Corte costituzionale

JUDGMENT NO. 69 OF 2009

FRANCESC O AMIRANTE, President
GAETANO SILVESTRI, Author of the Judgment

JUDGMENT NO. 69 YEAR 2009

In this case the Court heard a challenge from the Parliamentary Committee on Broadcasting to a decision by the Finance Minister to dismiss one of the directors of RAI, without having previously consulted the Committee and obtained a resolution to that effect. The Court held that, although a literal interpretation of the contested legislation appeared to support the Finance Minister's position, it was necessary to interpret the provisions from a systematic viewpoint and avoid a situation in which different members of the Committee were subject to different arrangements and were the position of some was more precarious than that of others, since this would be detrimental to the constitutionally guaranteed rights and freedoms relating to public broadcasting.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO,

gives the following

JUDGMENT

in proceedings concerning a jurisdictional dispute between branches of state which arose following the proposal to dismiss the member of the Board of Directors of RAI-Radiotelevisione italiana S.p.a., Prof. Angelo Maria Petroni, presented by the Minister for the Economy and Finances on 11 May 2007, notwithstanding the fact that the decision was taken together with the President of the Council of Ministers, and of all the other acts related to and resulting from it carried out by the Parliamentary Committee for general guidance and oversight over radio and television services, by application served on 18 March 2008, filed in the Court Registry on 25 March 2008 and registered as No. 16 in the Register of Jurisdictional Disputes between Branches of State 2007, merits stage.

Considering the entry of appearance by the President of the Council of Ministers;

having heard the Judge Rapporteur Gaetano Silvestri in the public hearing of 24 February 2009;

having heard Beniamino Caravita di Toritto, barrister, for the Parliamentary Committee for general guidance and oversight over radio and television services and the *Avvocato dello Stato* Gianni De Bellis for the President of the Council of Ministers.

The facts of the case

1. – By application filed on 8 November 2007 la Parliamentary Committee for general guidance and oversight over radio and television services, in the person of its Chairman *pro tempore*, commenced a jurisdictional dispute between branches of state against the Minister for the Economy and Finances and the President of the Council of Ministers, requesting the Constitutional Court to rule that the Minister for the Economy and Finances, notwithstanding the fact that the decision was taken together with the President of the Council of Ministers, was not entitled to request and vote in favour of in the Shareholder Assembly of RAI – Radio Televisione Italiana S.p.a. the dismissal of a member of the Board of Directors in the absence of a prior resolution adopted by that Parliamentary Committee and, accordingly, to annul the proposal for dismissal presented by the Minister for the Economy and Finances on 11 May 2007 and all the acts related to and resulting from it.

1.1. – The Applicant points out that this dispute originates from the violation of the powers guaranteed to it under the Constitution, "since the activity of public radio and television broadcasting cannot be regarded as an exclusive prerogative of the political majority, but must be carried out in a manner compatible with the political guidelines laid down by the Constitution, which considers the free circulation of ideas and cultural pluralism as the cornerstones of the legal order".

The Committee's representative points out in this regard that the functions of guidance and oversight have been conferred on the parliamentary organ "in consideration of the characteristics of impartiality, democracy and pluralism which must inform the conduct of the activities of the public radio and television service" and with the principal purpose of avoiding "a direct and exclusive interference by the Executive" in the management of the service.

In the case before the Court, the powers of the Committee are claimed to have been infringed by the dismissal of a member of the Board of Directors of RAI, Prof. Angelo Maria Petroni, by the relative Shareholder Assembly, requested by the Minister for the Economy and Finances, in his capacity as majority shareholder, "without having obtained the necessary prior resolution of the parliamentary oversight committee". In particular, in the opinion of the Applicant, the Minister for the Economy disregarded the provisions of

Article 49(8) of legislative decree No. 177 of 31 July 2005 (Consolidated law on radio and television services), according to which "In assemblies of the concessionary company convened in order to make deliberations for the dismissal or which will entail the dismissal of, or the commencement of proceedings for a breach of duty against the directors, the representative of the Minister for the Economy and Finances shall cast his vote in accordance with the resolution of the Parliamentary Committee for general guidance and oversight over radio and television services communicated to the Minister".

1.2. – The Applicant's representative summarises the "main stages which led to the emergence of the dispute" recalling that through various letters starting from 18 January 2007, the Chairman of the parliamentary oversight committee called the attention of the Minister for the Economy and Finances "to the institutional requirement to take all steps necessary to ensure the most correct exercise of the role assigned to the Committee", with particular reference to cases involving the dismissal of a member of the Board of Directors.

The Minister for the Economy responded to the observations of the Chairman of the Committee by letter of 6 February 2007, in which it is stated that the Committee is called upon to participate only in procedures for the appointment of members of the Board of Directors and not also those for their dismissal or those relating to the commencement of proceedings for a breach of duty. In this regard, the Minister pointed out that Article 49(8) of legislative decree No. 177 of 2005, pursuant to the provisions of Article 49(10), cannot apply until the ninetieth day after the closure of the first public offer of sale of RAI. Therefore, since this prerequisite has not yet been satisfied, sub-section 8 – which is not referred to in the second sentence of Article 49(10) – does not apply to the case before the Court.

