II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 October 2003

on the measures implemented by Italy for RAI SpA

(notified under document number C(2003) 3528)

(Only the Italian text is authentic)

(Text with EEA relevance)

(2004/339/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By way of a complaint lodged with it on 17 June 1996 by RTI SpA (Reti Televisive Italiane), an undertaking controlling three Italian national television channels and belonging to the Mediaset group [2], the Commission was informed that Italy had implemented a number of measures in favour of RAI-Radiotelevisione Italiana SpA (the national public broadcaster, hereinafter RAI). The complaint focused on the licence fee granted to RAI and on a set of measures adopted by the Italian Government in the first half of the 1990s in favour of RAI.

(2) The Commission requested information from the Italian authorities by letters of 15 July and 4 September 1996, to which the Italian authorities replied by letters of 30 August and 4 November 1996 respectively.

(3) On 23 May 1997 Mediaset took over its complaint as its own and submitted further documents.

(4) Another letter requesting information was sent by the Commission to the Italian authorities on 1 July 1998. The Italian authorities provided some of the information requested at a meeting on 31 July and by letter of 7 August 1998. Meetings with the complainant were held on several occasions.

(5) On 19 October 1998 Mediaset lodged an additional complaint with the Commission concerning the same aid measures mentioned in the original complaint. Mediaset presented further documents by letter of 8 January 1999 and had a meeting at the Commission on 15 February 1999.

(6) On 3 February 1999 the Commission enjoined Italy to provide all the information necessary to assess whether

[1] OJ C 351, 4.12.1999, p. 20.

[2] In the present decision the Commission will refer to the complainant as 'Mediaset' since it is Mediaset SpA that has participated in the Commission's State aid investigation and since it has made the complaint originally lodged by RTI SpA its own.

the measures had to be considered as existing or new aid (hereinafter the injunction). This decision was communicated to Italy by letter of 26 February. Italy provided some of the information requested and submitted observations by letter of 26 March. The Commission requested additional information by letter of 28 April, to which the Italian authorities replied by letter of 16 June.

(7) Mediaset wrote to the Commission on 17 May 1999 on the question of whether the measures had to be considered as existing or new aid and had a meeting at the Commission on 18 May.

(8) By letter dated 27 September 1999, the Commission informed Italy that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of some of the ad hoc measures indicated by Mediaset as State aid (hereinafter the decision to initiate the procedure).

(9) The decision to initiate the procedure was published in the *Official Journal of the European Communities* ([3]). The Commission invited interested parties to submit their comments on the measures.

(10) The Commission received comments from Italy on 2 December 1999.

(11) The Commission received comments from interested parties as follows:

— by letter dated 2 December 1999, comments from RAI (forwarded to Italy by letter of 6 December 1999),

— by letter dated 19 January 2000, comments from Federazione Radio Televisioni (FRT),

— by letter dated 1 February 2000, comments from Association of Commercial Televisions (ACT),

— by letter dated 28 January 2000, comments from Mediaset.

(12) Comments from interested parties were forwarded to Italy by letters of 6 December 1999 and 23 February 2000. Italy was thus given the opportunity to react; its comments were received by letter dated 5 May 2000.

(13) Late comments were received by letter dated 12 June 2000 from Codacons (Coordination group for associations for the protection of the environment and of the rights of users and consumers).

(14) Meetings with RAI were held at the Commission on 26 January and 4 December 2000.

(15) A meeting with the Italian authorities was held at the Commission on 5 June 2000.

(16) Meetings with Mediaset were held at the Commission on 20 March 2000, 20 June 2000, 2 May 2001, 20 June 2001 and 25 October 2001 and letters from the complainant dated 8 November 2000 and 25 May 2001 were received. At the meeting on 20 June 2001 Mediaset submitted a study on the restructuring of RAI prepared by Charles River Associates. Mediaset also wrote to the Commission on 12 June 2002 and 20 April 2003.

(17) With the entry into force of the Amsterdam Treaty an interpretative protocol on the system of public broadcasting was annexed to the EC Treaty (hereinafter the Amsterdam Protocol).

(18) The Commission communication on the application of state aid rules to public service broadcasting ([4]) (hereinafter the communication) sets out the principles to be followed by the Commission in applying State aid rules to State funding of public service broadcasting.

(19) In the light of the communication, the Commission requested new information from Italy by letter dated 13 September 2002. A meeting with the Italian authorities was held at the Commission on 8 December 2002 and some of the information requested was received on 3 and 11 December 2002.

(20) The Commission also wrote to the Italian authorities on 14 November 2002 requesting a number of documents. The Italian authorities replied on 5 May 2003.

([3]) See footnote 1.

([4]) OJ C 320, 15.11.2001, p. 5.

2. NATIONAL BACKGROUND

2.1. Historical development of the legal basis for public service broadcasting in Italy

(21) After 1910 the Italian State reserved for itself the exploitation of radiotelegraphic services and the right to grant concessions and licences to private or public operators. In 1924 the public radio service was entrusted on the basis of an exclusive licence to URI, which subsequently became EIAR and then RAI. From 1927 the law justified the State monopoly of broadcasting services by reference to their public utility and their educational, artistic and cultural objectives that are in the interests of everyone.

(22) In 1948 the Republican Constitution entered into force and public service broadcasting was given a constitutional foundation in the principle of freedom of speech and in the right of individuals to be informed so as to be able to participate in the democratic life of the country. Radio and television broadcasting continued to be the prerogative of the State on the basis of Article 43 of the Constitution, which refers to essential public services of overriding general interest. RAI was the sole concessionaire by virtue of a series of conventions.

(23) Law No 103 of 14 April 1975 (Nuove norme in materia di diffusione radiofonica e televisiva, hereinafter Law 103/75) codified this situation. It stressed the link between public service broadcasting, Article 43 of the Constitution, the concept of essential public service of overriding general interest and the State monopoly in this sector. Article 15 of Law 103/75, which confirms the substance of Article 7 of Presidential Decree No 180 of 26 January 1952 (hereinafter Decree 180/1952), provided for RAI to be financed through the licence fee, advertising and other revenues established pursuant to the Law.

(24) The broadcasting market changed gradually. During the second half of the 1970s private operators started broadcasting, first at local level and then at national level.

(25) The Constitutional Court endorsed this development. It is not disputed, and it has been stressed by Mediaset itself, that Judgment No 202/1976 was the first judgment by the Constitutional Court that contributed substantially to opening up the Italian broadcasting market to competition. In the case at issue, the Court held that the monopoly of local television and radio broadcasting was unconstitutional, while it confirmed that the State monopoly of national broadcasting was legitimate since this was an essential public service of overriding general interest. Following Judgment No 202/1976 local broadcasters appeared throughout the country. After a number of years, thanks to the use of videotapes or radio connections, they would broadcast the same programme at the same time over a wide area (so-called syndication). The legality of the national broadcasting monopoly was again confirmed on a temporary basis (i.e. until the adoption of an appropriate antitrust law for the broadcasting sector) by the Constitutional Court in 1981 with Judgment No 148/1981, relying on the argument that national broadcasting constituted an essential public service of overriding general interest. During the 1980s the national monopoly basically existed alongside private operators that broadcast at national level through the syndication system.

(26) Law No 223 of 6 August 1990 (Disciplina del sistema radiotelevisivo pubblico e privato, hereinafter Law 223/90), which is the first general law regulating public and private broadcasting, took note of and codified the situation that developed in the broadcasting market during the 1980s. It provided for the possibility for private concessionaires too to engage in broadcasting at national level (and not only at local level), in addition to the public service concessionaire.

(27) Other important provisions of the Law relate to advertising. Article 8(6) established the limit on advertising for RAI and for private concessionaires: advertising on RAI may not exceed 4 % of its weekly broadcasting time and 12 % of any hour, while national private concessionaires cannot exceed 15 % of daily broadcasting time and 18 % of any hour. Article 8(16) imposed a ceiling on RAI's advertising revenues that was removed by Decree-Law 408/1992 with effect from 1 January 1994 ([5]).

2.2. Description of RAI

(28) RAI was originally set up in 1924 as URI (Unione Radiofonica Italiana) and later transformed into EIAR in 1927, RAI (Radio Audizioni Italia) in 1944 and finally, RAI-Radiotelevisione Italiana SpA in 1954. It began its

([5]) Garante per la radiodiffusione e l'editoria, 1995 report, p. 140.

television broadcasting activities on 3 January 1954, with its channel RAI 1, on the basis of Decree 180/1952, which entrusted RAI with broadcasting. Since 1957 its broadcasting signal has covered the whole of Italy. In 1961 it launched a second channel, RAI 2, followed in 1979 by a regional channel, RAI 3. Since 1934 radio broadcasting has been based on a subdivision into three channels: the Primo, Secondo and Terzo programma.

(29) The object of the company, as described in RAI's by-laws, consists in broadcasting, distributing and transferring radio or television programmes and signals over the air, by satellite or by any other means, in establishing, managing, developing and using equipment and other means for the above activity, in producing, acquiring and marketing works, programmes and services capable of constituting the object of the above activity and in carrying out any other operations useful to the conduct of the above activity.

(30) RAI is a public limited company of national importance within the meaning of Article 2461 of the Italian Civil Code. In the period covered by the present decision, its share capital is held entirely by the public sector ([6]). Even though RAI is a public limited company, it is subject to specific regulations. For instance, it is subject to supervision by and directives of the Italian Parliament by way of a dedicated parliamentary commission and, since the entry into force of Law No 203 of 25 June 1993, RAI's board of directors has been appointed by the Presidents of the two chambers of Parliament.

(31) The Convention between the State and RAI of 1 August 1988 (approved by DPR No 367 of that same date and hereinafter the 1988 Convention) lays down that RAI is to operate at least three radio channels and three television channels. One of the television channels may also be used for regional or subregional broadcasting. The Convention between the State and RAI of 1994 (approved by the DPR of 28 March 1994 and hereinafter the 1994 Convention) contains similar provisions, with RAI being required to operate three radio channels and three television channels as well as to devise the necessary means for linking production and distribution. One of the television channels may also be used for regional or subregional broadcasting.

