

5. Venice Commission opinions

The European Commission for Democracy through Law (Venice Commission) issued a number of opinions on freedom of expression and media freedom, some of which include specific references to PSM.⁸⁷ They are summarised below, in a thematic order.

5.1. PSM values: neutrality, quality, diversity

Outlining freedom of expression and media pluralism considerations in the opinion on the compatibility of two Italian legislative instruments, a law on the governance of PSM,⁸⁸ the so-called Gasparri Law, and a bill on resolving conflicts of interest between media ownership and discharge of public office at the highest level,⁸⁹ the so-called Frattini Bill, the Venice Commission also emphasised that PSM must be free from both the state and the market forces.⁹⁰ Being a public service, PSM have different obligations on the one hand, and they enjoy different privileges on the other,⁹¹ but the foundations consist of:

- ▶ universality of content and access;
- ▶ editorial independence and impartiality;
- ▶ benchmark quality;
- ▶ variety of programmes and services catering to all groups in society;
- ▶ public accountability.⁹²

Among the key references to PSM as regards their neutrality, quality and diversity, provided in different Venice Commission's opinions, is the following:

- ▶ Public service broadcasting must be free from the constraining forces of the state and, on the other hand, enjoy autonomy and independence from the marketplace. Its specific remit is essentially to operate independently of those holding economic and political power. Public service broadcasting “provides

87. Compilations of excerpts are available here: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)008-e) and the links to the relevant documents here <https://www.venice.coe.int/webforms/documents/?topic=35&year=all>

88. Principles governing the broadcasting system and RAI-Radiotelevisione Italiana SpA, and the authority delegated to the Government to issue the consolidated legislation on television broadcasting

89. CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)017-e)

90. Ibid, § 54, *ibid*, § 162

91. Ibid, § 52

92. Ibid, § 54

the whole of society with information, culture, education and entertainment; it enhances social, political and cultural citizenship and promotes social cohesion. To that end, it is typically universal in terms of content and access; it guarantees editorial independence and impartiality; it provides a benchmark of quality; it offers a variety of programmes and services catering for the needs of all groups in society and is publicly accountable. These principles apply, whatever changes may have to be introduced to meet the requirements of the twenty-first century.”⁹³ Forms of consultation of the public within the public service broadcasting organisations may be envisaged in order to reflect in their programming policy the needs and requirements of the different groups in society.⁹⁴

In the 2015 opinion of media legislation in Hungary, the Venice Commission argued that despite the need for journalistic standards, it is almost impossible to define “balanced and neutral reporting” without ultimately turning the provisions of “balance and neutrality” into a tool of suppression of the free speech.⁹⁵ The Commission recommended amending the Media Act so as to permit PSM to choose news sources according to its own professional standards and avoid creating a monopoly of news delivery by a body with a politically-appointed director:⁹⁶

- ▶ Balanced and neutral news reporting is, indeed, a commendable professional standard for every journalist. Furthermore, it is perfectly legitimate to require that ‘media system on the whole’ is organised in such a manner as ‘to provide credible information, quickly and accurately’ [...].⁹⁷
- ▶ However, it is questionable whether ‘balance’ should become an enforceable legal obligation of every particular media taken alone. The norms under consideration create a very complex obligation on the media and lack precision. How can information be ‘balanced’? One can understand balance of opinion, but information (facts) needs to be thorough and accurate, not ‘balanced’. How quickly has the ‘balance’ to be achieved when the programme is a ‘series of programmes regularly shown’? Should the ‘balance’ be assessed in quantitative or more in qualitative terms? In addition, ‘facts’ cannot always be clearly distinguished from ‘opinions’; after all, it is difficult to imagine an anchor-man not using any adjective, while every adjective gives a flavour of an ‘opinion’ to a statement of fact. In sum, the vagueness of the terms employed in two acts may turn those provisions into a tool of suppression of the free speech [...].⁹⁸

93. See Parliamentary Assembly Recommendation 1641 (2004) on public service broadcasting.

94. Ibid, § 54

95. CDL-AD(2015)015, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, §§ 49-50. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)015-e)

96. Ibid., § 90

97. Ibid., §§ 49-50

98. Ibid.

- ▶ The Venice Commission recommends amending the Media Act so as to permit individual public service media to choose its own news sources, or even set up its own newsroom. There should be no monopoly of news provision by a body with a politically-appointed director.”⁹⁹

5.2. Internal organisation of the PSM

In the 2015 evaluation of the Hungarian Media Act, the Venice Commission recognised that where States fail to secure the pluralistic composition of PSM supervisory bodies and to protect these bodies from the political influences, there is a space for covert intrusion into journalistic freedom. This intrusion is also not always easily discernible because it is not formalised and as such also cannot be remedied through judicial review. In the absence of a common European model for PSM governance, it is up to the State – Hungary in the particular case – to develop the legal framework which would protect the pluralism in the supervising bodies and the independence of PSM.¹⁰⁰ The Venice Commission further indicated that a reform to that end should simplify the structure of bodies governing the PSM sector, reduce the influence of the ruling party in the process of appointment of members of the PSM supervising bodies and PSM executives, and secure a fair representation of all important political, social and relevant professional groups within those bodies.”