The Committee's representative considers that the argument proposed by the Minister is the result of a formalistic interpretation of the provisions of Article 49 of legislative decree No. 177 of 2005 which contrasts with the rationale underlying the legislation as a whole enacted by that legislative decree. In the view of the Applicant, this interpretation could result in the conclusion that "even other significant provisions indispensable for the activity of the concessionary company for public radio and television services could be [held to be] inapplicable" (and indicating, in particular, Article 49(1)).

The Applicant also recalls that on 11 May 2007 the President of the Council of Ministers, pursuant to a request contained in a letter of the same date from the Minister for the Economy and Finances, notified the Chairman of the parliamentary oversight committee of the need to replace the member of the RAI Board of Directors appointed by the minister, Prof. Angelo Maria Petroni, since the fiduciary relationship on the basis of which he had been appointed had broken down.

Following the request formulated by the Minister for the Economy, on 16 May 2007 the RAI Board of Directors convened a Shareholder Assembly to consider the question of the dismissal of the member indicated and to take steps to replace him. At this stage, the Chairman of the parliamentary oversight committee notified on 29 May 2007 the Minister for the Economy of his intention to convene the Committee as soon as possible in order to pass the necessary resolution for the dismissal of Prof. Petroni, pursuant to Article 49(8) of legislative decree No. 177 of 2005. However, the proposal for dismissal was pursued with the convocation of the RAI Shareholder Assembly, without any formal notice of this being given to the Committee.

On 7 June 2007, pursuant to an application by Prof. Petroni, the Regional Administrative Tribunal for Lazio suspended the convocation of the Shareholder Assembly on a precautionary and interim basis, but this measure was then annulled on 31 July 2007 by the Council of State.

The Applicant's representative also states that on 1 August 2007, the Chairman of the Parliamentary Committee wrote to the Minister for the Economy "in order to verify his intention to pursue the proposal for dismissal", requesting to this end a new hearing with the Minister and the President of RAI and communicating his complete willingness to convene the Committee even during the summer holiday period.

The subsequent attempts to convene the Shareholder Assembly in order to dismiss Prof. Petroni, pursuant to the request of the Minister for the Economy of 2 August 2007, proved to be unsuccessful, and therefore the Audit Committee, acting pursuant to Article 2367 of the Civil Code, convened the Assembly for 10 September. In the relative meeting Prof. Petroni was in actual fact dismissed and replaced by Mr Fabiano Fabiani.

The Applicant argues that the succession of events described, and in particular the "overall conduct" of the Minister for the Economy, resulted in a serious infringement of the constitutionally guaranteed competences of the Parliamentary Committee for general guidance and oversight over radio and television services.

1.3. – The Applicant identifies the constitutional principle infringed as the principle of pluralism in information contained in Article 21 of the Constitution.

According to the Parliamentary Committee's representative, this principle, "applied within the context of public radio and television operations, means that such operations cannot be regarded as an exclusive prerogative of the majority (albeit under parliamentary control) but requires an adequate reconciliation of all the interests in play in the light of the policy requirement laid down by the Constitution".

In this regard, the Applicant points out that the "affirmation of the central role of Parliament in the regulation of the public radio and television system" has been asserted in legislation since law No. 103 of 14 April 1975 (New arrangements governing radio and

television broadcasting), in addition to the case law of the Constitutional Court, including in particular judgment No. 225 of 1974 which "definitively opened up the road towards the 'parliamentarisation' of the public radio and television system, moving the focus for the determination of general choices in this sector to the representative body of the nation".

The Applicant goes on to emphasise that the "parliamentarisation" entailed the granting to the Parliamentary Committee for general guidance and oversight over radio and television services "of significant powers of influence (such as powers of general guidance, the determination of advertising ceilings, etc.) on the only radio and television broadcaster recognised under Italian law".

The Applicant draws the conclusion from an examination of several judgments of the Constitutional Court, and in particular of judgment No. 194 of 1987, that Parliament, "and for it the Parliamentary Committee for general guidance and oversight over radio and television services", constitutes "the natural institutional base in which the principle of pluralism, which must inform the entire public radio and television sector, is most effectively guaranteed both as regards the access by social groupings to radio and television as well as the mechanisms which guarantee the presence of a plurality of sources of information".

For these reasons, the Committee's representative adds, "the 'parliamentarisation' of the radio and television service […] implies a duty of oversight by Parliament over all matters relating to RAI which could result in negative consequences for freedom of expression and freedom of information".

1.4. – As far as its own standing in these proceedings is concerned, the Applicant emphasises that the parliamentary committees, as the holders of specific powers exercised autonomously, are bodies which have standing to commence this dispute "since they are bodies/authorities which, albeit forming part of the broader complex organisational structure of Parliament, nonetheless occupy a peculiar and distinct position within the constitutional system and are able to state the position of the body to which they belong".

