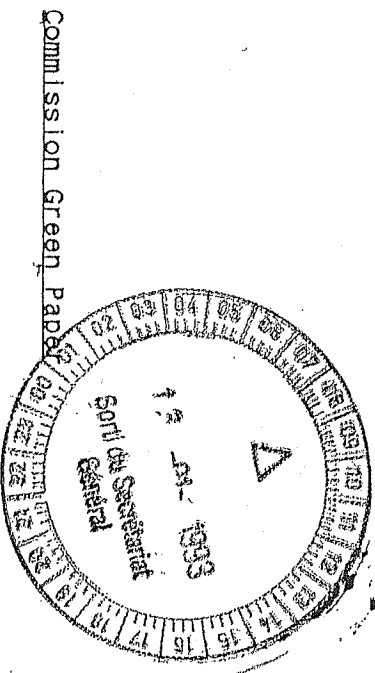


PLURALISM AND MEDIA CONCENTRATION

IN THE INTERNAL MARKET

An assessment of the need for Community action



NOTICE TO THE READER.

On a number of occasions, the European Parliament has requested that the Commission should propose measures aiming to safeguard pluralism in view of mergers and acquisitions taking place within the media sectors. The questions arising as to the necessity and timeliness of such possible actions are both complex and sensitive requiring, prior to taking a final decision, the wide canvassing of views from interested parties as well as the initiation of a public debate. To these ends the Commission has decided to propose this Green paper.

The Green paper analyses the need for action and considers potential options. The Commission has not committed itself to any of these options to date and would be willing to consider others that might arise.

In addition to the views of the European Parliament and competent national authorities, the Commission seeks to receive the opinions of all interested parties and particularly the European organisations representing television broadcasters, radio broadcasters, publishers, journalists, audio-visual creative artists, audio-visual producers, satellite distributors, cable distributors and advertisers.

The Commission plans to invite these European trade organisations to a hearing on this issue in the spring of next year.

Written comments should be submitted before the hearing and mailed to the following address:

DGIII/F/5 - "Media and Data Protection" Unit,

N-9; 6/11

200 rue de la Loi

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Annex : Review of national legislation

S U M M A R Y

The purpose of the Green Paper is to present an initial assessment of the need for Community action concerning concentration in the media (Television, radio, press) together with the different approaches which the Commission might adopt once it has consulted the parties concerned.

In recent years, Parliament has expressed its concern about this question on several occasions, in particular in its resolutions of 15 February 1990 and 16 September 1992, which call on the Commission to propose regulatory measures so as to restrict concentration in the media and safeguard pluralism.

In the light of the Community's objectives and powers, the results of this look into the need for action can be summarized as follows:

1. Protection of pluralism as such is primarily a matter for the Member States. In working towards its objectives and exercising its powers, the Community must, however, ensure that its own activities and those for which it has competence do not adversely affect pluralism. In this respect with regard solely to the objective of safeguarding pluralism, there would not appear to be any need for action at Community level, since national mechanisms for protecting pluralism can be applied to situations with a Community dimension. Thus, should a broadcaster established in another Member State genuinely circumvent legislation on pluralism, the Member State of reception could, subject to observing the conditions laid down in the case law of the Court of Justice, restrict the free movement of such broadcasts. Similarly, where a merger declared to be compatible with the common market under the Merger Control Regulation is harmful to pluralism, the Member State would still be able to take appropriate measures to ensure that pluralism is protected.

2. This capacity of the Member States to safeguard pluralism through a national regulatory framework for mergers may, however, lead to interference within the area without frontiers consisting of the Community. Since the mid-1980s, laws on media ownership have been introduced and are developing in divergent ways. Such laws on pluralism, which consist in particular in limiting maximum holdings in media companies and in preventing cumulative control of, or holdings in, several media companies at once, must be distinguished from the discriminatory restrictions which limit ownership by foreigners and which are therefore incompatible with the Treaty.

3. Disparities between national measures aiming to safeguard pluralism may, at least potentially, impact upon the functioning of this area without frontiers :

- a Member State could possibly restrict the free movement of broadcasts in the event of genuine circumvention of one of these laws;
- the establishment of media companies in another Member State could be limited;
- restrictions and distortions of competition are introduced;
- uncertainty in the law, harmful to the competitiveness of companies, could result from diverging views on what constitutes circumvention;
- such laws limit access to the activities and to the ownership of the media, when access should be facilitated so as to permit the establishment of the single market and secure the competitiveness of media companies which pluralism requires.

4. The restrictions on ownership at the root of these effects are not, as such, incompatible with Community law. They are not discriminatory and pursue a public-interest objective associated with freedom of expression.

5. Restrictions on media ownership cannot be replaced just by applying general competition law and in particular, at Community level, the Merger Control Regulation. The latter can prevent mergers which adversely affect pluralism only in so far as they also affect competition, which is not always the case.

6. In the light of this analysis, there are three different options among which the Commission may choose and on which the Commission would like to know the opinions of the parties concerned:

- (I) taking no action;
- (II) proposing a recommendation to enhance transparency;
- (III) proposing the harmonization of national restrictions on media ownership by
 - (a) a Council Directive, or
 - (b) a Council regulation, or
 - (c) a directive or a regulation together with an independent committee.