(32) From 1992 to 1995 RAI was entrusted with the provision of public service broadcasting. It also carried out commercial activities not falling within the definition of public service, essentially through separate legal entities, the most important of which were Sipra, Nuova Fonit, Nuova Eri and Sacis.

([6]) The Treasury Ministry currently holds 99,45 % of the share capital.

3. DETAILED DESCRIPTION OF THE MEASURES

3.1. Purpose of the present decision

(33) In its injunction, the Commission mentioned different measures that, according to Mediaset, were contrary to Article 87 of the Treaty, namely:

(a) the licence fee;

(b) the tax exemption on the revaluation of RAI assets;

(c) the conversion of the 1992 and 1993 concession fee into a Cassa depositi e prestiti (hereinafter CDDPP) loan in 1995;

(d) the capital injection for RAI in 1992;

(e) the reduction in the concession fee paid by RAI to the State (from ITL 154 billion to ITL 40 billion);

(f) the factoring operation by Cofiri Factor in 1990;

(g) the Cofiri loan of 1997.

(34) The information received following the injunction led the Commission to the conclusion that the measure at (a) constituted existing aid and that the measures at (e), (f), and (g) did not constitute State aid, while the measures at (b), (c) and (d) are new and may qualify for State aid. Accordingly, with the decision to initiate the procedure, the Commission launched a formal investigation procedure under Article 88(2) in respect of the tax exemption on the revaluation of RAI assets, the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995, and the capital injection for RAI in 1992 ([7]) (hereinafter the ad hoc measures). At the same time, in its decision, the Commission explained in detail why the measures at (e), (f), and (g) did not constitute State aid. The conclusions concerning the measures at (e), (f) and (g) were not challenged before the Court. As the licence fee could rank as existing aid, it was explicitly excluded from the scope of the decision to initiate the procedure.

([7]) Point 74 of the decision to initiate the procedure.

(35) The ad hoc measures covered by the Commission's formal investigation were adopted over the period 1992 to 1995. The present decision thus focuses on the financial relations between RAI and the Italian State during that period.

(36) Like the decision to initiate the procedure, the present decision does not deal with the legal classification of the licence fee or its compatibility with the Treaty. Since the licence fee is considered on a preliminary basis as existing aid, these matters are being dealt with in a separate procedure under Article 17 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([8]). However, in order to have a complete picture of the financial relations between the Italian State and RAI over the period covered by the present investigation, the Commission has to take into consideration not only the ad hoc measures but also the financial support granted to RAI by means of the licence fee mechanism. Therefore, it will refer here to the licence fee only to the extent necessary to clarify its reasoning regarding the ad hoc measures.

(37) In addition to the statutory instruments already mentioned, during the period covered by the present investigation relations between the Italian State and RAI were governed by the 1988 Convention, which remained in force until August 1994, and by the 1994 Convention, which entered into force on 1 September 1994.

3.1.1. *Licence fee*

(38) The licence fee is the most important funding mechanism for RAI. The law clearly links the licence fee to the assignment of the public broadcasting service to the concessionaire, RAI. The licence has its origins in RDL No 246 of 1938, converted into Law No 880 of 1938, which introduced the obligation for all owners of an appliance capable of receiving the signal broadcast to pay to the State a licence fee the proceeds from which were allocated by the State to the entity entrusted with the public broadcasting service.

([8]) OJ L 83, 27.3.1999, p. 1.

3.1.2. *Tax exemption on the revaluation of RAI assets*

(39) Decree Law No 558 of 30 December 1993 (Disposizioni urgenti per il risanamento e il riordino della RAI — SpA and hereinafter DL 558/1993) laid down a series of measures for reforming RAI. Its provisions were reproduced in later decrees and eventually converted into Law No 650/1996.

(40) According to Articles 2, 3 and 5 of DL 558/1993, RAI is to revalue the assets entered in its 1993 balance sheet. Any possible positive difference between the revalued assets and those shown in the last balance sheet can be placed in a special reserve. Such operations are exempt from tax and duties.

(41) By revaluing its assets, RAI created a revaluation reserve amounting to ITL 677 billion. It used this reserve to cover accounting losses in 1993.

3.1.3. *Conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995*

(42) As noted in the decision to initiate the procedure, the concession fee is an amount paid by all television broadcasters to the State for using a certain transmission frequency. The 1988 Convention governed the concession fee payable by RAI in 1992 and 1993. The concession fee payable by RAI in 1992 and 1993, which was determined according to Article 24 of DPR 367/1988, totalled around ITL 154 billion per year ([9]). The amount had to be paid within 30 days of RAI's annual budget being approved.

(43) Article 4 of DL 558/1993 stated that the State's credit for the 1992 and 1993 concession fee would be sold to CDDPP, which would then transform the liability into equity if certain conditions were met. Subsequently, Article 4 of DL 134/1995 provided for the possibility of converting the CDDPP credit into a loan. Accordingly, Article 4 of DL 252/1995, which was converted into

([9]) ITL 154 283 billion in 1992 and ITL 154 245 billion in 1993. However, RAI paid ITL 1 560 billion for 1992, leaving an amount outstanding of ITL 152 723 billion.

Law 650/1996, provided for the actual assignment of the State credit for the 1992 and 1993 concession fee to CDDPP and for the transformation of these credits into a loan for RAI ([10]).

(44) On 6 July 1995 CDDPP granted RAI a 10-year loan at a fixed interest rate of 9 %. On 31 December 1997 RAI repaid the entire loan thanks to another loan granted by Cofiri. In the decision to initiate the procedure, the Commission noted that the latter loan complies with market conditions.

3.1.4. *1992 capital injection for RAI*

(45) According to Article 1 of DL No 2 of 2 January 1992, converted into Law No 332 of 1 July 1992, the State granted ITL 100 billion to IRI, which was to transfer the money to RAI. In the parliamentary acts the grant is described as compensation for the insufficient increase in the licence fee for 1992 relative to inflation. On 20 February 1992 IRI transferred the ITL 100 billion to RAI ([11]).

4. COMMENTS FROM INTERESTED PARTIES

(46) The comments submitted by RAI are fundamentally the same as the arguments developed by the Italian authorities and are summarised in recitals 55 to 61. For brevity's sake, they will not be examined in this section.

(47) The arguments of the complainant may be summed up as follows: Mediaset maintains that the tax exemption on RAI's asset revaluation resulted in an advantage for RAI of some ITL 450,6 billion. Moreover, the reserve created following the revaluation was also used to reconstitute RAI's share capital, which should have been subject to a registration tax of 1 %. The exemption from registration tax conferred an advantage of ITL 1,2 billion.

(48) Mediaset is of the opinion that the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995 constitutes an advantage for RAI in so far as this operation made it possible to reduce the sums that RAI should have paid to the State as the concession fee for 1992 and 1993, including interest.

(49) Mediaset contends that, while the debt for the concession fee was outstanding (i.e. up to 1995), RAI should have paid interest at the statutory discount rate (tasso ufficiale di sconto) plus a penalty of 2,5 %, rising to 5 % after the first month ([12]). When the amounts due for the concession fee were converted into a loan, this penalty rate was not applied and RAI obtained an advantage. Moreover, RAI obtained other advantages because the loan itself carried an interest rate (9 %) that was lower than the market rate (12 %) ([13]).

(50) As for the capital injection, Mediaset claims that this is not consistent with the market economy investor principle and thus constitutes State aid in favour of RAI.

(51) Mediaset further argues that there should be supervision at national level of the performance of the public service task entrusted to RAI. However, in the absence of an effective national body to carry out this role, it falls to the Commission to exercise that supervision ([14]). Mediaset subsequently added that the communication would preclude a finding by the Commission that the public funding of RAI can be considered compatible with the common market simply because there are no indications that the public service is effectively supervised ([15]).

(52) Since its first complaint was lodged on 17 June 1996, Mediaset has argued that RAI is engaged in 'dumping' on the advertising market, with devastating effects for the financing of private broadcasters. In its subsequent complaint of 19 October 1998, Mediaset took the matter further, arguing that RAI was able to offer airtime at below cost in a market that is of secondary importance to it (advertising accounts for only 33 % of RAI's revenues) by financing the cost of the operation with State resources with a view to undermining Mediaset, whose only income is from advertising. This happened in 1993 and 1994 once the ceiling on RAI's advertising revenue was removed ([16]). The number of seconds of advertising broadcast by RAI increased dramatically from 2 823 000 in 1992 to 3 845 000 in 1994.

(53) The Federazione Radio Televisioni (FRT), the association of Italian private broadcasters, observed that RAI operates as a private broadcaster, seeking an audience

([10]) Letter from the Italian authorities of 16 June 1999.

([11]) As a matter of fact, this measure is more in the nature of a grant than a capital injection. Indeed, there was no corresponding increase in capital. However, since this measure has been described as a 'capital injection' from the moment the procedure was initiated, the Commission will retain the wording used.

([12]) Mediaset letter of 28 January 2000.

([13]) Mediaset letter of 8 January 1999.

([14]) Mediaset letter of 12 June 2002.

([15]) Mediaset letter of 20 April 2003.

([16]) Paragraph 10.4.1 of the letter of 19 October 1998.

and advertising revenues. The State aid allows RAI to employ anchormen and acquire interesting programmes, conferring on RAI advantages in terms of audiences and advertising revenues. RAI's behaviour on the market is that of a typical commercial operator seeking to increase its audience in order to attract advertising. Major sporting events too are used to boost already sizable advertising revenues. Other commercial programmes are bought with State resources if they are capable of guaranteeing a large audience and advertising revenues. State aid to RAI has the effect of preventing development of the local broadcasting sector. Regardless of the Amsterdam Protocol, which allows Member States to define as a public service programmes that are intrinsically commercial and to fund them with State resources, commercial television and public television should be clearly distinguished and State financing allowed only for services that are not provided by private broadcasters and are clearly described as having social utility.

(54) According to the Association of Commercial Televisions in Europe (ACT), these measures are undoubtedly capable of adversely affecting competition because some EU broadcasters are already active in Italy. All other broadcasters are potential competitors of RAI. The public broadcasters should be allowed to broadcast only programmes that the market does not provide. Even though, in accordance with the Amsterdam Protocol, the Commission cannot introduce a European measure defining the content and organisation of public service broadcasting, it should still endeavour to demarcate the concept of public service in this sector in line with the case-law of the European Court of Justice.