Reference is made in this regard to judgment No. 49 of 1998 and orders No. 137 of 2000 and No. 171 of 1997 of the Constitutional Court, which recognised the competence of the Parliamentary Oversight Committee to state definitively the position of the Chamber of Deputies and of the Senate of the Republic in matters directly relating to information.

Ultimately, the Applicant considers that "precisely the powers of guidance, control and oversight and the other competences directly related to the constitutional value of pluralism" justify "the full recognition of the powers of constitutional significance" of the Parliamentary Oversight Committee.

1.5. – As far as the standing to be sued of the Minister for the Economy and Finances and the President of the Council of Ministers is concerned, the Applicant points out that the

Constitutional Court has interpreted Article 37 of law No. 87 of 11 March 1953 "in a rigorous but not mandatory manner" concluding on the one hand that the executive is not a "dispersed power", whilst on the other hand that certain exceptions are possible, in the sense that individual ministers may be recognised as having standing to be sued. In particular, according to the Committee's representative, "the indispensable prerequisite in order to have standing appears […] to be the independent exercise of powers of a constitutional nature".

The Applicant infers from the points mentioned above that there are "valid arguments" in support of the standing to be a party to a jurisdictional dispute between branches of state also for the Minister for the Economy and Finances on the grounds that "as the majority shareholder in RAI S.p.a., he acts as a representative of the government, but in any case independently of it considered as a whole".

In the event that this broad reading is not accepted, the Applicant considers that the President of the Council of Ministers has standing to be sued "in his own right and as the body entitled to express the position of the entire government" pursuant to Article 95(1) of the Constitution, emphasising in this regard that on 11 May 2007 the President of the Council of Ministers informed the Council of Ministers of the letter of the same date that he had received from the Minister for the Economy containing the proposal to dismiss Prof. Petroni, and declared in a further letter of 11 May 2007 addressed to the Chairman of the Oversight Committee that he "fully endorsed the assessment of the Minister for the Economy and Finances".

According to the Applicant, it may be inferred from the above that "the President of the Council of Ministers fully endorsed the actions of the Minister and hence gave full government approval to the unlawful conduct challenged before the Court".

1.6. – Finally, the representative of the Parliamentary Committee addresses the subject matter of the dispute between branches of state, recalling that it may consist not only "in the claim by one body to a power usurped by another" but also "in the challenge, not to the entitlement of another body to exercise certain powers, but rather the actual manner in which those powers are exercised when this prevents as a matter of fact the other body from fully carrying out its competences conferred by the Constitution".

It is stated to be clear in the case before the Court that the Minister for the Economy acted "as if he were the only body entitled to make the decision to dismiss a member of the Board of Directors of RAI S.p.a., disregarding the constitutional powers vested in the Applicant Oversight Committee", with the result that it "unlawfully brought RAI back under the exclusive control of the government".

The Minister's conduct was "even more serious, and therefore infringed the prerogatives of the Oversight Committee, since it clearly filed to respect the principle of

'loyal cooperation'" which the Constitutional Court has expressly required also for relations between branches of state when reciprocal powers end up overlapping one another.

In this regard, the Committee's representative recalls the findings made in judgment No. 379 of 1992 of the Court, emphasising that "two important indications" may be drawn from this judgment: "first, the unfailing requirement that in situations which affect the public interest and concern requirements specified under constitutional law, any organs called upon to regulate them must exercise their powers in accordance with the principle of loyal cooperation, including where they form part of different branches of state; secondly, the control over the respect for this principle may be carried out by the Constitutional Court directly with reference to the specific individual actions of those organs".

The Applicant observes that "in the overall course of conduct followed by the Minister for the Economy, it is not only impossible to discern an even minimum sensitivity towards 'loyal cooperation', but there is even complete disregard for the role and competences of the Oversight Committee".

Therefore, the conduct of the Minister for the Economy reflects "the clear intention to reassign the central role in the management of the public service concessionary to the government, that is to a body which is by definition partial", with the resulting violation of the powers vested in the Parliamentary Committee for general guidance and oversight over radio and television services under the Constitution. The Committee's representative concludes, pointing out that all this "means depriving Parliament of a function which the constitutional system has clearly assigned to it".

2. – On 21 February 2008 the Applicant filed a supplementary written statement in which it reasserts that the jurisdictional dispute is admissible and describes certain new events which occurred after this appeal was filed.

2.1. – In particular, the Committee's representative mentions judgment No. 11271 of division 3-*ter* of the Regional Administrative Tribunal for Lazio of 16 November 2007 which ruled unlawful the "sequence of acts" culminating in the dismissal of Prof. Petroni, and therefore annulled them, and order No. 6284 of the 4th division of the Council of State of 4 December 2007 which rejected the interim application to suspend the effects of the above judgment of the Regional Administrative Tribunal for Lazio, and scheduled a hearing for the discussion of the merits on 11 March 2008.

