SIC, in turn, is determined by the aggregate revenue from these activities, as established by Article 43(10). See also Albanesi, Valastro and Zaccaria (n 40) 243.

³¹ Article 43(9) d.lgd. n. 177/2005.

³² Article 43(7), (8), (9), (11), (12) d.lgs. n. 177/2005.

These antimonopoly thresholds, encompassing both technical and economic constraints, targeted “audiovisual media service providers”. Technically, Article 43 prohibited a single provider from holding authorizations allowing it to broadcast over 20% of television and radio programmes on terrestrial frequencies nationwide.³³ Economically, it set three distinct thresholds: (i) limiting an individual provider from generating more than 20% of SIC revenues;³⁴ (ii) restricting companies with over 40% of total revenues in the electronic communications sector from earning more than 10% of SIC revenues;³⁵ (iii) prohibiting newspaper ownership for companies engaged in television activities and holding more than 8% of SIC revenues or over 40% of revenues in the electronic communications sector.³⁶ These thresholds, including multimedia limits, were meant to curb the accumulation of substantial ownership stakes across diverse media platforms.

Article 43 of the Consolidated Law on Radio and Television (TUSMAR) also outlined procedural rules aimed at ensuring compliance with its specified limits, and preventing the emergence of dominant positions within the Integrated Communications System (SIC). On one hand, undertakings within the SIC were mandated to notify the media regulator (AGCOM) of any agreements or concentrations with potential impacts on media pluralism.³⁷ On the other hand, AGCOM was tasked with defining the relevant markets of the SIC using traditional antitrust methodologies, and assessing the economic size of the SIC to determine compliance with antimonopoly thresholds. Additionally, it was required to identify dominant positions within both individual markets and the entire SIC, considering factors such as competition levels, entry barriers, economic scale, and broadcasting indices.³⁸ If a mere risk of surpassing the relevant thresholds was identified, AGCOM issued public warnings.³⁹ If a prohibited position was confirmed, AGCOM took measures to prevent its continuation and mitigate its effects, with Article 43 establishing the nullity of arrangements and mergers infringing its provisions.⁴⁰

³³ Article 43(7) d.lgs. n. 177/2005.

³⁴ Article 43(9) d.lgs. n. 177/2005.

³⁵ Article 43(11) d.lgs. n. 177/2005.

³⁶ Article 43(12) d.lgs. n. 177/2005.

³⁷ Article 43(1) d.lgs. n. 177/2005.

³⁸ Article 43(2) d.lgs. n. 177/2005.

³⁹ Article 43(3) d.lgs. n. 177/2005.

⁴⁰ Article 43(4), and (5) d.lgs. n. 177/2005.

2. Substantive challenges

Despite the theoretical distinction between antimonopoly legislation applicable to media and competition law described above, the integration of general antitrust categories and instruments into media regulation raises some practical issues.

Firstly, confusion and ambiguity may arise from the overlap of principles. Although the objectives of protecting pluralism and fostering competition are distinct, the principle of external pluralism shares similarities with competition. This resemblance blurs the boundaries between the two, contributing to uncertainty and misunderstanding. The Consolidated Law on Radio and Television (TUSMAR) exemplifies this issue by repeatedly referencing to the principle of competition across its provisions. For instance, Article 5, which outlines the general principles governing the media system, combines the goals of protecting pluralism with those of promoting competition. This conflation introduces an ancillary objective that deviates from the core focus of media regulation, thereby complicating the regulatory framework and its effective implementation.

Secondly, more broadly, it is debatable whether the Italian antimonopoly legislation in force until 2021 was effectively able to ensure a satisfactory level of external pluralism, understood as the existence of a plurality of players in the media market. Without mentioning the Italian issue of governmental interference on the media, or the close economic ties between the political sector and private media owners, the antimonopoly thresholds have always been very high, making it difficult for them to be in fact exceeded in practice. For years, the Italian legislature set thresholds above those held by the historical incumbents, Rai and Mediaset, merely solidifying the existing state of affairs. This situation has not changed even with the establishment of the Integrated Communications System (SIC), which aggregates revenues from various markets, and thus risks diluting positions that are nonetheless dangerous for media pluralism. On the other hand, and more importantly, even exceeding these thresholds is not always indicative of a risk to pluralism, just as being below them could instead have negative consequences in terms of the plurality of content, opinions, and different points of view. For instance, exceeding 20% of the revenues of the SIC could result from the sum of many revenues scattered across the individual relevant markets, just as an entity could have very high revenues in a single market, but be below the relevant percentage under Article 43 TUSMAR.⁴¹

⁴¹ See Section IV below.