5. COMMENTS FROM ITALY

(55) The Italian authorities have asserted that the public service task entrusted to RAI extends to all of its programming. This situation stems from the development over time of broadcasting regulations in Italy and from the various provisions in force defining public service broadcasting.

(56) The Italian authorities have argued that the tax exemption on the revaluation of RAI's assets does not constitute State aid for the following reasons:

(a) this kind of tax exemption is a measure that has also been used in connection with the conversion of other public bodies into limited companies (such as IRI, ENEL, ENI and INA) and with certain cases of privatisation in the banking sector. It is not therefore a special measure;

(b) there is no real financial advantage for RAI, simply a recalculation of the value of assets already at its disposal;

(c) private law prohibits asset revaluation. The measure was thus compulsory for RAI, which had no reason to carry out a revaluation. Any possible advantage would therefore not have been intended;

(d) in the past, some laws have provided for optional revaluation of the assets of all undertakings and laid down specific tax treatment: either tax exemption or a substitute duty ([17]).

(e) the tax exemption on revaluation is linked to the restructuring of RAI provided for by DL 558/93.

(57) In the opinion of the Italian authorities, the conversion of the 1992 and 1993 concession fee into a CDDPP loan does not constitute State aid either. The 1995 loan to RAI was indeed granted at market conditions. Bearing in mind that in 1998 RAI obtained a EUR 150 million loan from Comit and Citibank at Libor plus 25 basis points, an interest rate of Ribor plus 60 basis points would have been appropriate for RAI in 1995 since, at that time, RAI was a healthy undertaking. This rate is very close to the rate applied by CDDPP ([18]).

(58) In any case, even if the conversion meant that RAI paid less than what was originally due for the 1992 and 1993 concession fee, a possible reduction would be justified by the disparity between the fee paid by RAI and that paid by private operators in previous years.

(59) According to the Italian authorities, the 1992 capital injection should be considered as part of the licence fee,

([17]) Letter from the Italian authorities of 12 December 2002.

([18]) According to the Italian authorities, a comparison between Ribor + 60 and the interest rate applied by CDDPP shows that RAI saved ITL 5 billion thanks to the CDDPP loan.

because the latter was not adjusted for inflation, and as a measure aimed at covering the cost of the public service task entrusted to RAI. The Italian authorities have also argued that the capital injection complies with the market economy investor principle because after 1993 RAI's economic situation began to improve ([19]). Accordingly, the capital injection is not to be regarded as State aid.

(60) In their letter of 2 December 1999 the Italian authorities contested the fact that RAI advertising prices were higher than those of competitors. RAI has limited advertising time compared with private broadcasters and so has to apply higher prices in order to survive in this competitive market. According to a table annexed to that letter, RAI's average advertising prices in 1993 were consistently and significantly higher than those of Mediaset (30 seconds of advertising at prime times, both day and night).

(61) The Italian authorities and RAI have also claimed that the measures under investigation do not constitute State aid because they are not capable of affecting trade between Member States and compensate RAI for the net additional cost of performing the general service task entrusted to it, i.e. public service broadcasting.

6. ASSESSMENT OF THE AID

6.1. Existence of aid under Article 87(1) of the Treaty

(62) For a State measure to constitute State aid within the meaning of Article 87(1), all the following conditions must be met:

(a) it must be granted by a Member State or through State resources in any form whatsoever;

(b) it must favour certain undertakings or the production of certain goods (selective advantage), thereby distorting or threatening to distort competition;

(c) it must affect trade between Member States.

([19]) The return on equity (ROE) rose from 0,0 in 1992 to 15,7 in 1997.

(63) For each measure, the Commission will examine separately whether the conditions at (a) and (b) are met. It will then consider whether the measures that meet those two conditions also meet the condition at (c). Then it will examine whether the recent case-law of the Court of Justice of the European Community ([20]) affects this analysis.

6.2. State resources, selective advantage and distortion of competition

6.2.1. *Tax exemption on revaluation of RAI assets*

(64) At the time DL 558/1993 was adopted, asset revaluation normally involved the payment of income taxes if the operation resulted in an increase in value ([21]). Accordingly, the tax exemption on the revaluation of RAI assets, while not involving a direct cash outflow, does directly affect the public budget. The State, in fact, forgoes tax revenues to which it has a statutory right and which it would normally have claimed. The Court of Justice has consistently held that: 'A measure whereby the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the exemption applies in a more favourable financial position than other taxpayers constitutes State aid within the meaning of Article 92(1) of the Treaty' ([22]). This measure is, therefore, granted through the use of State resources.

(65) This measure is capable of conferring an economic advantage on RAI as it eliminates a cost item from the undertaking's profit and loss account. Any other undertaking would have paid the normal tax rate on the revaluation of its assets and would thus have incurred a cash outflow. By virtue of DL 558/1993, RAI has been able to avoid paying such taxes, thereby benefiting directly from a financial and economic advantage not available to any other undertaking in a comparable situation. Given that competition is distorted whenever aid reinforces the competitive position of the beneficiary

([20]) Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans*, not yet published.

([21]) See Article 54(1)(c) of DPR No 917 of 22 December 1986: 'Approvazione del testo unico delle imposte sui redditi'. See also Leo, Monacchi and Schiavo, 'Le imposte sui redditi nel testo unico', Giuffré 1990, p. 551.

([22]) Case C-6/97 *Italian Republic* v *Commission* [1999] ECR I-2981, paragraph 16.

undertaking vis-à-vis its competitors, this advantage is capable of distorting competition between RAI and other undertakings ([23]).

(66) The arguments adduced by the Italian State and RAI as justification for the revaluation are essentially the following:

(a) this kind of tax exemption is a measure that has also been used in connection with the conversion of other public bodies into SpAs and with certain privatisation cases in the banking sector. It is not, therefore, a special measure;

(b) there is no real financial advantage for RAI, simply a recalculation of the value of assets already at its disposal;

(c) private law prohibits asset revaluation. The measure was thus compulsory for RAI, which had no reason to carry out a revaluation. Any possible advantage would therefore not have been intended;

(d) in the past, some laws enacted before DL 558/1993 provided for optional revaluation of the assets of all undertakings and laid down specific tax treatment, viz. either tax exemption or a substitute duty ([24]);

(e) the tax exemption on revaluation is linked to the restructuring of RAI provided for by DL 558/93.

(67) The argument at (a) is not pertinent in so far as the fact that a tax exemption might have been applied in other cases (which, moreover, have no similarity with the situation of RAI) does not change the selective nature of the measure at issue, unless it is demonstrated that the measure accords with the general scheme or nature of the system. The Italian authorities have not provided any such evidence.

(68) The argument at (b) cannot be accepted because the advantage lies not in the fact that RAI obtains new assets or in the fact that assets are transferred to a different legal entity, but simply in the fact that the same company (RAI) does not pay taxes that would have been normally applicable in respect of such an operation. RAI's asset revaluation improves its balance sheet and its overall economic situation. Moreover, RAI does not pay taxes that would normally be applicable in respect of revaluation and so a cost item that otherwise would have been present is eliminated from its balance sheet.

(69) Similarly, the argument at (c) cannot be accepted either. According to the case law, the concept of State aid is defined on the basis of the effects of the measure and not on the basis of other characteristics such as the objectives, the scope or the compulsory or voluntary nature of the measure. The fact that the aid is compulsory does not alter the fact that RAI receives an advantage that it would not have received under normal market conditions. In so far as RAI received an advantage from specific tax treatment provided for by the law, the fact that revaluation is not permitted under private law is likewise irrelevant.

(70) The argument at (d) confirms the Commission's analysis of this measure. Before DL 558/1993, other laws provided for favourable treatment for all undertakings in case of asset revaluation. Instead of the normal tax rules being applied, they provided for total exemption or a substitute duty. In the present case, this treatment has been offered only to RAI. Therefore, this measure is selective.

(71) The argument at (e) relates to the compatibility of the measure and does not need to be dealt with in this section.

(72) In conclusion, the tax exemption on the revaluation of RAI assets is granted through State resources, appears to confer an advantage on RAI and is capable of distorting competition.

6.2.2. *Conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995*

(73) As mentioned above, the Commission concluded in the decision to initiate the procedure that the concession fee

([23]) See Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11, and Opinion of the Advocate General, p. 2698; see also Case 259/85 *Italian Republic* v *Commission* [1987] ECR 4393, paragraph 24. See also opinion of the Advocate General in Case C-280/00 *Altmark*, not yet published in ECR, paragraph 103, where it is noted that this requirement is very easy to fulfil since it can be assumed that any State aid distorts or threatens to distort competition.

([24]) Letter from the Italian authorities of 12 December 2002.

is a payment made by all broadcasting companies to the State for the right to use a certain broadcasting frequency ([25]).

(74) As indicated by the Italian authorities, URI and then RAI had paid a concession fee since 1924 ([26]). The amount payable by RAI for the concession fee totalled ITL 152 703 million in 1992 and ITL 154 245 million in 1993. On the other hand, private broadcasters did not pay any concession fee before Law 223/90. They have since had to pay a fee for a national concession, but the amount differs from that payable by RAI. In the same period the annual fee for a private operator amounted to around ITL 0,5 billion per frequency.

(75) In the decision to initiate the procedure, the Commission concluded that the reduction of the concession fee payable by RAI did not constitute State aid. It observed:

'RAI's concession fee was, at the time the measure was adopted, significantly higher than the fee paid by its competitors (RAI paid ITL 140 billion per year for its concession on three frequencies ([27]), while other broadcasters were charged some ITL 0,5 billion per frequency). […] The reduction in its concession fee has not conferred any economic advantage on RAI since, in fact, it has only partially reduced the burden imposed by the State on the undertaking. […] Therefore, the reduction in the concession fee from ITL 154 billion to ITL 40 billion per year, although it alleviates the burden on RAI, does not constitute State aid within the meaning of Article 87 of the Treaty as it did not confer on the beneficiary any economic advantage over its competitors' or any undertaking in comparable circumstances ([28]).

(76) In line with its conclusion above regarding the reduction in the concession fee, the Commission notes that any operation having the effect of reducing the concession fee payable by RAI in 1992 and 1993 under the 1988 Convention does not constitute State aid in so far as the reduction does not exceed what a private operator in a similar situation would have paid as the concession fee.