The Applicant points out that, following the above judgments, the interest of the Committee to pursue the jurisdictional dispute before the Constitutional Court has not lapsed; nor would that interest lapse in the event that the appeal court confirmed the unlawful nature of the contested acts. In this regard, the Committee's representative specifies that in proceedings involving jurisdictional disputes it is "not so much and not only the unlawful nature of the acts carried out by the Minister for the Economy and

Finances (with the authorisation of the government from the President of the Council of Ministers) seeking to dismiss a member of the Board of Directors of RAI [that are relevant], as rather the usurpation of the competences vested in the Parliamentary Oversight Committee resulting from the conduct carried out by the Minister for the Economy and Finances".

Accordingly – the Committee's representative observes, recalling Constitutional Court judgments No. 49 of 1998 and No. 150 of 1981 – irrespective of the outcome of the administrative proceedings concerning the contested acts, the Applicant retains an interest in obtaining a ruling on the attribution of the powers in dispute which represents the principal object of the jurisdictional dispute between branches of state.

2.2. – The Committee's representative points out that the early dissolution of Parliament, ordered by presidential decree No. 19 of 6 February 2008, is in the same way immaterial since this does not result in any interruption in the conduct of the business of the Parliamentary Oversight Committee, which must in any case be regarded as extended in its current composition until the first session of the new Houses of Parliament, and in fact some of the powers of the Committee (specifically those concerning the regulation of election campaigns) "are based on the dissolution of Parliament as their logical and legal premise".

2.3. – The expiry in May 2008 of the term of the mandate for the RAI Board of Directors is – according to the written statement concerned – irrelevant, since the early dissolution of Parliament and the resulting scheduling of the first session for the Houses on 29 April 2008 mean that an extension for the current Board beyond that deadline is likely.

For these reasons, the three-year term of the mandate – as well as the early dissolution of Parliament – could not, according to the Committee's representative, result in "any cessation of the matters at issue in this dispute".

3. – On 25 February 2008, the Applicant's representative filed a copy of the resolution by which the Parliamentary Oversight Committee decided to commence this jurisdictional dispute between branches of state.

4. – By order No. 61 of 2008, filed on 13 March 2008, the Constitutional Court ruled this dispute admissible.

That order and the appeal were served by the Applicant on the Government of the Republic, in the person of the President of the Council of Ministers, on 18 March 2008 and filed along with evidence of service in the registry of the Constitutional Court on 25 March 2008.

5. – The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, entered an appearance by writ filed on 7 April 2008, requesting that the appeal be dismissed.

The state representative emphasises that the measure to dismiss Prof. Petroni was adopted by the Minister for the Economy and Finances on the basis of the applicable law, and in particular the provisions of Article 49 of legislative decree No. 177 of 2005. By contrast, the argument proposed by the Parliamentary Committee would lead to "the substantive repeal" of Article 49(10) which subjects the entry into force of the previous sub-sections, with the sole exception of sub-sections 7 and 9, to a future event which has not yet occurred.

The *Avvocatura Generale* points out in this regard that the existence of the power of dismissal for the Minister for the Economy and Finances was expressly recognised in judgment No. 11271 of division 3-*ter* of the Regional Administrative Tribunal for Lazio of 16 November 2007, and "whilst on the one hand [this decision] found the measures to be *ultra vires* […], on the other hand rejected the sixth ground of appeal in which it was argued that the decision by the Minister for the Economy was unlawful insofar as taken without having previously obtained the approval of the Parliamentary Committee for general guidance and oversight over radio and television services".

Therefore, the Respondent considers that the Minister's position is "consistent with the mechanism for appointing members of the Board of Directors contemplated under sub-sections 7 and 9" of Article 49 of legislative decree No. 177 of 2005.

In any case, in the opinion of the state representative, the conferral on the Minister of the power to appoint only one out of nine members of the Board of Directors cannot in any way amount to a violation of the principle enunciated by the Constitutional Court in judgment No. 225 of 1974 according to which the government must not be represented in the managing bodies of RAI in an exclusive or predominant manner.

6. – On 24 June 2008, the Applicant's representative filed a written statement in which, after having set out the terms of the jurisdictional dispute, it argued that "the proceedings before the administrative courts do not cover the same issue as the present dispute" which, moreover, "concerns an issue – the necessary involvement of the Parliamentary Oversight Committee in the dismissal procedures" – which was not addressed in judgment No. 11271 of 2007 of the regional administrative court for Lazio, cited by the Respondent.

Accordingly, the representative of the Parliamentary Committee reiterated the conclusions already formulated in its application.

7. – On 26 June 2008, the President of the Council of Ministers filed a motion requesting the adjournment of the public hearing scheduled for 8 July, which was supported by the other party, on the grounds that "following the recent political elections, the Applicant Committee is currently being reconstituted".

8. – Following the scheduling of a new hearing, on 11 February 2009 the Applicant's representative filed a written statement in which it restated and confirmed the arguments and conclusions already presented in the application and its previous written statements.