Thirdly, there is a fundamental question about whether antitrust thresholds are truly effective tools for ensuring an adequate level of media pluralism, encompassing both its external and internal dimensions, as defined by the Constitutional Court. Numerous studies investigating the efficacy of antitrust regulations in safeguarding pluralism have revealed that a proliferation of market operators, indicative of strong external pluralism, does not necessarily translate to robust internal pluralism.⁴² This is particularly evident in markets driven by demand catering to standardized viewer preferences in terms of tastes and interests. Thus, while external pluralism may thrive, ensuring diverse ownership and competition, it does not automatically guarantee a rich diversity of content and viewpoints, as essential components of internal pluralism.⁴³

Hence, when assessing the risks to pluralism, it seems appropriate to prioritize rules concerning content, and the actual influence an operator wields over its creation and distribution, regardless of or at the very least not solely contingent upon its market position.

3. Procedural challenges

Another significant aspect to consider is the division of tasks and duties among administrative authorities within the media sector in Italy. Oversight of this area is shared by two bodies: the National Competition Authority (AGCM) and the National Regulatory Authority (AGCOM).⁴⁴ AGCOM, as a sector-specific regulator, is tasked with supervising the media sector and enforcing its antimonopoly legislation. In contrast, AGCM's mandate is broader, with responsibility for applying general competition law across all sectors of the economy.⁴⁵

⁴² Pires (n 9) 256; and Ariño (n 9) 99–100.

⁴³ Aldo Frignani, 'La concorrenza' in Aldo Frignani, Elena Poddighe, Vincenzo Zencovich (eds), *La televisione digitale: temi e problemi. Commento al D.lgs. 177/05 T.U. della Radiotelevisione* (Giuffrè 2006) 241; Ottavio Grandinetti, 'Principi costituzionali in materia radiotelevisiva e d.d.l. Gasparri' (2003) 2 *Giornale di diritto amministrativo* 191, 193.

⁴⁴ When Italy introduced its national antitrust law (l. 287/1990), the media sector was already subject to separate legislation. This prompted a debate over whether antitrust law should be applied to this sector at all, or if it should be exempted, due to the primacy of the interests safeguarded by sector-specific rules, especially media pluralism. Ultimately, the decision was reached to fully subject the media sector to general antitrust rules. See Federico Ghezzi and Gustavo Olivieri, *Diritto antitrust* (3rd edn, Giappichelli 2023) 404–406.

⁴⁵ This corresponds to the distinction between "sector-specific" and "cross-sectoral" authorities. See Roberto Garofoli and Giulia Ferrari, *Manuale di diritto amministrativo* (17th edn, Neldiritto 2024). Initially, however, the authority to enforce antitrust law in the broadcasting sector – as well as in banking, insurance, and publishing – was assigned to the sector's administrative body, then known as the *Garante per la radiodiffusione e l'editoria*. Meanwhile,

This arrangement sets the stage for potential conflicts, especially concerning mergers involving media companies. Given that both media-specific antimonopoly legislation and general competition law address such mergers, it is conceivable that a single transaction could face scrutiny from both authorities.⁴⁶ This situation can lead to conflicts between principles, as a merger might align with competition law due to economic efficiencies, while simultaneously posing a threat to pluralism by reducing media diversity, or vice versa.⁴⁷ This raises the fundamental question: should business freedom be prioritized or freedom of expression?

To be sure, Article 20 of Italian competition law establishes the independence between general competition rules and sector-specific media regulations. It grants each authority the autonomy to act within its jurisdiction and to adopt measures within its competence.⁴⁸ This autonomy allows for conflicting decisions to be issued by AGCM and AGCOM, reflecting their respective interests in competition and media pluralism. Likewise, authorization from one authority does not automatically imply approval under the jurisdiction of the other, supporting the application of the disjunctive veto principle.⁴⁹

the national antitrust authority's role was limited to providing a preliminary opinion within a specified time frame.

⁴⁶ Indeed, Article 20(9) of Law n. 287/1990 clarifies that the merger provisions within general competition law do not override the special rules applicable to regulated industries such as banking, insurance, broadcasting and publishing sectors. In particular, a merger in the mass media sector can be relevant from three distinct perspectives: a) it may threaten competition, making it subject to general competition law under the jurisdiction of AGCM; b) it may endanger media pluralism, activating sector-specific anti-concentration regulations, such as those outlined in TUSMAR, under the jurisdiction of AGCOM; and c) it may simultaneously compromise both competitive dynamics and media pluralism, thereby implicating both regulatory frameworks and requiring coordinated intervention by both authorities. See also Decision n. 2869/2002 (Italian Council of State, 24 May 2002) para 6. See Matteo Beretta and Marco D'Ostuni, *Il Sistema di controllo delle concentrazioni in Italia* (Giappichelli 2017) 222 and 237–240.