(77) It is therefore necessary to check whether the conversion of the 1992 and 1993 concession fee had the effect of reducing the amount payable by RAI for the concession fee in those two years and whether this reduction exceeded what a private operator in a similar situation would have paid as the concession fee. First, it has to be checked whether the amount of the CDDPP loan covers the sums payable for the 1992 and 1993 licence fee plus the interest accrued in the period during which the payment remained outstanding. Second, it has to be checked whether and to what extent the interest rate on the CDDPP loan was below the rate that RAI could have obtained on the market.

(78) As to the first element, it should be recalled that on 6 July 1995 the 1992 and 1993 concession fee was converted into a CDDPP loan granted to RAI for 10 years. The loan amounted to ITL 345 810 892 000, equivalent to the credits assigned to CDDPP and to around ITL 39 billion of interest accrued while the debt for the concession fees was outstanding. In the period during which the sums payable for the licence fee remained outstanding the tasso ufficiale di sconto fell from 9 to 7 % before rising again to 9 % ([29]). According to the Commission's calculation, the amount of interest charged to RAI is slightly higher than that resulting from the mere application of the tasso ufficiale di sconto ([30]).

(79) As mentioned in points 47 to 52, Mediaset contends that, while the debt for the concession fee was outstanding (i.e. up to 1995), RAI should have paid,

([25]) See the decision to initiate the procedure.

([26]) Letter from the Italian authorities of 16 June 1999.

([27]) This decision implicitly refers to the three television channels allocated to RAI but the conclusion would be no different if account were taken of the three radio channels also allocated to RAI.

([28]) Paragraphs 21, 23 and 24 of the decision. The Commission also noted that 'this situation might actually be considered as providing State aid to RAI's competitors as the State renounces part of the concession fee and favours these undertakings over RAI, which pays the full amount'.
It is worth recalling that the complainant did not formally contest this analysis or the amounts of the concession fee payable by RAI and by the private broadcasters. The complainant has not even suggested any justification for the disparity between the concession fee for RAI and that for the private broadcasters.

([29]) For the 1992 concession fee the period during which the debt was outstanding ran from 18 July 1993 (date of approval of the 1992 budget plus 30 days) to 6 July 1995 and for the 1993 concession fee from 23 July 1994 (date of approval of the 1993 budget plus 30 days) to 6 July 1995. The tasso ufficiale di sconto was as follows:

6.7.1993 to 9.9.1993	9,00 %,
10.9.1993 to 21.10.1993	8,50 %,
22.10.1993 to 17.2.1994	8,00 %,
18.2.1994 to 11.5.1994	7,50 %,
12.5.1994 to 11.8.1994	7,00 %,
12.8.1994 to 21.2.1995	7,50 %,
22.2.1995 to 28.5.1995	8,25 %,
29.5.1995 to 23.7.1996	9,00 %.

([30]) In the absence of precise information from the Italian authorities about the calculation of interest accrued while the debt for the concession fees was outstanding, the Commission has calculated the amount of interest on the basis of the *tasso ufficiale di sconto*.

according to Article 27 of the 1988 Convention, interest at the tasso ufficiale di sconto plus a penalty of 2,5 %, rising to 5 % after the first month ([31]). As to non-payment of the penalty, it should be stressed that the provision mentioned by the complainant stipulates that, in the event of any delay in paying the concession fee, RAI is to be subject to interest on arrears, to be added to the statutory rate, of not more than 2,5 %, rising to not more than 5 % after the first month. Therefore, nothing in this provision indicates that the maximum amount of the penalty rate has to be applied since this is at the discretion of the administration, which can apply a penalty ranging from zero to 5 %. The complainant has not provided any information in support of the argument that a given rate has to be applied. In these circumstances, the Commission cannot accept the claim of the complainant according to which, on the occasion of the conversion of the sums payable for the 1992 and 1993 concession fee into a loan granted by CDDPP, RAI obtained an advantage because it did not pay the penalty.

(80) Regarding the second element, it should be borne in mind that the interest rate on the CDDPP loan was fixed at 9 %. The loan was for 10 years but RAI repaid the loan after about two and a half years, on 31 December 1997. According to Banca d'Italia, the rate applicable to medium and long-term loans in the relevant period was: 1995: 11,71 %; 1996: 9,10 %; 1997: 8,28 % ([32]).

(81) As indicated in recital 57, following the decision to initiate the procedure, the Italian authorities argued that the CDDPP loan was granted at market conditions. Bearing in mind that in 1998 RAI secured a EUR 150 million loan from Comit and Citibank at Libor plus 25 basis points, an interest rate of Ribor plus 60 basis points would have been appropriate for RAI in 1995. This rate is very close to the rate applied by CDDPP.

(82) In view of the observations in recitals 73 to 81, it does not appear to be established that the conversion of the concession fee entailed a reduction in the sums that RAI should have paid for the concession fee in 1992 and 1993, including interest. Even if there were such a reduction, given the above circumstances, it is clear that the reduction could not be very substantial. In particular, given the disparity between the fee charged to RAI and that charged to private broadcasters, it follows that the reduction (if any) would not be such as to bring the concession fee paid by RAI for 1992 and 1993 below the concession fee payable by a private operator in a comparable situation in the same period ([33]). Since any operation having the effect of reducing the concession fee payable by RAI for 1992 and 1993 does not constitute State aid provided that the reduction does not exceed what a private operator in a similar situation would have paid as the concession fee, the Commission concludes that the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995 did not confer on RAI an advantage relative to any other undertaking in comparable circumstances. Accordingly, this measure does not constitute State aid within the meaning of Article 87(1).

6.2.3. *RAI capital injection of 1992*

(83) In February 1992 IRI transferred to RAI on behalf of the State an amount of ITL 100 billion. There is no doubt that this measure entails the use of State resources (the money comes directly from the State budget) and is imputable to the State (it is provided for by a law of the State).

(84) In order to establish whether the injection of capital by the public authorities confers a selective advantage on the recipient (i.e. an advantage that the undertaking would not have obtained under normal market conditions), the Commission applies the market economy investor principle. By its very nature, this principle applies to investments in commercial activities where the State can have the prospect of achieving a return. The present case involves a company whose main activity is classified by the State itself as a public service and is, therefore, financed by the State. The Commission observes that there appears to be a contradiction in the argument of the Italian authorities according to which this transfer of resources should be regarded as a commercial investment when RAI's main activity is not carried out primarily with a view to making profits and generating a return on capital invested.

(85) In any event, even assuming that the Italian authorities have good reason to put forward this argument, it must be pointed out that, in order to assess whether this

([31]) Mediaset letter of 28 January 2000.

([32]) Given the difference between the market rates and the CDDPP rate, it transpires that RAI enjoyed a reduced rate only for about half of 1995. In the most prudent and unlikely scenario (with RAI securing a loan on the market at 11,71 % for two and a half years, without refinancing it when the market rate falls), RAI would have paid about ITL 27 billion more in interest relative to the CDDPP loan.

([33]) Basically, RAI paid more than ITL 300 billion while, if it had to pay the same fee as a private broadcaster, it would not have paid more than ITL 6 billion.

capital injection complied with the market economy investor principle, it is necessary to analyse the business results obtained by RAI in the period before the measure was adopted and its financial prospects estimated on the basis of the market forecasts, as shown in the table below.

Table 1

RAI consolidated data 1990 to 1995

(ITL billion)

	1990	1991	1992	1993	1994	1995
Revenue of which	2 995	3 390	3 629	3 613	4 334	4 435
— advertising	1 026	1 130	1 247	1 193	1 264	1 321
— licence fee	1 650	1 929	2 044	2 123	2 249	2 361
Operating costs	n. a.	n. a.	n. a.	n. a.	(3 285)	(3 342)
Depreciation	(582)	(642)	(767)	(756)	(902)	(852)
Financial charges	(170)	(149)	(224)	(190)	(121)	(55)
Net profit (loss)	(54)	2	0	(479)	(14)	137

NB: 1992 data and 1993 data are not consolidated.
Source: Decision to initiate the procedure.

(86) The table shows that RAI was not a profitable concern in the years before the so-called capital increase. When the Italian authorities decided to inject the capital, a private investor would not have invested in such a company as he could have found a better return with other undertakings or investments. Nor could such a return be expected on the basis of RAI's business prospects or market forecasts.

(87) Moreover, a private investor would not have injected capital into RAI in the absence of a sound, realistic and reasonable business plan substantiating its expectations of the return on investment. In the present case, the Italian authorities have provided no evidence of the existence of such a plan. The only business plan to which the Italian authorities have referred in relation to RAI is the restructuring plan prepared by RAI's board of directors in 1993 and 1994 pursuant to Article 1 of DL 558/93 and finally approved by the Italian authorities in October 1994. The measure in question cannot, however, be linked to that plan since it was taken at the beginning of 1992. Furthermore, this measure was never presented at this time, either by the Italian authorities or by RAI as an investment from which the State expected any return. The Italian authorities indicated in the relevant parliamentary acts that the injection was necessary to compensate for the insufficient increase in the licence fee in 1992 relative to inflation. RAI itself presented the injection as a grant in accounting terms ([34]) and defined it as a *contributo a fondo perduto* ([35]) (outright grant). It should be noted though that, if this measure were to be regarded as a mere subsidy, the selective advantage condition would in any case be met in so far as only RAI received such a grant that improved its financial situation.

(88) Accordingly, the Commission confirms its preliminary conclusion contained in the decision to initiate the procedure that the injection conferred on RAI a selective advantage that it would not have obtained under normal market conditions and that improved its economic prospects by

([34]) See the 1992 profit and loss account (Contributi e/o sovvenzioni d'esercizio).
([35]) See Note sulla gestione relating to RAI's 1993 balance sheet.

providing it with additional financial resources. Given that competition is distorted whenever aid reinforces the competitive position of the beneficiary undertaking vis-à-vis its competitors, this advantage is such as to distort competition between RAI and other undertakings ([36]).

(89) Finally, the Commission is of the opinion that the Italian authorities' argument according to which the injection must be regarded as a part of the licence fee (because it is aimed at compensating for the reduction in the real value of the licence fee) cannot be followed ([37]). Indeed, the injection is clearly a measure distinct from the licence fee and its legal basis has nothing to do with the legal basis of the fee.