Conclusions on points of law

1. – By application filed on 8 November 2007 the Parliamentary Committee for general guidance and oversight over radio and television services, in the person of its Chairman *pro tempore*, commenced a jurisdictional dispute between branches of state against the Minister for the Economy and Finances and the President of the Council of Ministers, requesting the Constitutional Court to declare that the Minister for the Economy and Finances, notwithstanding the fact that the decision was taken together with the President of the Council of Ministers, was not entitled to request and vote on in the Shareholder Assembly of RAI -Radiotelevisione italiana S.p.a., the dismissal of a member of the Board of Directors in the absence of a prior resolution adopted by that Parliamentary Committee and, accordingly, to annul the proposal for dismissal presented by the Minister for the Economy and Finances on 11 May 2007 and all the acts related to and resulting from it.

2. – As a preliminary matter, the Court finds that the dispute is admissible pursuant to Article 37 of law No. 87 of 11 March 1953, a ruling already made in summary form in order No. 61 of 2008.

As far as the individual standing to participate in these proceedings is concerned, the Parliamentary Committee for general guidance and oversight over radio and television services must be classified as the body competent to state the definitive position of the Chamber of Deputies and the Senate of the Republic (judgments No. 502 of 2000 and No. 49 of 1998 and orders No. 195 of 2003, No. 137 of 2000 and No. 171 of 1997).

Also the President of the Council of Ministers is a body competent to state the position of the Government, in contrast to the Minister for the Economy and Finances. In fact, the executive power "is not a 'dispersed power', but is exercised […] by the government as a whole, in the name of the unity of political and administrative policy proclaimed by Article 95(1) of the Constitution" (order No. 123 of 1979), with the result that "the individual ministers are not entitled to be parties to a jurisdictional dispute between branches of state, whilst such standing is recognised in cases […] concerning the powers directly and exclusively conferred on the Minister of Justice pursuant to Articles 107(2) and 110 of the Constitution […] and an individual vote of no confidence expressed by Parliament against a minister" and accordingly that "in situations other than the above, it is the government which participates – in accordance with the unity of political and administrative policy

proclaimed in Article 95(1) of the Constitution – in disputes between branches of state" (order No. 221 of 2004).

As far as the objective prerequisites for the dispute are concerned, the Applicant Committee is vested with the powers which result from the requirement to guarantee media pluralism, based on Article 21 of the Constitution, according to which the existence of a parliamentary body for guidance and oversight is necessary in order to prevent the public radio and television services from being managed by the government in an "exclusive and predominant" manner (judgment No. 225 of 1974). The alleged infringements [of these prerogatives] caused by the actions of the government have an impact, according to the Applicant, on the latter's guarantee function, which is grounded in constitutional law and recognised in the case law of this Court. The subject matter of the dispute is therefore the delineation of the extent of the powers of the branches of state in dispute, as resulting from constitutional rules and principles, which satisfies goals and requirements different from the assessment over whether or not the contested decision was lawful, which was carried out by the administrative courts seized by Prof. Petroni in order to protect his own individual legal rights.

3. – The application is well founded.

3.1. – It is first and foremost necessary to clarify the legislative framework within which the power to appoint and dismiss members of the Board of Directors of RAI – Radiotelevisione italiana S.p.a., concessionary for the general public radio and television service, is exercised.

Article 49(7) of legislative decree No. 177 of 31 July 2005 (Consolidated law on radio and television services) provides that: "unless and until the state shareholding is completely divested", the representative of the Minister for the Economy and Finances shall present to the [Shareholder] Assembly for RAI, convened in order to appoint the members of the Board of Directors, a list of candidates formulated on the basis of the resolutions of the Parliamentary Oversight Committee and the indications of the Minister himself.

Article 49(9) provides that unless and until the number of shares divested – in accordance with the privatisation process of the concessionary company – is not greater than 10 percent of the capital, "in consideration of the significant and inderogable requirements of general interest related to the conduct of the general public radio and television services […] when formulating the single list mentioned in sub-section 7, the Parliamentary Committee for general guidance and oversight over radio and television services shall indicate seven members, electing each by an individual vote; the remaining two members, including the Chairman, shall on the other hand be proposed by the majority shareholder. The appointment of the Chairman shall become effective after approval by the Parliamentary Committee for general guidance and oversight over radio and television

services, expressed by a two thirds majority of its members. Where the Chairman or one or more members is dismissed, resigns or becomes permanently barred, the new members shall be appointed according to the same procedures specified in this sub-section within the thirty days following the date of formal notification of the resignation to the Committee".

Article 49(8) provides moreover that: "In assemblies of the concessionary company convened in order to make deliberations for the dismissal or which will entail the dismissal of, or the commencement of proceedings for a breach of duty against the directors, the representative of the Minister for the Economy and Finances shall cast his vote in accordance with the resolution of the Parliamentary Committee for general guidance and oversight over radio and television services communicated to the Minister".

Finally, sub-section 10 provides that: "The provisions of sub-sections 1 to 9 shall enter into force on the ninetieth day after the closure date of the first public offer of sale […]. Where, prior to that date, it is necessary to appoint the Board of Directors, due to the natural expiry of a mandate or for other reasons, this shall be done following the procedures specified in sub-sections 7 and 9".