⁴⁷ See also Simone Cadeddu, 'Strumenti di controllo del potere di mercato e strumenti di difesa del pluralismo nel settore radiotelevisivo: convergenza o divergenza?' in Angelo Castaldo, Stefano da Empoli, Antonio Nicita (eds) *La tripla convergenza: Innovazione, regolazione e concorrenza nelle comunicazioni elettroniche* (Carocci 2008) 141 ff.

⁴⁸ See Article 20(4) l. 287/1990. On the division of tasks between AGCM and AGCOM see also Decision n. 2869/2002 (Italian Council of State, 24 May 2002) para 6, which clarifies that the law provides AGCM with general competences in protecting competition, including in the media sector while, at the same time, providing AGCOM with general competences over safeguarding pluralism in the media.

⁴⁹ Ghezzi and Olivieri (n 55) 411. According to AGCM, the possibility of conflicting decisions does not constitute an "institutional conflict". Instead, it is a natural outcome of having different regulatory frameworks in place to protect distinct interests. While potential conflicts could still arise, these can be managed by ensuring that each authority operates strictly within the boundaries of its mandate. See AGCM, *Relazione annuale sull'attività svolta*, 30 April

The only exception to this separation lies in the requirement for the National Competition Authority, AGCM, to seek a compulsory, but advisory opinion from the media National Regulatory Authority, AGCOM. While mandatory, this opinion is non-binding, allowing the national competition authority to deviate from it provided it has sufficient justification. This mechanism aims to incorporate AGCOM's expertise on technical and sector-specific aspects into AGCM's preliminary decision regarding media markets.⁵⁰

The described framework reveals a model of “parallel” competences that should operate independently without overlapping. On one hand, the general competition framework, enforced by AGCM, applies broadly to ensure fair competition among enterprises, with an emphasis on economic efficiency. On the other hand, a set of sector-specific “antimonopoly” rules is in place, exclusively applicable to the communications sector and enforced by AGCOM.

However, *in practice*, the scrutiny of a merger by two distinct authorities, using partly similar tools, creates a high risk of one authority exceeding its sphere of competences. Notably, AGCOM might express concerns about anticompetitive behavior, while AGCM might raise issues regarding the impact of a merger on media pluralism. This risk is evident in cases like the early 2000s acquisition of a television broadcaster by an electronic communication company under Telecom Italia's control. AGCOM rejected the acquisition on the grounds of antitrust concerns, while AGCM cleared it despite potential anticompetitive effects, citing its positive impact on media pluralism. This led to conflicting decisions and a problematic role reversal.⁵¹

Unsurprisingly, these procedural challenges stem from the integration of antitrust concepts into media specific regulation. When two authorities are tasked with applying similar rules and principles to the same case, it can lead to several procedural issues. One potential problem is conflicting decisions, which may occur even when consistency is expected. For instance, a transaction could have negative effects on both market competition and media pluralism, resulting in its contradictory evaluations. On the other hand, identical decisions

2001 35 available at <<https://www.agcm.it/dotcmsDOC/relazioni-annuali/Relaz00.pdf>> (last accessed October 2024).

⁵⁰ Ghezzi and Olivieri (n 55) 405–406.

⁵¹ See Decision n. 51/01/CONS (AGCOM, 17 January 2001); Decision n. 9142 (C4158) (AGCM, 23 January 2023) and Matteo Giampieretti, ‘Pluralismo e concorrenza nel caso Seat – Tmc’ (2001) 2 *Giurisprudenza Costituzionale* 836.

In response, the Italian Council of State, upholding the ruling of the Regional Administrative Court of first instance, annulled AGCOM's decision for relying on assessments beyond its scope. It clarified that AGCOM must adhere strictly to criteria for safeguarding pluralism, without interpreting rules arbitrarily to protect competition. See Decision n. 1852/2001 (TAR Lazio, 12 March 2001; and Decision n. 282/2001 (Italian Council of State, 30 May 2001).

may be made in cases where divergence is needed. For example, a merger may appear economically beneficial but still harm media pluralism.

More to the point, due to the overlap between external pluralism and competition, AGCOM may be pushed to exceed its jurisdiction and encroach upon AGCM's domain. Indeed, while AGCOM is mandated to apply specific legislation aimed at protecting pluralism, this legislation undeniably grants it certain "competitive tasks", such as when defining relevant markets. However, it must be noted that AGCOM officials may not necessarily possess the required expertise in areas like market definition or assessing dominant positions within the sector, further complicating the situation.