(90) In conclusion, the capital injection for RAI in 1992 was granted through State resources and appears such as to confer an advantage on RAI and to distort competition.

6.3. **Effect on trade between Member States**

6.3.1. *Tax exemption on the revaluation of RAI assets and RAI capital injection of 1992*

(91) 'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid' ([38]), even if the beneficiary undertaking is itself not involved in exporting ([39]). Similarly, where a Member State grants aid to undertakings operating in the service and distributive industries, the recipient undertakings need not themselves carry on their business outside the Member State for the aid to have an effect on Community trade ([40]). In line with this case-law, the communication explains that 'State financing of public service broadcasters can generally be considered to affect trade between Member States. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State.' ([41])

(92) In the present case, RAI is itself active on international markets. Indeed, through the European Broadcasting Union it exchanges television programmes and participates in the Eurovision system ([42]). Furthermore, it is in direct competition with commercial broadcasters that are active on the international broadcasting market and have an international ownership structure ([43]).

(93) RAI presents itself as an important international operator active in a competitive international broadcasting market ([44]).

(94) Therefore, the Commission concludes that the measures in question are such as to affect trade between Member States within the meaning of Article 87(1).

([36]) Case 730/79 *Philip Morris* [1980] ECR 2671, paragraph 11, and Opinion of the Advocate-General, p. 2698; see also Case 259/85 [1987] ECR 4393, paragraph 24. See also the Opinion of the Advocate-General in Case C-280/00 *Altmark*, not yet published (footnote 20), point 103, where the Advocate-General notes that this requirement is very easy to fulfil since it can be assumed that any State aid distorts or threatens to distort competition. It goes without saying that this conclusion is even more true if the measure in question is considered not as a capital injection but as a mere State subsidy aimed at covering RAI's financial needs (as would seem to be the case from RAI's accounts).

([37]) In the decision to initiate the procedure, the Commission calculated that, in real terms, between 1991 and 1992 RAI lost ITL 25 billion because of the failure to adjust the amount of the licence fee in line with inflation. RAI noted that the licence fee was not adjusted in 1993 either, while the inflation rate was 4,2 %. It argues that in 1993 it lost ITL 90 billion because the licence fee was not updated. However, as explained below, the question is not whether the real value of the licence fee was restored but whether the public aid granted to RAI in the period when the measures under examination were adopted exceeded the net cost of the general service task entrusted to RAI in the same period.

([38]) See *Philip Morris* (footnote 23; paragraph 11) and Case 259/85 (footnote 23; paragraph 11).

([39]) Case C-75/97 *Maribel bis/ter* [1999] ECR I-3671.

([40]) Case C-310/99 *Italy* v *Commission*, not yet reported.

([41]) See the communication, op. cit., paragraph 18.

([42]) See Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6 and Others* v *Commission*, not yet published.

([43]) For a more detailed discussion of the effect on trade between Member States, see the decision to initiate the procedure, points 43 to 57.

([44]) See, for instance, presentation of the report by the board of directors on the 1992 budget: 'la fortissima concorrenza sul mercato nazionale e su quelli internazionali …' and the reference framework (general guidelines and objectives) in the board of directors' report: 'nel contesto di forte competizione nazionale e sovranazionale che caratterizza il comparto in cui opera la RAI…'; presentation of the report by the board of directors on the 1994 budget: 'si é ampliata e arricchita nel 1994 la presenza internazionale della RAI, su molteplici fronti …'; introduction to the report by the board of directors on the 1995 budget 'riportare l'azienda ad un ruolo di primo piano sui mercati internazionali'.

6.4. **Real advantage according to the Altmark ruling**

6.4.1. *Tax exemption on the revaluation of RAI assets and RAI capital injection of 1992*

(95) As indicated below, RAI is an undertaking entrusted with the provision of a service of general economic interest (SGEI), namely public service broadcasting. Italy has argued that the measures under investigation compensate RAI for the net cost incurred in discharging the general service task entrusted to it. State measures compensating for the net additional costs of an SGEI do not qualify as State aid within the meaning of Article 87(1) if the compensation is determined in such a way that a real advantage cannot be conferred on the undertaking. In Altmark ([45]) the Court of Justice has indicated the conditions that have to be satisfied in order to escape such classification. These conditions are:

— first, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined;

— second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings;

— fhird, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

— fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate means of production so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(96) '… (A) State measure which does not comply with one or more of those conditions must be regarded as State aid within the meaning (of Article 87(1))' ([46]).

(97) Leaving aside for a moment the first and the third condition, the Commission notes that in the present case it does not result that the parameters on the basis of which the financial support granted through these measures (i.e. the possible compensation) is calculated in advance in an objective and transparent manner so as to avoid conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Moreover, RAI has not been chosen as the public service broadcasting provider on a basis of a public procurement procedure and it does not appear that the level of compensation needed is determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the appropriate means of production so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(98) Since all the conditions of Article 87(1) are met and since two of the conditions set out by the Court in Altmark are not, the Commission concludes that the tax exemption on the revaluation of RAI assets and the so-called RAI capital injection of 1992 constitute State aid within the meaning of Article 87(1) ([47]).

([45]) Case C-280/00 *Altmark Trans* (not yet published).

([46]) Op. cit., paragraph 94.

([47]) In the best-case scenario, the measures in question may be of the same kind as those mentioned by the Court in paragraph 91 of the Altmark ruling: 'Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty'.

7. COMPATIBILITY OF THE AID UNDER ARTICLE 86(2) OF THE TREATY

(99) The Court has consistently held that Article 86 may provide for a derogation from the ban on State aid for undertakings entrusted with an SGEI. It has been implicitly confirmed in Altmark that State aid designed to compensate for the costs incurred by an undertaking in providing an SGEI can be found to be compatible with the common market if it satisfies the conditions of Article 86 ([48]). The Court has made it clear that, in order for a measure to benefit from such a derogation, all the conditions of definition, entrustment and proportionality need to be fulfilled. The Commission considers that, where these principles are fulfilled, the development of trade is not affected to an extent contrary to the Community interest. The way these principles apply in the broadcasting sector is explained in the communication.

(100) Accordingly, the Commission has to assess whether or not ([49]):

— public service broadcasting is clearly defined as a service of general economic interest (public service) by the Member State (definition),

— RAI is officially entrusted by the Italian authorities with the provision of that service (entrustment),

— the State funding does not exceed the net cost of the public service, also taking into account other direct or indirect revenues derived from the public service (proportionality).

(101) In carrying out its analysis, the Commission has also to take into account the Amsterdam Protocol, according to which the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. More specifically, Member States have 'the competence to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'

7.1. Definition and entrustment

(102) Definition of the public service mandate falls within the competence of the Member States. Given the specific nature of the broadcasting sector, Member States may provide for a wide definition, and the role of the Commission is limited to checking for manifest error ([50]).

(103) As has already been noted, broadcasting was, from the beginning of the 20th century, considered to be a service of general interest and thus reserved to the State. The State monopoly of broadcasting services was justified in the light of their public utility and their educational, artistic and cultural objectives that are of interest to everyone. With the entry into force of the Republican Constitution, public service broadcasting was seen as an activity directly linked to fundamental rights and freedoms and thus reserved to the State on the basis of Article 43 of the Constitution, which refers to essential public services of overriding general interest. RAI was the sole concessionaire. In line with the communication and in the light of these historical legislative elements, the Commission accepts the Italian authorities' claim that in the Italian legal system public service broadcasting was considered to be a service of general economic interest within the meaning of Article 86(2).

(104) During the period covered by the present investigation public service broadcasting was entrusted to RAI under the 1988 and 1994 Conventions.

7.1.1. *Public service concession from 1992 to August 1994*

(105) During these two years relations between the State and RAI were governed by the 1988 Convention, which remained in force until August 1994.

([48]) Altmark (see footnote 20), paragraphs 101 to 109. In those paragraphs the Court examined the question of whether State payments to transport undertakings classified as State aid could be found to be compatible with the common market within the meaning of Article 77 of the Treaty as reimbursement for the discharge of public service obligations. It did not rule out this possibility, provided that the binding conditions laid down by the secondary legislation for the transport sector were met. *Mutatis mutandis* this reasoning must apply to undertaking entrusted with an SGEI outside the transport sector and in relation to Article 86(2).

([49]) See point 29 of the communication.

([50]) See points 32 to 39 of the communication.

(106) Article 1 of the 1988 Convention explicitly states that the public broadcasting service is entrusted exclusively to RAI by a concession covering the entire national territory. The service entrusted consists in broadcasting radio and television programmes over the air, by cable, by satellite and by any other means.

(107) As explained above, both the Constitutional Court and Italian legislation justified the State monopoly of national broadcasting on the basis of the concept of essential public service of overriding general interest laid down in Article 43 of the Constitution. Neither the Constitutional Court nor Law 103/75 made any distinction as to the quantity or kind of programming that would fall within the scope of this concept ([51]). Instead, the Constitutional Court referred to information, culture and entertainment in Judgment No 59/1960. By the same token, the 1988 Convention states that the broadcasting of radio and television programmes throughout Italian territory constitutes the public service entrusted to RAI (Article 1). The Commission thus concludes that, as claimed by the Italian authorities, the definition of public service broadcasting in Italy included, under the 1988 Convention, all of RAI's programming activity.

(108) A number of obligations are imposed on RAI as a corollary to its public service task. The 1988 Convention contains obligations concerning investment, quality and coverage of the signal (Articles 9, 10, 15 and 16) and research (Articles 11 and 12).

(109) Another set of obligations and special rules is contained in Law 103/75, which is still in force. It comprises the following:

— a general obligation of objectivity and pluralism (Article 1(2)),

— a specific parliamentary commission determines (Article 1(3) and (4)) the general guidelines that RAI must respect and monitors the broadcasting service provided by RAI,

— the obligation to reserve at least 5 % of total television broadcasting time and 3 % of radio broadcasting time to political parties, religious groups, and unions and the like and to provide them with technical assistance free of charge,

— RAI is required: to set up its transmission facilities and to manage third-party plants close to bilingual areas in order to be able to re-broadcast programmes of foreign operators; to provide television and radio programmes for other countries with a view of disseminating Italian culture and language abroad; and to provide television and radio programmes in German, Ladino, French and Slovenian in regions where such linguistic minorities live (Article 19) ([52]),

— RAI is required to broadcast messages by the President of the Republic, the Presidents of the two chambers of Parliament, the Constitutional Court and the Prime Minister (Article 22).