3.2. – The provisions set out above are subject to two opposing interpretations by the Applicant and by the Respondent, which lead each of the parties to a different solution of this dispute.

The representative of the Parliamentary Oversight Committee argues that the provisions set out above must be given a meaning consistent with the overall constitutional and legislative framework, which may be reconstructed from constitutional law, the case law of this Court and the legislative developments in recent decades. To accept that a Member of the Board of Directors of RAI may be dismissed by a unilateral and discretionary decision of the Minister for the Economy and Finances would run contrary to the requirement, based on Article 21 of the Constitution, to guarantee pluralism, and the democratic and impartial nature of information, which are considered in the case law of this Court to be essential features of the public radio and television service, and must be entrusted to the parliamentary control and oversight, as the expression of the entire national collectivity.

This therefore means, in the opinion of the Applicant, that it is necessary to go beyond a reading of Article 49(10) of the consolidated law on radio and television services and interpret it in such a way as to retain control powers for the parliamentary body over all matters which in one way or another may have an impact on the pluralism and impartiality of the public radio and television service. Moreover, if the aforementioned interpretation were to be understood in a strictly literal sense, it would not according to the Applicant be possible to apply either sub-section 1, which provides for the award of the service concession, sub-section 3, which stipulates the number of members of the Board of

Directors, or sub-section 4, which sets the duration of their mandate at three years. The Committee's representative submitted documentation to the Court demonstrating that the Board of Directors, appointed in 2005 after the entry into force of the provisions mentioned above, remained in post for three years as required under sub-section 4, and not for two years as on the other hand required under the previous legislation.

The state representative counters the Applicant's interpretation with a reading of the legislative text (Article 49 of the consolidated law on radio and television services) in strictly literal terms and infers from the absence of any reference to sub-section 8 by sub-section 10 – which, as mentioned above, limits the reference only to sub-sections 7 and 9 – that Parliament intended to bring forward the entry into force – to a date earlier than the closure of the first public offer of sale – only of the appointment procedures and not also of the dismissal procedures. The effect of this reading of the legislation in force would be that the procedure contemplated under sub-section 8 governing the dismissal of the member of the Board of Directors appointed by the Minister for the Economy and Finances would not apply during the intervening period between the entry into force of law No. 112 of 3 May 2004 (Principles governing the structure of the radio and television system and RAI-Radiotelevisione italiana S.p.a., and authorisation to the Government to issue the Consolidated law on radio and television services), Article 20 of which has been reproduced in full by Article 49 of the consolidated law on radio and television services, and the future event on which the entry into force of sub-sections 1 to 9 is conditional.

The impact of the two interpretations proposed by the parties on the solution to the dispute is clear.

If the former were accepted, it would be necessary to consider whether the contested decision were not only contrary to law but also violated the sphere of competences guaranteed under the Constitution to Parliament and, on its behalf, to the Oversight Committee for RAI.

If on the other hand the second interpretation were accepted, the same decision would amount to the mere application of the applicable law and all the considerations concerning any infringement of the prerogatives of the Parliamentary Oversight Committee should relate to the legislative provisions with which the contested decision complied.

To summarise, according to the first interpretation, the Court should enter into the merits of the dispute and examine whether or not the dismissal made without a corresponding resolution of the Parliamentary Committee infringed the latter's prerogatives. According to the second interpretation, any consideration regarding the alleged infringement of the powers of Parliament would be based on the law (Article 49(10) of the consolidated law on radio and television services), with the result that the application would be ruled inadmissible or, should any doubt arise regarding the constitutionality of the

provision concerned, a decision would be taken by the Court to address the relative question.

3.3. – First and foremost, it must be pointed out that it is a matter for this Court to interpret the provisions relevant in this dispute, as the court directly seized of the jurisdictional dispute between branches of state following the application by the Parliamentary Committee for general guidance and oversight over radio and television services. Moreover, as mentioned above, the decision on the dispute itself depends on the resolution of the interpretative doubt set out in the previous paragraph.

This Court finds that the legislation cited above may and must be interpreted in accordance with the Constitution as providing that, in referring to "the procedures specified in sub-sections 7 and 9", Article 49(10) of legislative decree No. 177 of 2005 implicitly intended to refer to the related power of dismissal provided for under the same legislation.

Various considerations based on the framework of constitutional law and other legislation weigh in favour of the above interpretation.

Judgment No. 225 of 1974 of this Court emphasised that the primary requirement which the public radio and television service must satisfy is that of "offering to the public a range of services characterised by objectivity and comprehensive information, a broad broad receptiveness to all cultural tendencies, and the impartial reporting of the ideas which are expressed in society". Compared to these fundamental goals, it is indispensable that the management bodies must first not "represent directly or indirectly an expression, either exclusive or predominant, of the government" and second have a structure "capable of guaranteeing objectivity". These two negative and positive requirements may be fulfilled only if "adequate powers are recognised to Parliament, as the institutional representation of the entire national society". This Court has reiterated this view, asserting that the public radio and television service, understood as a "social service", must have a "high level of democratic representativeness", which "reflects its structuring within the ambit of Parliament ('parliamentarisation')" (judgment No. 194 of 1987).