In conclusion, the division of responsibilities among administrative authorities in the media sector presents clear procedural challenges. Even EU institutions have criticized these rules, considering them incompatible with EU law and insufficient for effectively safeguarding media pluralism, as the next section will discuss.

IV. The Mediaset-Vivendi case

Indeed, in September 2020, the Court of Justice of the European Union (hereinafter: CJEU) ruled that Italy's antimonopoly legislation in Article 43 of the Consolidated Law on Radio and Television (TUSMAR) conflicted with primary EU law, particularly Article 49 TFEU, which guarantees the freedom of establishment within the EU.⁵² This case involved Mediaset, the second-largest media company in Italy, and Vivendi, a French media and audiovisual content company. In 2015, Vivendi acquired a controlling stake in Telecom Italia, the leading provider of electronic communication services in Italy. The following year, the French company also purchased a substantial stake in Mediaset, becoming its second-largest shareholder. Through its holding in these two companies, Vivendi thus established a joint presence in two interrelated sectors: electronic communications and media.

⁵² Case C-719/18 *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni* [2020] OJ C 103/2019. ("*Vivendi v AGCOM*"). For a comment of the judgement see Ernesto Apa, 'Sic et non: nel caso Vivendi la Corte di giustizia censura le incongruenze della disciplina italiana a tutela del pluralismo dell'informazione' (2021) *Rivista di Diritto dei Media* 235; Andrea Giannaccari, 'Vivendi tra libertà di stabilimento e pluralismo informativo. Tanto tuonò che piovve' (2020) 3 *Mercato concorrenza regole* 599; and Marco Orofino, 'SIC ... transit gloria mundi. La Corte di giustizia dichiara le soglie asimmetriche del sistema integrato delle comunicazioni incompatibili con la libertà di stabilimento (Corte di giustizia dell'Unione europea Quinta Sezione, Sentenza 3 settembre 2020 – causa C-719/18 – Vivendi SA v. Autorità per le Garanzie nelle Comunicazioni e Mediaset)' (2020) *Osservatorio costituzionale* 201.

In 2017, AGCOM found Vivendi in violation of the antimonopoly thresholds established by Article 43 TUSMAR, notably the multimedia threshold,⁵³ which prohibited any company with a dominant position in the electronic communications sector (defined as exceeding 40% of the sector's revenues) from expanding within the Integrated Communications System (SIC) by earning more than 10% of SIC's total revenue.⁵⁴ The purpose of this rule was to prevent cross-ownership between the audiovisual and electronic communications sectors, as such concentration could result in an undue competitive advantage, and to pose a threat to media pluralism.⁵⁵ The restriction also covered indirect earnings through subsidiaries and affiliates,⁵⁶ as was the case with Vivendi, which violated the first threshold by holding a controlling stake in Telecom Italia, generating over 40% of revenues in the electronic communications sector, and the second by holding a stake in Mediaset, which accounted for more than 10% of SIC's revenues.

Against this background, the regional administrative court, prompted by Vivendi's appeal against AGCOM's decision, sought a preliminary ruling from the CJEU. The national court questioned the compatibility of Italian antimonopoly legislation with fundamental EU freedoms, including freedom of establishment, movement of capital, and movement of services.⁵⁷ Indeed, the multimedia threshold, if applied, would have effectively barred a French company already active in one Italian market from expanding into a neighboring market. More importantly, the national court took this as an opportunity to examine the legitimacy of the Italian rules protecting media pluralism in light of their alignment with EU primary law.⁵⁸

The CJEU's ruling addressed the issue in two key ways. First, while recognizing that Article 43 TUSMAR indeed restricted a company's freedom of establishment within a Member State, the Court also affirmed that media pluralism is a public interest objective that can, in principle, justify national measures limiting fundamental internal market freedoms.⁵⁹ This view aligns with established jurisprudence allowing restrictions on fundamental freedoms

⁵³ Decision n. 178/17/CONS (AGCOM, 18 April 2017), available at <www.agcom.it> (last accessed February 2024).

⁵⁴ See Article 43(11) d.lgs. n. 177/2005.

⁵⁵ Giuseppe Guizzi, 'Gli incerti confini del collegamento societario: l'AGCOM e il caso Mediaset/Vivendi' (2017) 8–9 1033.