(110) Article 3 of the 1988 Convention provides for RAI to carry out other activities of a commercial nature (such as discography, sales of programmes, and the exploitation of cinema, theatre and concert rights) ancillary to the public service or in any way linked to the object of the company, in so far as they are not prejudicial to the performance of the public service task. Lastly, in recent years RAI has also been active in the advertising market.

7.1.2. *Public service remit from September 1994 to 1995*

(111) The 1994 Convention has a duration of 20 years. It entrusts public service broadcasting to RAI on an exclusive basis, referring to the service contract as the legal instrument fleshing out the provisions of the Convention itself. Article 3 of the Convention states that the service contract for the period 1994 to 1996 had to be concluded before the end of June 1994.

(112) Article 1 of the 1994 Convention explicitly states that public service broadcasting covering the entire national territory is entrusted exclusively to RAI by means of a concession. The service consists in broadcasting radio and television programmes by any means.

(113) The 1994 Convention lays down general obligations to provide objective, complete and impartial information, to recognise regional diversities, to protect national and regional cultures, and to educate. It also contains some obligations ancillary to the public service task. RAI is required: to ensure the widest possible diffusion of its signal and to respect a minimum programming time; to broadcast free of charge messages of public interest at

([51]) See Articles 1 and 2 of that Law.

([52]) Article 20 provides that RAI is to conclude contracts for valuable consideration with the administrative bodies interested in such services.

the request of the Government; to create a radio service providing traffic information for the national motorway network; to facilitate the utilisation of its services by disabled people (Article 8); to provide special programming for minors (Article 11); to carry out research activity (Article 12); and to establish state-of-the-art television and radio infrastructures that reflect the most advanced technological standards (Article 14).

(114) Even though a service contract should have been concluded before the end of June 1994, the first genuine service contract (hereinafter the '1996 contract') was signed in 1996 and entered into force around the middle of that year. The Commission therefore concludes that the 1996 contract is not relevant for the purpose of defining RAI's public service obligations in 1994 and 1995. To sum up, it appears that RAI's public service remit in 1994 and 1995 was no different from that for the previous two years.

(115) The Commission concludes that, as claimed by the Italian authorities, over the period 1992 to 1995 the definition of public service broadcasting in Italy included all of RAI's programming activity and was accompanied by a number of other ancillary obligations.

(116) As with the 1988 Convention, Article 5 of the 1994 Convention authorises RAI to carry out commercial and editorial activities linked to the diffusion of sound, images and data, as well as other activities linked to the object of the company. These activities cannot prevail over public service broadcasting.

(117) It follows that there are no doubts as to the classification of public service broadcasting as a service of general economic interest, the entrustment of RAI with public service broadcasting and the identification of public service broadcasting with the entire range of RAI's programming. Although the definition of public service broadcasting is of a qualitative and rather wide nature, the Commission, taking into account the interpretative provisions of the Amsterdam Protocol, considers such a 'wide' definition as legitimate ([53]). Moreover, such a definition does not seem to contain any abuses or manifest errors in so far as it does not explicitly include any commercial activities such as advertising or the sale of programmes.

([53]) See point 33 of the communication.

(118) As indicated in point 41 of the communication, it is not sufficient that the public service broadcaster be formally entrusted with the provision of a public service but it is also necessary that the public service be actually provided as mandatory. It is therefore desirable that an appropriate authority monitor its application, especially where the public service task is widely defined and contains quality standards. The presence of an independent monitoring mechanism provides sufficient and reliable indications that the public service is actually provided as mandated. It is therefore a guarantee for the Member States that the task is being performed and may, at the same time, enable the Commission to carry out its tasks under the State aid rules.

(119) In this respect, it is to be noted that RAI is subject to the authority of a specific parliamentary commission ([54]) and to monitoring by Garante per la radiodiffusione e l'editoria ([55]). The powers of that commission are laid down in Article 4 of Law 103/75, which provides, *inter alia*, for the commission to establish the general directives for implementation of the principles set out in Article 1 of that Law and for RAI programmes. The commission checks that these directives are complied with, establishes the general criteria for the formulation of RAI's annual and multiannual expenditure and investment plans, approves RAI's general annual and multiannual programming plans and checks that they are being implemented ([56]). The Garante carries out several tasks that help to ensure that RAI's activity complies with the relevant legal provisions; for instance, it is required to examine RAI's accounts and to monitor compliance with the limits on advertising and audience figures ([57]). Lastly, the Post and Telecommunications Ministry carries out other checks ([58]). The Commission therefore considers that in the period under examination the Italian authorities put in place a system of checks providing sufficient indications that the public service entrusted to RAI was being provided as mandated.

7.2. **Proportionality**

(120) Once it has been established that the task entrusted to RAI is a service of general economic interest and is defined as such by the Member State and that RAI is

([54]) Commissione Parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi.
([55]) Now Autorità garante per la radiodiffusione e l'editoria.
([56]) See also Articles 2 and 18 of the 1988 Convention.
([57]) See also Article 17 of the 1994 Convention.
([58]) See Article 20 of the 1988 Convention and Article 17 of the 1994 Convention.

officially entrusted by the Italian authorities with the provision of that service, the Commission has to assess whether the State funding of that task exceeds what is necessary to cover the net cost of the public service, taking into account the revenues accruing from the public service task.

(121) Before such an assessment is carried out, it is appropriate to recall the criteria laid down in the communication regarding cost allocation in the broadcasting sector. The communication indicates that costs of the public service activities must be distinguished from the costs of non-public service activities. To this end, it refers to Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings ([59]) and the obligation to keep separate accounts laid down in the Directive. However, the obligation to keep separate accounts for public and non-public service activities did not apply to broadcasting in the period 1992 to 1995. Nor did it apply up to the entry into force of the revised version of the transparency Directive on 31 July 2001. Accordingly, compliance with the transparency Directive is not a matter at issue in the present procedure.

(122) The communication lays down specific rules for the costs that can be allocated to the public service activities on account of the specific characteristic of public service broadcasting. The costs that would be avoided in the hypothetical situation where the non-public service activities were to be discontinued should be allocated to the non-public service activities, separately for each of those activities. This includes the costs that are specific to the non-public service activities and the additional amount of common costs incurred through the use of resources that are also used for the public service, such as personnel, equipment, fixed installations, etc. (points 55 and 56). This method is accepted because of the peculiarities of the broadcasting sector, where a large share of the production that is part of the public service can, at the same time, be exploited commercially ([60]). This is the case with programmes that are defined as a public service but simultaneously generate an audience that permits the sale of advertising or the sale of the programmes to other broadcasters. These costs can be allocated in their entirety to the public service since a full distribution of these costs between the two activities risks being arbitrary and not meaningful ([61]). However, cost allocation with a view to transparency of the accounts should not be confused with cost recovery in the definition of pricing policies or compensation for public service obligations.

(123) Compensation is allowed only for the net costs of the public service task. This means that account must be taken of direct and indirect revenues derived from the public service. In other words, the net advertising revenues generated during the transmission of programmes falling within the scope of the public service task and the net revenues derived from the marketing of such programmes, for example, must be deducted from the total amount of public service costs as determined above.

(124) Moreover, if the revenues from public service activities are deliberately not maximised (for instance, in order to harm competitors), then the net public service costs will be greater and the amount of compensation will be higher than necessary and hence not justified. That means, for instance, that RAI's advertising prices cannot fall below the level that would allow an efficient commercial operator in a similar situation to cover its costs.

(125) The proportionality assessment that the Commission must carry out is therefore twofold. First, the Commission has to calculate the net cost of the public service task entrusted to RAI and ascertain whether or not this cost has been overcompensated. Second, it has to investigate any element at its disposal suggesting that RAI has inflated this cost by deliberately not maximising revenues from the commercial exploitation of the public service activities. In the present case, the complainant has asserted in particular that RAI was 'dumping' on the advertising market, with devastating effects on the financing of private broadcasters, in order to harm Mediaset, whose sole income is derived from advertising. Therefore, the Commission assesses below,

([59]) OJ L 195, 29.7.1980, p. 35. Directive as amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).

([60]) In general, if a cost relating to a public service also benefits commercial activities, this cost must be proportionally allocated between the two activities on the basis of appropriate criteria.

([61]) This, however, does not prevent broadcasters from allocating costs on the basis of other accounting principles that are clearly explained, consistently applied and objectively justifiable.

first, whether the net cost of the public service has been overcompensated by the financial support from the State and, second, whether RAI has carried out a pricing policy in the advertising market ([62]) below the level that would allow an efficient commercial operator in a similar situation to cover its costs (hereinafter price undercutting).

7.2.1. *Calculation of the net cost of the public service task entrusted to RAI and comparison with the amount of financial support provided by the State to RAI in the period 1992 to 1995*

(126) As indicated above, in the period 1992 to 1995 RAI carried out some commercial activities through separate legal entities. Following the conclusion that in the same period the service entrusted to RAI embraced the whole of RAI's programming and was accompanied by a number of other ancillary obligations, the Commission notes that the net cost of the public service task entrusted to RAI can be identified, in principle, by deducting from RAI's costs indicated in its financial statements with regard to the public service the revenues received by RAI from its subsidiaries whose activity consists in the commercial exploitation of the public service.

(127) The Commission, in its letter of 13 September 2002, called on the Italian authorities to submit figures on such cost allocation. The Italian authorities did not provide such calculations but sent to the Commission RAI's balance sheet. The Commission has therefore calculated itself the net cost of the public service task. So as not to overestimate the cost, it has included only the costs that appear to be linked to RAI's normal broadcasting activity, excluding the costs that could be linked to the commercial exploitation of the public service or any other commercial activity (it has therefore excluded any cost linked to the activities of RAI's subsidiaries ([63]) or any other cost that appeared to be linked to the commercial exploitation of the public service). Moreover, among the revenues directly or indirectly linked to the public service that have to be deducted from the gross cost of the public service, the Commission has included all revenues derived from commercial activities ([64]).