The impartiality and objectivity of information may only be guaranteed by a pluralism of sources and of ideological, cultural and political views, since it is difficult for the news and programme content in itself, for itself, always and in any case to be objective. Parliamentary representation, which tends to reflect the pluralism existing within society, therefore presents itself under the current arrangements as the most appropriate custodian of the indispensable conditions for ensuring that the directors of the concessionary company are protected as far as possible from pressure and conditioning, which would inevitably have an impact on their objectivity and impartiality.

3.4. – Parliament has provided over the last thirty years for different forms and proportions governing appointments and the membership of the Board of Directors of RAI,

but has always respected two fundamental principles: the first is that a majority of the members should be appointed by the Parliamentary Committee, and the second that the committee must necessarily play a role in procedures to remove members of the Board.

Law No. 103 of 14 April 1975 (New arrangements governing radio and television broadcasting) provided (Article 8) that the Board be composed of sixteen members, of which ten were elected by the Committee by qualified majority and six by the shareholder assembly. However, Article 12 of the same law provided that, in the event of a financial year deficit greater than ten percent, the Board would be dissolved pursuant to notification of the existence of the financial imbalance by the Audit Committee to the Parliamentary Committee, provided that the Committee confirm that the statutory prerequisites for dissolution had been fulfilled. Decree-law No. 807 of 6 December 1984 (Urgent provisions on radio and television broadcasting), converted into law No. 10 of 4 February 1985, provided that the Board of Directors be comprised of sixteen members all appointed by the Parliamentary Committee (Article 6). A similar provision was contained in Article 25 of law No. 223 of 6 August 1990 (Provisions regulating public and private radio and television services). Law No. 206 of 25 June 1993 (Provisions regulating the concessionary company of the public radio and television service) granted the Presidents of the two Houses of Parliament the power to appoint, on a consensus basis, the five members of the Board of Directors of RAI, stipulating however that these members could only be dismissed only pursuant to a proposal of the Parliamentary Committee adopted by two thirds majority of its members.

3.5. – The legislative development examined above demonstrates that Parliament has complied with the principles asserted by this Court regarding the predominant role of parliamentary guidance and oversight over the management of the concessionary company for the public radio and television service. In this regard it is necessary to point out two constant features which are particularly significant for our present purposes: *a*) it is a matter for Parliament to order that the entire Board be appointed or designated by the parliamentary body for guidance and oversight, or that the latter have the power to decide on the appointment only of a majority of members; *b*) the removal of the members is in any case possible subject to an assessment by the Committee.

The second principle mentioned above originates from the need to safeguard the independence of the members of the management body of the concessionary company. If the appointment is to be made by a body other than Parliament, the choice of the persons to be appointed must be made according to discretionary criteria and in accordance with the qualitative requirements set by law. Even where the appointment was made by the Presidents of the two Houses of Parliament, there was no requirement for a prior opinion of the Oversight Committee on the persons whom the Presidents intended to appoint as

members. On the other hand, the law provided for a resolution by the Committee in cases where the members were to be dismissed.

The guarantee of independence of the officeholders required, on various grounds, under constitutional or ordinary legislation, precludes the possibility of a perfect symmetry between the powers of appointment and the power of dismissal. The former follows the logic of the discretionary choice of the persons considered most capable and most in tune with the appointing body, whilst the latter implies a judgment on the performance of the member of the body, which cannot be left to a free and uncontrolled decision by the body which appointed them – which otherwise entails the loss of the minimum level of protection of his independence.

In the case at issue in the proceedings before this Court, the filter of the resolution by the Parliamentary Oversight Committee is necessary in order to moderate the power to dismiss the individual appointed, which is justified in order to prevent that individual from no longer being answerable to Parliament, according to the necessary control that it exercises as the supreme guarantor of the compliance by the members of the Board of Directors with their duties of objectivity and impartiality imposed by Article 21 of the Constitution.

4. – The applicable legislation followed the trend of the legislative development described above and the principles laid down in the case law of this Court. It is in fact provided that two out of nine members be appointed by the majority shareholder (currently the Minister for the Economy and Finances). Whilst in order for the member designated to occupy the position of chairman to be appointed validly, it is necessary to obtain the approval of the Parliamentary Committee, expressed by two thirds majority of its members, no consultation of the Committee is required for the appointment of the second of the two members concerned, with the result that the choice is discretionary, subject to compliance with the prerequisites laid down by Article 49(4) of the consolidated law on radio and television services. As far on the other hand as dismissal is concerned, Article 49(8) – again following the trend under previous legislation – stipulates, for all directors, that they may only be dismissed pursuant to a corresponding resolution of the Parliamentary Oversight Committee.