⁵⁶ The core issue in the dispute between the parties revolved around the interpretation of Article 43(11) TUSMAR. Specifically, the debate focused on clarifying the meaning of the terms "controlled company" and "associated company" within the context of this provision. The central question was whether these terms should be understood in accordance with the definitions provided in Article 2359 of the Italian Civil Code. In this regard, see Guizzi (n 66).

⁵⁷ Decision n. 10654/2018 (TAR Lazio, section III, lodged on 5 November 2018).

⁵⁸ *Vivendi v AGCOM*, paras 51–54.

⁵⁹ *Vivendi v AGCOM*, paras 56–59.

only when justified by “overriding reasons in the public interest”,⁶⁰ such as public health,⁶¹ and recognizing media pluralism as one such reason. Furthermore, the ruling highlighted the need to balance individual and market freedoms in certain sectors, as mentioned earlier in the paper, and it acknowledged that a non-market value like media pluralism can impose limits on market freedoms – in the case at stake, the freedom of establishment – within the EU internal market.

However, the CJEU found the thresholds set by Article 43 to be disproportionate to the objective pursued. For restrictions on fundamental freedoms to be lawful, they must also meet the criterion of proportionality, meaning they should be suitable to achieve their goals and not go beyond what is necessary.⁶²

In particular, the Court determined that the multimedia thresholds did not effectively fulfill their intended purpose of evaluating the risks to information plurality that could arise from a combined presence in the electronic communications and media sectors. The CJEU observed that while it might be justifiable, in principle, to restrict companies with a dominant position in electronic communications from entering the media sector, in order to prevent excessive resource concentration in these converging fields, but the thresholds themselves failed to accurately assess such risks. Instead, they imposed blanket prohibitions that disregarded the actual influence a company might exert over media content, particularly regarding its editorial responsibility.⁶³

As clarified by previous case law, “the various directives making up the new regulatory framework applicable to electronic communications services, in particular the Framework Directive and Directive 2002/77, [...] make a clear distinction between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility, content and transmission being covered by different measures which pursue their own specific objectives.”⁶⁴ In other words, only the creation of content that entails editorial responsibility may directly impact media pluralism. Therefore, a provision that fails to distinguish whether

⁶⁰ Case C-106/16 *Polbud – Wykonawstwo* [2017] ECLI:EU:C:2017:804 para. 52 and case law cited. See also Francesco Barzanti, ‘La giurisprudenza della Corte di giustizia dell’Unione Europea in tema di pluralismo dell’informazione: acquisizioni e prospettive’ in Riccardo Pisillo Mazzeschi et al. (eds), *Il diritto al pluralismo dell’informazione in Europa e in Italia* (Rai Eri 2012) 205.

⁶¹ Case C-333/14 *Scotch Whisky Association and Others v The Lord Advocate and The Advocate General for Scotland* [2015] ECLI:EU:C:2015:845 para 27.

⁶² *Ibidem.* para 53.

⁶³ *Vivendi v AGCOM*, paras 65–69.

⁶⁴ Case C-193/18 *Google LLC v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:498 para. 31.

a company's expansion from electronic communications into the media sector involves only content transmission, or if it also includes content production, does not satisfy the proportionality test in that it is unable to identify a genuine risk to media pluralism.

Furthermore, the CJEU stressed the broader point that the Integrated Communications System (SIC), given its diverse markets, cannot ensure a pluralistic media landscape solely through revenue thresholds. Indeed, simply exceeding 10% of total SIC revenues would not automatically indicate a threat to media pluralism, especially if those revenues were dispersed across various markets within the SIC. Conversely, a company holding less than 10% of total SIC revenues, but actually only dominating a single market therein could, in fact, pose a more serious threat to pluralism.⁶⁵ This underscores the shortcomings of the Italian law in addressing the complexities of media concentration and influence over content. In essence, the Court echoed a longstanding critique in Italian legal doctrine about the inadequacy of revenue-based thresholds for effectively identifying significant risks for pluralism.

V. The new Italian rules for media pluralism after 2021

In 2021, a notable shift occurred in Italy's media regulation with the enactment of a new Consolidated Law designed to uphold media pluralism (commonly referred to as "TUSMA", by contrast its predecessor was known as "TUSMAR").⁶⁶ This legislative reform not only aligns Italy's regulatory framework with the latest EU Directive on audiovisual media services⁶⁷, but also responds to the recent ruling by the CJEU discussed earlier. In theory, the introduction of TUSMA should mark a departure from the previous regulatory approach, which primarily aimed at safeguarding external pluralism by prohibiting dominant positions within the SIC and its individual markets. However, this assumption requires scrutiny through an examination of the law's specific provisions.