(128) The Commission has deducted from the net cost of the public service the amount of the State financial support received by RAI in the period 1992 to 1995. This amount includes any revenues from the State identified in RAI's balance sheet. However, it does not include the financial advantage obtained by RAI thanks to the tax exemption on the asset revaluation. Indeed, in the present case that advantage can be considered as compensating for a cost that would otherwise have had to be financed ([65]). In other words, in order to calculate the proportionality of State funding to the net cost of the public service task, it is not necessary in the present case to quantify the advantage obtained by RAI thanks to the tax exemption on the revaluation of the assets specified in RAI's 1993 balance sheet because a higher tax liability would have proportionally increased the net cost of the public service entrusted to RAI (even though it is regrettable, for the sake of transparency and clarity, that this tax liability has not been included in RAI's accounts).

(129) The result of the Commission's calculation is summarised in the following table.

([62]) The Commission has focused its investigation on prices for 'spots', which represent the bulk of the advertising market (and to which the complainant appears to refer), and not for emerging forms of advertising such as 'telepromotions'.

([63]) Since, on the basis of the information contained in RAI's financial statements, it was not possible to distinguish clearly between subsidiaries involved in the provision of the public service and those involved in the commercial exploitation of that service, the Commission has taken a prudent approach, excluding all the cost items present in RAI's profit and loss account and linked to subsidiaries.

([64]) As it is not possible to verify the correctness of the transfer prices between RAI and its subsidiaries on the basis of RAI's financial statements, the Commission has adopted a prudent approach, deducting all the revenues received by RAI from its subsidiaries, including any dividend. For the reason mentioned in the previous footnote, it has made no distinction between subsidiaries involved in the provision of the public service and those involved in the commercial exploitation of that service.

([65]) See Commission aid decision C 2/03 (ex NN 22/02) — State financing of Danish public broadcaster TV2 by means of licence fee and other measures, paragraph 69 (OJ C 59, 14.3.2003, p. 2).

Table 2

Calculation of the net cost of the public service task entrusted to RAI and comparison with the total financial support granted by the State in the period 1992 to 1995

	Gross public service cost	Direct and indirect revenues linked to the public service task	Net public service cost	State funding	Overcompensation (+) or undercompensation (–)
1992	4 171	1 827	2 344	2 354	9,5
1993	4 151	1 550	2 600	2 269	– 331
1994	3 877	1 627	2 249	2 375	125
1995	4 125	1 718	2 407	2 494	87
Total					– 109

7.2.2. *RAI pricing policy in the advertising market*

(130) It should be stressed at the outset that there is general agreement that the television advertising market in Italy is characterised by a low degree of transparency ([66]). Conditions and prices often vary greatly depending on the client. Price lists are indicative in that broadcasters grant discounts that vary according to the total advertising time bought by the client. The average discount is not therefore very significant when it comes to assessing whether the public broadcaster has undercut prices ([67]). The data on advertising prices must thus be interpreted with some caution.

(131) The price of advertising is linked to the audience share of each broadcaster. In the period under investigation RAI's and Mediaset's audience shares were as follows:

Table 3

Average annual audience share as % (24 hours) (*)

	RAI I	RAI II	RAI III	Total RAI	Canale 5	Italia 1	Rete 4	Total Mediaset
1992	18,96	18,27	8,95	46,18	19,56	11,78	11,70	43,04
1993	18,13	17,74	9,34	45,21	20,52	12,48	11,74	44,74
1994	19,91	16,39	10,09	46,39	20,26	12,57	10,76	43,59
1995	22,76	15,50	9,67	47,93	21,21	12,07	9,49	42,75

(*) *Source:* Auditel and Corte dei Conti, 'Relazione sul risultato del controllo eseguito sulla gestione finanziaria della RAI per gli esercizi 1994, 1995 e 1996'.

([66]) See Decision No 6662 by the Italian antitrust authority of 10 December 1998. This view is shared by another Italian autonomous authority, Garante per la radiodiffusione e l'editoria, in its 1995 report (pp. 140 to 143), referring to the absolute opacity of this market. It also notes that radio advertising revenue represents a limited component of the market since the bulk of the market is made up of television advertising. Lastly, it points out that the advertising market is concentrated in the hands of Sipra and Publitalia, respectively RAI's and Mediaset's advertising agency.

([67]) In a letter of 25 May 2001 sent, *inter alia*, to the Commission's Competition Directorate-General, Mediaset acknowledges that it is not possible to provide significant evidence of RAI's discount practices. It further states that on some occasions RAI has granted excessive discounts but it does not identify those cases. Mediaset submitted a table on the average discounts granted by RAI, adding that it is very difficult to measure the effects of individual discounts on the basis of the data concerning average discounts (the table is reproduced below).

Table 4

Average annual audience share as % during prime time (20.30 to 22.30) (*)

	RAI I	RAI II	RAI III	Total RAI	Canale 5	Italia 1	Rete 4	Total Mediaset
1992	20,70	15,92	10,67	47,29	19,96	11,97	11,44	43,37
1993	20,51	15,73	11,74	47,98	19,66	13,04	11,13	43,83
1994	21,43	15,10	11,78	48,31	20,39	13,37	9,72	43,48
1995	24,17	14,13	10,76	49,06	22,21	12,37	8,80	43,38

(*) *Source:* Auditel and Corte dei Conti, 'Relazione sul risultato del controllo eseguito sulla gestione finanziaria della RAI per gli esercizi 1994, 1995 e 1996'.

(132) Article 8(6) of Law 223/90 established the advertising limits for RAI and for private concessionaires. RAI may not devote more than 4 % of its weekly broadcasting time and 12 % of every hour to advertising, while national private concessionaires may not exceed 15 % of daily broadcasting time and 18 % of every hour. Article 8(16) provided for the imposition of a ceiling on the overall amount of revenue that RAI could generate from advertising. This ceiling was abolished by Decree-Law 408/1992 with effect from 1 January 1994.

Table 5

Statutory advertising time for RAI and for private national broadcasters

Advertising	RAI	Private national broadcasters
Hourly	12 ± 2 %	18 ± 2 %
Daily	—	15 %
Weekly	4 %	—

(133) The above table shows clearly that RAI's hourly limit is lower than Mediaset's. Accordingly, the quantity of advertising that RAI can broadcast is also lower. In any case, advertising is an important source of revenue for RAI. Indeed, it represents more than 30 % of its total revenues ([68]). It must also be noted that the abolition of the revenue ceiling does not substantiate Mediaset's claim about RAI's policy of undercutting. Abolition of the revenue ceiling allows RAI to increase its advertising revenue. This, however, is not evidence of price undercutting. On the contrary, the fact that abolition of the ceiling was followed by a significant increase in RAI's advertising revenue seems to be the logical consequence of the removal of a measure (the ceiling on advertising revenue) that limits an operator's commercial behaviour. In fact, such developments in prices and revenue are compatible with a sound commercial strategy that is not anti-competitive.

(134) In particular, it must be pointed out that RAI's commercial strategy in the advertising market appears to have changed over time. Before 1994 RAI was subject to a revenue ceiling which it observed by selling a quantity of advertising below the time set. This suggests that RAI did not pursue a low pricing policy before 1994 but instead chose to observe the ceiling through a combination of relatively low supply and relatively high price, a strategy that influenced to a lesser extent the share of its competitors in the advertising market and was more favourable for viewers ([69]). After the removal of the revenue ceiling, RAI lowered its prices and expanded its sales of advertising space, thereby increasing its advertising revenue. Since the marginal costs of advertising space are very limited, the fact that RAI expanded its revenues from advertising by increasing the quantity does not contradict the view that, also after 1994, RAI followed a sound commercial strategy and is not sufficient to show that prices were set below the level that would allow an efficient commercial operator in a similar situation to cover its costs ([70]).

(135) Furthermore, it should be stressed that Mediaset's observations tend to demonstrate not so much that

([68]) The Garante report of 1995 indicates that between 1993 and 1995 advertising revenue represented 33 % of RAI's total revenue.

([69]) The fact that, while the advertising ceiling was in force, RAI did not sell all the advertising time that it could have sold shows that there was an opportunity for RAI to sell at lower prices and it did not do so.

([70]) The Garante report of 1995 refers to an increase in RAI's advertising spaces from 1993 to 1994, a fall in the average advertising price per minute and an increase in total advertising revenue. The average price per minute in the case of RAI's channels is still higher than that of Mediaset's channels. Its 1996 report confirms the tendency towards more advertising time and higher advertising revenue for RAI in 1994 and 1995.

RAI's pricing behaviour was one of price undercutting but rather that it adopted the rational behaviour of any commercial operator that tries to maximise its advertising revenue. For instance, in a letter of 28 January 2000 Mediaset argued that, without the ceiling, 'now RAI can raise its advertisement prices as and when it wishes with no commercial risk attached'. Second, in its complaint of 19 October 1998 Mediaset makes some statements that would indicate that RAI's advertising practices corresponded to normal commercial behaviour. In paragraph 10.5.1 Mediaset states that 'RAI has progressively modelled its advertising behaviour on Mediaset' or, in even clearer terms, 'RAI has modelled its pricing and marketing policies ever more closely on those of Mediaset's advertisement subsidiary'. Again, in paragraph 10.6.2, 'RAI is encouraged to increase its ratings and audience share through the offer of commercial programmes … in order to maximise advertisement revenues'. In a document of 8 January 1999 Mediaset stated: 'RAI continue to compete to the best of its ability in the advertisement market place, indeed, the government had abolished the ceiling on RAI's revenue from advertisement shortly before ([71]). Lastly, in a letter dated 25 May 2001, Mediaset complains again that RAI's board of directors had decided to adopt an advertisement policy based on a decisively commercial approach ([72]). Similar points were also made by FRT (an association of Italian private broadcasters) in its observations on the opening of the procedure. Now, all these statements suggest that RAI's behaviour in the advertising market has been close to that of other commercial operators and do not point to excessively low prices out of line with those of competitors.'