5.3. Economic independence of public service media: funding PSM

In reviewing the Frattini law and the potential privatisation of the Italian public broadcasting company RAI in 2005, the Venice Commission tackled the dilemma of choosing between the pure market model of PSM and the public-policy model. The latter is not supposed to be in the business of maximising income: coming under pressure to compete for the revenues with other commercial entities might interfere with its fundamental task of serving the public interest:¹⁰¹

- ▶ The Commission observes that, should the interest in the purchase of RAI shares [in the process of privatisation] be indeed low, the Minister of Economy will retain some control of the Board of Governors. There is also the possibility that the Governors representing the private shareholders will belong to the political parties of the majority. [...]”¹⁰²
- ▶ Methods of funding RAI (setting the level of the licence fee for only a year; possible contracts with public authorities for paid services) are not fully consistent with Recommendation No. R(96) 10 on the Guarantee of the Independence of Public Service Broadcasting, which states in its Appendix that:

99. Ibid., § 90

100. Ibid., §§ 86 and 88

101. CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§ 170-173. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)017-e)

102. Ibid., § 168

- the decision-making power of authorities regarding funding should not be used to exert, directly or indirectly, any influence over the editorial independence and institutional autonomy of the PSB organisation; [...]
 - payment of the contribution or licence fee should be made in a way which guarantees the continuity of the activities of the public service broadcasting organisation and which allows it to engage in long-term planning; and
 - the use of the contribution or licence fee by the public service broadcasting organisation should respect the principle of independence and autonomy.
- ▶ In more general terms, with reference to the privatisation of RAI, the Commission recalls the dilemma between the pure market model and the public-policy model.
 - ▶ The Commission also wishes to refer to the warning which AGCOM¹⁰³ has recently issued with reference to the circumstance that RAI, as a stock company, will be under great pressure to maximise the advertising income, which will interfere with the achievement of the public-policy aims. [...] [The] privatisation does not appear suitable to ensure that RAI will efficiently carry out its public-policy tasks and at the same time efficiently compete with other operators [...] in the area of advertising revenues.
 - ▶ AGCOM has indeed pointed to the solution in force in the UK, where the Public Broadcasting Service is publicly owned and financed by licence fees, while commercial operators, including public ones, are financed through advertising.”¹⁰⁴

5.4. Composition, mandate, and procedures of media national regulatory authorities

In the same opinion on the governance of the Italian PSM, the Venice Commission, citing the Committee of Ministers’ Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector,¹⁰⁵ pointed out that that any role of a political body – like the parliamentary commission in the particular case – might be problematic in terms of preserving editorial independence; the authorities should not exercise *a priori* control over programming.¹⁰⁶ The role of the parliamentary body should be limited to the establishment of guidelines and the solution to certain problems of public opinion and should not be extended in a manner to pose a threat to the editorial autonomy or independence of PSM to recruit or dismiss journalists.¹⁰⁷

103. Italian media regulator “L’Autorità per le Garanzie nelle Comunicazioni”.

104. Ibid, §§ 170-173

105. Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322

106. CDL-AD(2005)017, Opinion on the compatibility of the laws “Gasparri” and “Frattini” of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media, §§ 148 and 150. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2005\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)017-e)

107. Ibid, § 153

The Commission also recalled that this particular kind of parliamentary involvement in the boards of PSM is present not only in Italy but also in other European countries.¹⁰⁸

In the case of Hungary, where the media legislation stipulated that the members of the Media Council, which also acts as the supervisory body for the Hungarian PSM, must receive the support of a qualified majority in Parliament to be elected, the Venice Commission noted that in normal circumstances this would result in cross-party support for the candidates, but it becomes a threat to pluralism and political detachment of the regulatory body in cases when a political group has that supermajority.¹⁰⁹ Hence, the Commission recommended changing the system and introducing a transparent and fair procedure, so that the composition of the supervisory body would reflect political diversity, ensure that all major political parties and social groups have fair representation there and prevent strong ties with the Government.¹¹⁰

108. Ibid, § 152

109. CDL-AD(2015)015, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, § 64. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)015-e)

110. Ibid, § 70