⁶⁵ *Vivendi v AGCOM*, para 75.

⁶⁶ D.lgs. n. 208/2021 of 8 November 2021.

⁶⁷ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain laws, regulations and administrative provisions of the Member States relating to the provision of media services audiovisual media (Audiovisual Media Services Directive), taking into account evolving market realities [2018] OJ L 303/69.

In particular, central to this new framework is its Article 51, which warrants a closer examination to understand its implications for media pluralism in Italy.⁶⁸

Firstly, Article 51 TUSMA moves away from the terminology of “dominant positions”, and instead prohibits the creation of “positions of significant market power potentially harmful for media pluralism” within the SIC and its individual markets. While clarification is still needed regarding the definition of “positions of significant market power potentially harmful for media pluralism”, the link between possessing market power and a threat to media pluralism aligns more closely with the overarching goals of the legislation. The previous framework tasked AGCOM with assessing the existence of dominant positions within individual markets of the SIC, under the assumption that such dominance invariably undermines media pluralism. By contrast, the revised approach acknowledges the need for a more nuanced evaluation of market dynamics and their implications for media pluralism and media freedom.

The most notable innovation introduced by Article 51 TUSMA is the elimination of the ex-ante thresholds that previously determined the existence of a prohibited dominant position. Under the new framework, these antimonopoly thresholds no longer automatically trigger a prohibition, but serve as mere procedural indicators of “significant market power potentially harmful to pluralism”. Companies exceeding these thresholds are now required to notify AGCOM of agreements and mergers within the SIC.⁶⁹ While this change might appear minor at first glance, it represents a significant shift in regulatory focus. Surpassing these thresholds does not inherently imply a detrimental effect on media pluralism; instead, it prompts AGCOM to carry out a comprehensive assessment to determine whether an actual risk to pluralism exists or not. This evolution stresses that the presence of market power, while not inherently harmful, may warrant closer examination to safeguard pluralism. At the same time, it marks a departure from the previous system, where exceeding antimonopoly thresholds under Article 43 TUSMAR led directly to a prohibition without further evaluation.

Under the new regime established in TUSMA, some changes have been made to the antimonopoly thresholds set out in Article 43 of TUSMAR:

- (i) In terms of the threshold set at 20% of the total revenues of the Integrated Communications System (SIC), Article 51 TUSMA additionally takes into account exceeding 50% of these revenues in one or more individual markets within the SIC as indicative of a position of significant market power.⁷⁰ While this adjustment partly aligns with

⁶⁸ For a comment on this provision see Ottavio Grandinetti, ‘La tutela del pluralismo nel nuovo Testo unico sui servizi di media audiovisivi’ (2022) 2 *Media Laws* 286.

⁶⁹ Article 51(3) d.lgs. n. 208/2021. See Grandinetti (n 80) 288.

⁷⁰ Article 51(3)(a) d.lgs. n. 208/2021.

the CJEU's ruling, which emphasized the limitations of relying solely on the *total* revenues of the SIC for identifying positions threatening media pluralism, the new provision still overlooks an essential aspect. It fails to consider the actual role of the entity exceeding these thresholds, notably whether it merely transmits content or exercises editorial control over it.

- (ii) Regarding the multimedia threshold, which Vivendi was accused of surpassing by AGCOM, the new Article 51 TUSMA reduces the threshold to 20% (from the prior 40%) of the revenues in the retail markets of electronic communications services.⁷¹ This stricter requirement indicates that even a non-dominant position within the electronic communications market can pose risks to pluralism when combined with significant participation in the SIC.
- (iii) The remaining two thresholds largely mirror those outlined in Article 43 TUSMAR. Firstly, the economic threshold mandates the notification of agreements or concentrations by companies operating within the SIC that acquire or hold a stake in non-electronic newspaper publishing companies.⁷² Secondly, the technical threshold pertains to entities holding authorizations to broadcast more than 20% of television and radio programmes.⁷³

Another interesting aspect of the new Article 51 TUSMA concerns the assessment of positions of market power that may pose a threat to media pluralism. As mentioned, an assessment can be initiated by companies themselves through the notification of agreements or mergers. Additionally, Article 51 TUSMA obligates AGCOM to conduct an annual review of the economic value of the SIC as well as its individual markets, during which it must identify any positions of market power that could jeopardize pluralism.⁷⁴ Lastly, an evaluation can also be triggered by reports submitted by interested parties regarding the presence of significant market power.