(136) The complainant has not submitted, despite the Commission's requests, any precise evidence of price undercutting by RAI. On the contrary, it has explicitly acknowledged that it is impossible to provide significant evidence of RAI's discount practices ([73]). The elements submitted by the complainant (two tables attached to its complaint of 19 October 1998) in support of its claim that RAI had undercut advertising prices are not decisive in this respect. The first table concerns discounts and is reproduced below:

Table 6

Average discounts on advertising

	discount Sipra (*)	discount Publitalia (*)
1992	37,28 %	37,68 %
1993	45,50 %	41,04 %
1994	45,32 %	32,99 %
1995	48,26 %	39,98 %

(*) Sipra and Publitalia are respectively RAI's and Mediaset's exclusive advertising agents.

(137) This table shows that the average RAI discount was significantly higher than Mediaset's in the years under investigation. Nevertheless, in the absence of the absolute price charged by RAI and Mediaset and in the light of the characteristics of the advertising market in Italy highlighted above, the table does not prove that RAI has practised price undercutting ([74]) (see recital 144).

(138) The other table submitted by Mediaset (entitled Costo in lire per audience) compares RAI's and Mediaset's prices in April 1998. The table is as follows:

([71]) On 18 May 1999 representatives of the Commission's Competition Directorate-General met with Mediaset, which submitted a document in which it stated that the objective of its complaint was *inter alia* to limit RAI's access to advertising resources. However, according to the communication, public service broadcasters should try to maximise advertising revenues, if only to reduce the need for State compensation. In addition, Mediaset asserted that RAI had violated its advertising limits in 1998 as it sought more financial resources.

([72]) An annex to the complaint of 19 October 1998 contains a collection of public statements by RAI's managers that tend to demonstrate RAI's intention to maintain a high audience share in order to continue to generate high advertising revenues. Indeed, it appears that the maximisation of advertising revenues is a declared policy of RAI, as reaffirmed in different circumstances by RAI's management (see, for example, the ordine di servizio of 26 June 1998 (pp. 4 and 5) attached to the correspondence from the Italian authorities of 16 June 1999). Advertising indeed became an increasingly important source of revenue for RAI in the 1990s.

([73]) Letter of 25 May 2001, mentioned above.

([74]) As admitted by Mediaset itself, the figures for the average discount are not significant when it comes to proving the existence of price undercutting (see footnote 67).

Table 7

RAI's and Mediaset's advertising prices in 1998

Channel	Peak time	Peak rate (30 seconds) (in ITL million)	Peak audience (in ITL million)
RAI I	19.30 — 22.30	104 000	6 705
RAI II	19.30 — 22.30	60 000	2 930
RAI III	19.30 — 22.30	44 000	2 839
Canale 5	20.00 — 22.30	95 000	5 007
Italia 1	20.00 — 22.30	28 000	2 850
Rete 4	20.00 — 22.30	21 000	1 345

(139) Assuming that in 1998 audience shares remained substantially similar to those prevailing in the period under investigation, table 7 does not indicate that RAI undercut prices. Indeed, every RAI channel had a price for advertising that was higher than that of its closest private competitor channel.

(140) In the light of this plurality of elements indicating that RAI did not undercut prices in the advertising market in the years under investigation and in the absence of any precise evidence submitted by the complainant, the Commission has decided that, in order to supplement its analysis, a more detailed comparison should be made of RAI's and Mediaset's advertising prices in the period 1992 to 1995. Indeed, in the light of the similarity between the respective audience shares of RAI and Mediaset and the structure of the two broadcasters (based on three channels) and given that in the relevant period Mediaset ([75]) invariably posted profits (and so should, when it comes to selling advertising space, be considered an efficient commercial operator in a situation similar to that of RAI), the Commission is of the opinion that a comparison between the prices of these two operators is a meaningful proxy for the criteria indicated in point 58 of the communication, whereby the public service broadcaster must not undercut prices in non-public service activities below what is necessary 'to recover the stand-alone costs that an efficient commercial operator in a similar situation would normally have to recover'. Accordingly, it has compared the average daily price per contact (hereinafter daily price per contact) and the average prime time price per contact (hereinafter prime-time price per contact) of the two broadcasters. To obtain another indication of RAI's behaviour, the Commission has cross-checked the data and the results of the comparison of prices per contact with the data for the total advertising time and total advertising revenues of the two operators as well as with the amount of advertising broadcast in prime time and the advertising prime-time revenues of the two operators.

([75]) The Commission refers to the economic results of RTI SpA, the legal entity holding the three television concessions and one of RAI's competitors.

(141) Accordingly, the Commission requested the Italian authorities to submit information on the pricing of RAI and Mediaset in the advertising market. The Italian authorities provided this information on 12 December 2002 on the basis of data provided by AGB (leading company in independent audience measurement for advertising transactions) and Nielsen (leading provider of television audience measurement and related services).

(142) The Italian authorities explained that, given the different structure of the advertising limits for RAI (combination of hourly and low weekly limits) and Mediaset (combination of hourly and daily limits), Mediaset tends to reach the limit at any hour of the day, while RAI tends to concentrate advertising in the hours when its audience is higher. For the purposes of the present procedure, the Commission notes that RAI's behaviour is not inconsistent with the objective of revenue maximisation. Indeed, in the presence of a low weekly limit, it is important for maximising revenue that the broadcaster concentrates advertising in the hours when the audience is high.

(143) On the basis of the data provided by AGB, the Italian authorities have submitted two tables comparing RAI's and Mediaset's daily and prime-time price per contact. The tables refer to the price lists of RAI and Mediaset. Prices are in euro per thousand viewers.

Table 8

Daily price per contact

	1992	1993	1994	1995
RAI	2,8	2,5	2,7	2,9
Mediaset	1,9	1,7	1,7	1,9

Table 9

Prime-time price per contact

	1992	1993	1994	1995
RAI	3,2	3,3	3,5	3,7
Mediaset	2,4	2,2	1,9	2,0

(144) The Italian authorities have also provided data on the net price per contact. In order to obtain the net price per contact, they incorporated into the daily and prime-time price per contact the effects of possible discounts granted by the broadcasters, using the average discount calculated by Nielsen. Prices are in euro per thousand viewers.

Table 10

Net daily price per contact

	1992	1993	1994	1995
RAI	1,8	1,4	1,5	1,5
Mediaset	1,2	1	1,1	1,1

Table 11

Net prime-time price per contact

	1992	1993	1994	1995
RAI	2,1	1,9	2	1,9
Mediaset	1,5	1,3	1,3	1,2

(145) From the above tables it can be concluded that both the daily price per contact and the prime-time price per contact of RAI have been constantly higher than those of Mediaset.

(146) As to the data on the total advertising time and total advertising revenues of the two operators, the Italian authorities provided the following information on the basis of data compiled by AGB and Nielsen.

Table 12

Comparison between RAI's and Mediaset's total advertising time and total gross advertising revenue (including agency commissions)

	RAI total advertising time (hours)	RAI total advertising revenue (EUR million)	Mediaset total advertising time (hours)	Mediaset total advertising revenue (EUR million)
1992	794	699	2 735	1 146
1993	864	689	2 940	1 245
1994	1 003	744	3 106	1 278
1995	1 038	787	3 274	1 369

(147) These data show that, with an audience share slightly higher than that of Mediaset, RAI broadcast advertising for almost one third of the broadcasting time of Mediaset and generated revenue equal to more than half of Mediaset's revenue. To sum up, with less time RAI generated proportionally more revenue.

(148) As to the data regarding the amount of advertising broadcast in prime time and prime-time advertising revenues, the Italian authorities have provided the following information on the basis of data compiled by AGB and Nielsen.

Table 13

Comparison between RAI's and Mediaset's total prime-time advertising and total gross prime-time advertising revenue (including agency commissions)

	RAI total advertising time (hours)	RAI total advertising revenue (EUR million)	Mediaset total advertising time (hours)	Mediaset total advertising revenue (EUR million)
1992	121	208	301	370
1993	141	246	318	386
1994	160	254	326	338
1995	157	264	336	351

(149) These data show that, with an audience share slightly higher than that of Mediaset, RAI broadcast prime-time advertising for less than half the time of Mediaset and generated revenue equivalent to more than half (1992) and more than two thirds (1994 and 1995) of Mediaset's revenue. Again, with less time RAI generated proportionally more revenue.

(150) In conclusion, all the elements gathered by the Commission tend to demonstrate that RAI did not adopt a pattern of behaviour consisting in setting prices in the advertising market below the level that would allow an efficient commercial operator in a similar situation to cover its costs. Rather, it appears that this behaviour is consistent with the maximisation of advertising revenue. The complainant has not been able to provide evidence supporting its claim that RAI undercut advertising price (the complainant has not even been able to point to a single episode of price undercutting). Instead, it has supplied statements that tend to prove the opposite, i.e. that RAI operates in the advertising market as a normal commercial operator.

(151) In the light of the foregoing, the Commission concludes that in the period covered by the present investigation RAI has not undercut prices.

8. **CONCLUSION**

(152) The Commission finds that Italy has unlawfully implemented the measures provided for in Articles 2, 3 and 4 of Decree-Law No 558 of 30 December 1993 and in Article 1 of Decree-Law No 2 of 2 January 1992, which was converted into Law No 332 of 1 July 1992, in breach of Article 88(3) of the Treaty.

(153) However, the Commission considers that the aid covered by this investigation has not overcompensated RAI and, therefore, is compatible with the common market within the meaning of Article 86(2).

(154) Moreover, the Commission finds that the conversion of the 1992 and 1993 concession fee into a CDDPP loan in 1995 does not constitute State aid within the meaning of Article 87(1),

HAS ADOPTED THIS DECISION:

Article 1

The aid provided for in Articles 2, 3 and 4 of Decree-Law No 558 of 30 December 1993 and in Article 1 of Decree-Law No 2 of 2 January 1992, which was converted into Law No 332 of 1 July 1992, and implemented by Italy for RAI-Radiotelevisione Italiana SpA over the period 1992 to 1995 is compatible with the common market within the meaning of Article 86(2) of the Treaty.

Article 2

The conversion of the 1992 and 1993 concession fee into a loan by Cassa Depositi e Prestiti in 1995 does not constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 3

This Decision is addressed to the Italian Republic.

Done at Brussels, 15 October 2003.

For the Commission

Mario MONTI

Member of the Commission