The Court does not see any reason why the dismissal of the members of the Board of Directors of RAI during the period, of indefinite duration, preceding the closure of the first public offer of sale, should be subject to arrangements different to those required by Parliament over recent decades, and also reiterated for the future by the very same law currently in force. This would end up causing an unjustified and unprecedented disparity in status between the different members of the Board, one of whom would enjoy a weaker guarantee of independence compared to the others.

Moreover, were one to go no further than a literal interpretation of Article 49(10) of the consolidated law, cited above, not only would there be no explanation – as pointed out by the Applicant – as to why it was clearly considered that the term of the Board, which was appointed in 2005, expired in 2008 on conclusion of the three-year period provided for under sub-section 4 of that article (whilst the previous legislation provided for a term not longer than two financial years), but one would also have to surmise that the failure of sub-sections 1 to 9 to enter into force would also imply that either the subjective requirements stipulated under previous legislation (which, on this specific issue, should be regarded as not having been repealed) or purely and simply those stipulated under codified legislation for the directors of companies limited by shares should apply. Both eventualities would entail unreasonable strained interpretations, since the Court cannot see any justification for accepting a mixture of the appointment procedures provided for under the law currently in force and the prerequisites stipulated under the repealed legislation (which would continue to apply only in order to permit the appointment of individuals with different status compared to those required under the law currently in force). Nor would it be reasonable to conclude that the special prerequisites relating to expertise required under legislation from the past decades be completely disregarded, in favour of the application of the general prerequisites for the administrators of commercial companies, without any reference to the special nature of the public radio and television service.

For the reasons set out above, the Court concludes that Article 49(10) of the consolidated law on radio and television services may not be interpreted literally, which would result in a series of discrepancies and contradictions. It is necessary on the other hand to favour a systematic and constitutionally informed reading, which eliminates these problems and is more compatible with the rationale for the law in which it is included. This interpretation leads the Court to conclude – as mentioned above – that the reference to the appointment procedures necessarily implies the application of those parts of Article 49 which are strictly related to the appointment (term in office, requirements for candidates, dismissal of members), in order to prevent a mosaic comprised of legislative fragments deriving from a series of sources that are not well coordinated between themselves.

5. – The proposal to dismiss the member appointed by the Minister in the absence of a prior resolution to this effect by the Parliamentary Committee for general guidance and oversight over radio and television services is not, for the reasons discussed above, a mere application of the law in force, but by contrast amounts to a violation of the law, if interpreted in a systematic and constitutionally informed manner. As a result, it amounts to an unlawful limitation of the powers conferred by Article 21 of the Constitution on Parliament which acts, in matters concerning the public radio and television service, through the Oversight Committee.

6. – Since the Minister for the Economy did not have the power to request and vote in favour of in the Shareholder Assembly of RAI, acting through his representative, the dismissal of a member of the Board of Directors in the absence of a prior resolution adopted by the Parliamentary Oversight Committee, the note of the Minister for the Economy of 11 May 2007 addressed to the President of the Council of Ministers, by which the Minister notified the latter of his decision to dismiss the aforementioned member, must be annulled.

The Court also accepts the request of the Applicant Commission to annul all the acts "related to and resulting from" the above note of the Minister. In particular, on the basis of the above, this Court finds that the following acts infringed the Committee's prerogatives, and hence annuls them: the note of 11 May 2007 by which the President of the Council of Ministers notified the Chairman of the Oversight Committee of the decision of the Minister for the Economy to dismiss Prof. Petroni; the note, of the same date, by which the Minister for the Economy invited the Director General of the Treasury Department "to take the resulting steps in order to activate the procedure for the dismissal of Prof. Petroni and the appointment of a new member to the Board of Directors"; the note, of the same date, by which the Director General of the Treasury requested the Chairman of the Board of Directors and the Chairman of the Audit Committee of RAI S.p.A. to convene without delay the ordinary assembly of shareholders pursuant to Article 2367 of the Civil Code, with the following agenda: "1. Dismissal of a director and appointment of a new director of the Company".

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the Minister for the Economy and Finances, notwithstanding the fact that the decision was taken together with the President of the Council of Ministers, was not entitled to request and vote in favour of in the Shareholder Assembly of RAI – Radio Televisione Italiana S.p.a. the dismissal of a member of the Board of Directors in the absence of a prior resolution adopted by the Parliamentary Committee for general guidance and oversight over radio and television services;

accordingly, *annulls*:

a) the note of the Minister for the Economy and Finances, addressed to the President of the Council of Ministers in data 11 May 2007;

b) the note, of the same date, of the President of the Council of Ministers, addressed to the Chairman of the Parliamentary Committee for general guidance and oversight over radio and television services;

c) the note, of the same date, of the Minister for the Economy and Finances, addressed to the Director General of the Treasury Department;

d) the note, of the same date, of the Director General of the Treasury Department, addressed to the Chairman of the Board of Directors and to the Chairman of the Audit Committee of RAI S.p.A.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 March 2009.

Signed:

Francesco AMIRANTE, President

Gaetano SILVESTRI, Author of the judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 13 March 2009.

The Director of the Registry

Signed: DI PAOLA