To conduct its assessment, AGCOM must adhere to certain criteria established by Article 51 TUSMA.⁷⁵ Along with criteria already established by Article 43, like market competition levels within the SIC, and barriers to

⁷¹ Article 51(3)(b) d.lgs. n. 208/2021.

⁷² Article 51(3)(c) d.lgs. n. 208/2021.

⁷³ Article 51(3)(d) d.lgs. n. 208/2021.

⁷⁴ The findings of this assessment must be disclosed to the public by the authority. Article 51(2) d.lgs. n. 208/2021.

⁷⁵ Article 51(5) d.lgs. n. 208/2021. According to Grandinetti, those should be the only criteria for determining the presence or absence of a “position of significant market power detrimental to pluralism”, while antimonopoly thresholds should be relevant only in relation to the notification requirement, rather than the substantive assessment of market power. Grandinetti (n 80) 289.

entry, Article 51 introduces new considerations reflecting the evolving digital landscape. These include factors like data availability as well as the direct or indirect control of scarce resources, both of which are considered to be relevant in shaping media pluralism in the digital era.⁷⁶

In addition to the criteria outlined, AGCOM's methodology is further detailed in guidelines adopted in April 2023, which provide insight into whether the antitrust-based approach traditionally used to safeguard media pluralism has, in fact, truly evolved.⁷⁷ However, an analysis of these guidelines suggests that the approach continues to be influenced by antitrust principles. For instance, the first step of the assessment involves defining the relevant market, a fundamental element of antitrust analysis. Tools like the SSNIP test are used, alongside media-specific methods like the "small but significant non-transitory decrease of quality" (SSNDQ) test, which evaluates non-price factors affecting media markets.⁷⁸

Once the relevant market is defined, AGCOM's approach combines traditional antitrust indicators – such as market share and potential competition – with criteria specific to TUSMA, including quantitative metrics for programme distribution. On the positive side, this integration demonstrates an attempt to balance antitrust tools with media-specific considerations, acknowledging the distinct nature of pluralism as a protected interest separate from competition. However, this overlap also risks conflating the goals of competition law with those of pluralism protection.

Thus, while TUSMA aims to modernize and refine the protection of media pluralism, its continued reliance on antitrust reveals an ongoing challenge in clearly distinguishing the goals and tools of competition law, from those of pluralism protection. Given that AGCOM's guidelines must be reviewed and revised at least every three years, there is hope that future revisions will allow for a clearer and more independent approach to safeguarding media pluralism, free from the constraints of antitrust law.

As if that were not enough, the complexity of the regulatory framework outlined is further heightened by the introduction of the European Media Freedom Act (EMFA) and its provision in Article 22 TUSMA regarding

⁷⁶ Manganelli and Mariniello (n 28).

⁷⁷ Decision n. 94/23/CONS, Annex A (AGCOM, 4 April 2023).

⁷⁸ The SSNDQ test is a tool used in antitrust analysis to assess market power when price is not the primary competitive factor, such as in zero-price markets. It evaluates whether a hypothetical, small but significant and lasting reduction in the quality of a product or service would cause enough users to switch to alternatives, thereby constraining the firm's ability to degrade quality. The test mirrors the logic of the SSNIP (Small but Significant Non-transitory Increase in Price) test but focuses on quality instead of price. See Communication from the Commission – Commission Notice on the definition of the relevant market for the purposes of Union competition law C/2023/6789 [2024] OJ C, C/2024/1645 para 98.

media market concentrations (so-called “media pluralism test”). This provision requires Member States to establish, by August 2025, substantive and procedural rules – which must adhere to principles of transparency, objectivity, proportionality, and non-discrimination – for assessing media market concentrations that involve at least one media service provider or platform providing access to media content.⁷⁹ Furthermore, Member States must designate a national authority responsible for conducting this assessment which must remain distinct from EU and national competition law assessment by a competition authority, including merger control.⁸⁰

Article 22 TUSMA also specifies the elements that must be taken into account in the assessment of media concentrations, notably: i) impact on media pluralism (how the concentration might affect the diversity of media services and offerings, including the formation of public opinion, with particular consideration of online environments, and any cross-sectoral activities or interests of the parties involved); ii) editorial independence safeguards (reviewing measures adopted by media service providers to ensure independent editorial decision-making); iii) economic sustainability (assessing whether, without the concentration, the involved entities would remain economically viable and if alternative solutions exist to continue their operations); iv) rule of law findings (considering insights from the EU Commission’s annual rule of law reports regarding media pluralism and freedom); v) voluntary commitments (taking into account any commitments offered by the parties to preserve media pluralism and maintain editorial independence).⁸¹

Critics have pointed out significant shortcomings of the media pluralism test. Chief among these are the lack of a precise definition of key concepts such as pluralism and editorial independence, which are central to that law, as well as its status as a minimum harmonization measure.⁸² This approach sets general objectives for Member States to implement, using their own legal frameworks, potentially perpetuating existing regulatory fragmentation across the EU.⁸³

Rather than delving into the details of EMFA, the focus here is on its interplay with Italy’s TUSMA, specifically its Article 51. Indeed, unlike other Member States, Italy already has legislation addressing media concentrations that affect pluralism, raising questions about the compatibility of TUSMA with the European Media Freedom Act (EMFA). In some respects, Italian law may align with EMFA – for instance, by assigning responsibility for the application of TUSMA to AGCOM, an authority independent from the national

⁷⁹ See Article 2(15) EMFA.

⁸⁰ Article 22(1) EMFA.

⁸¹ Article 22(2) EMFA.

⁸² Sznajder (n 8); and Manganelli and Mariniello (n 28).

⁸³ Sznajder (n 8).

antitrust body.⁸⁴ However, doubts arise regarding the compatibility of Italy's criteria and methodology for assessing media concentrations, which rely partially on antitrust principles, with the requirements of EMFA. As noted, Italian legislation still incorporates antitrust methodologies, such as market definition and dominance assessment, into the evaluations of pluralism. This raises questions about whether these methodologies align with the EMFA's requirement for rules that are distinct from the national competition law framework, as well as their compatibility with the specific criteria outlined in Article 22(2) EMFA.

Ultimately, this regulatory overlap reflects two unresolved issues: the broad discretion left by EMFA to Member States, and the unclear relationship between Article 22 EMFA and existing competition laws.⁸⁵

VI. Conclusions

This paper delved into Italy's efforts to safeguard media pluralism through regulation. While Italy has long recognized the dual nature of media pluralism, encompassing both its internal and external aspects, past media legislation has primarily emphasized the protection of external pluralism.

Historically, until 2021, Italian regulations centered on preventing the emergence of dominant media positions through media-specific antimonopoly rules, particularly by imposing anti-concentration thresholds within the Integrated Communications System (SIC). However, this approach has faced criticism for several reasons. Firstly, by borrowing concepts from general antitrust law, it has created ambiguity and confusion, undermining the clarity of principles and tools. Secondly, the application of similar tools by different authorities – the national competition authority (NCA) and the media regulator (NRA) – has led to potential overlaps in competencies. Ultimately, reliance on antitrust concepts has deprived the legal system of specialized instruments tailored for media pluralism.

This critique was echoed in the CJEU ruling on the Mediaset-Vivendi case, which highlighted the inconsistency of Italy's former legislation (that is, TUSMAR) rules with the freedom of establishment in the EU. Specifically, the CJEU criticized the non-proportionality of the thresholds and their inability to adequately signal concrete risks to media pluralism.

⁸⁴ Manganelli and Mariniello (n 28).

⁸⁵ Sznajder (n 8).

In 2021, Italy introduced new legislation aimed at protecting media pluralism, notably articulated in Article 51 TUSMA. While these new rules suggest a potential departure from the previous approach, and appear to partially align with CJEU case law, they continue to focus on external pluralism. Despite the shift towards considering market power as indicative of a threat to media pluralism, rather than being automatically prohibitive, lingering concerns persist. Notably, the continued reliance on antitrust instruments signals a continuing focus on external, rather than internal pluralism, which prompts skepticism about the adequacy of Italian media regulation.

These considerations are particularly urgent in light of the following points. First, with all its limitations, the implementation of the European Media Freedom Act (EMFA), which mandates Member States to introduce specific national rules for assessing media market concentrations, will require Italy to evaluate the alignment of its current regulatory framework (TUSMA) with the EMFA. This includes ensuring compliance with the latter's stipulation that such national rules must remain distinct from competition law.

Second, the evolving digital environment, which is reshaping how information is accessed and consumed, coupled with the rise of new players alongside traditional media companies, presents an opportunity to reassess the concept of pluralism in a broader, multimedia context. This shift underscores the need for more sophisticated assessment tools, such as audience shares, which may provide a more accurate reflection of media influence than traditional metrics such as revenue shares.⁸⁶

In essence, the time is ripe to rethink regulation of (digital) media pluralism in a way that genuinely restores its democratic dimension, as established by the Italian Constitutional Court years ago. A critical first step could involve revising AGCOM's methodology by introducing a new iteration of its guidelines that will decisively move away from its economically driven, antitrust-oriented foundation.

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⁸⁶ Preta (n 35).

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