The Commission does not currently have a particular preference for, any one of these options and leaves open the possibility for other eventual alternatives. It wishes to know the views of interested parties on these options as well as on the questions posed in this Green paper which are summarised below:

QUESTION 1

The Commission would welcome the views of interested parties regarding the needs for action, and in particular on:

- any cases where the Community dimension of media activity has meant that restrictions on media ownership imposed for the purpose of maintaining pluralism have become ineffective, for example because they are circumvented or because of transparency problems;*
- the existence of restrictions or restrictive effects other than those identified above;*
- practical instances where ownership restrictions have actually impeded the activity of economic operators in the sector;*

- the sectors and activities which are especially affected by restrictions on ownership (for example, is the press subject to restrictive effects not only in respect of multimedia aspects but also in respect of monomedia aspects?).

QUESTION 2

The Commission would welcome the views of interested parties on whether the needs identified are of sufficient importance, in the light of Community objectives, to require action in the media industry and, if so, when such action should be taken.

QUESTION 3

The Commission would welcome the views of interested parties on the effectiveness, in the light of Community objectives, of action which would be taken solely at Member State level.

QUESTION 4

The Commission would welcome the views of interested parties on the content of a possible harmonization instrument as envisaged above, and in particular on the two variants for its scope, on the use of the real audience as a basis for setting thresholds, on the demarcation of distribution areas, on any other possible references, and on ways of defining the concept of controller.

QUESTION 5

The Commission would welcome the views of interested parties on the desirability of action to promote transparency which would be separate from a harmonization instrument.

QUESTION 6

The Commission would welcome the views of interested parties on the desirability of setting up a body with competence for media concentration.

QUESTION 7

The Commission would welcome the views of interested parties on each of these foreseeable options.

I N T R O D U C T I O N

Before taking up a position on the need for a Community initiative with regard to media (Television, radio, press) concentration, the Commission wishes to present its initial assessment and gather contributions from all interested parties.

The Green Paper is in response to the requests expressed over several years by Parliament, in particular in its resolution of 15 February 1990 on media takeovers and mergers,¹ in which it called on the Commission in particular "to put forward proposals for establishing a special legislative framework on media mergers and takeovers".

Parliament drew up a fresh resolution, adopted on 16 September 1992, which repeats this request.² This resolution refers to the effects of differing national laws on the operation of the internal market and calls on the Commission "to submit, after consultation with the parties concerned, a proposal for effective measures to combat or restrict concentration in the media, if necessary in the form of an anti-concentration directive...".³

The communication from the Commission to the Council and Parliament of 21 February 1990 on audiovisual policy⁴ states, in the section entitled "Pluralism and mergers", that:

"On account of the importance it attaches to the objective of maintaining pluralism, the Commission is studying this question with a view to a possible proposal for a directive, whose aim would be to harmonize certain aspects of national legislation in this field".

1 OJ No C 68, 19.3.1990, pp. 137-8.

In order to respond to Parliament's requests and to identify the different options available, the Green Paper is based on two studies, one looking into the economic aspects ordered by the Commission⁵ and the other describing the various national laws in this field (Annex).

5 "Study on pluralism and concentration in media - economic evaluation", Booz-Allen & Hamilton; February 1992; This study will be made available by the Commission on request by fax or mail to the following address:

Part One

OUTLINE OF THE ISSUE

The effect of concentration in the media on media pluralism can be understood only if one first defines what is meant by "pluralism".

1. THE CONCEPT OF PLURALISM

Outside the legal context, the concept of pluralism is used in a broad, general sense. Thus, reference is sometimes made to pluralism when it comes to justifying positive measures in support of freedom of expression and diversity of information sources, e.g. aid to the press or distribution systems. This kind of use is encountered in the general context of measures to assist the media; with its limits difficult to gauge since pluralism is easily invoked as soon as a problem involves the media.

Legal analysis provides some clarification, however, even if the term is not used in international statutes on basic rights. In national legal systems, the concept of pluralism is not explicitly recognized in constitutional statutes⁶ but can be found in the rulings of the constitutional courts of certain Member States (France, Germany and Italy), which treat it as a constitutional principle. Other legislative statutes which refer to pluralism do not define the concept. The variety of expressions used containing the word "pluralism" - pluralism of the media, pluralism in the media, the pluralist nature of the expression of currents of thought and opinion,⁷ pluralism of information,⁸ pluralism of the press,⁹ plurality of the media¹⁰ - shows that there is no common understanding of the concept.

⁶ Article 20(3) of the Spanish Constitution refers to "the pluralism of society".

⁷ The French Law of 30 September 1986.

⁸ Italy, Law of 6 August 1990; Spain, Law of 3 May 1990; Luxembourg, Law

However, two common features do emerge from a legal analysis of the European Convention on Human Rights as interpreted by the European Court of Human Rights and of national laws: ~

- the concept of pluralism serves to limit the scope of the principle of freedom of expression;
- the purpose of such limitation is to guarantee diversity of information for the public.

1. The concept of pluralism serves to limit the scope of the principle of freedom of expression

While the principle of safeguarding pluralism has constitutional force in certain Member States, it does not as such constitute a human or basic right. The link between maintaining pluralism and the principle of freedom of expression is not such as to make the former a basic right. Both in statutes and case-law the link is one of derogation from the principle of freedom of expression. Like certain obligations relating to editorial content (morality, impartiality, taste and decency, etc.), the function of the concept is to limit in certain cases the application of the right to freedom of expression to a potential beneficiary. Thus, it is possible in the name of pluralism to refuse a broadcasting licence or permission for the takeover of a newspaper, a monolithic corporate structure, a holding in a media company, etc.

The fact that a derogation is involved is brought out both by the judgments of the European Court of Human Rights and the rulings of the supreme courts of certain countries.¹¹

The European Court of Human Rights (hereinafter, the ECHR) takes the view that pluralism is an exception to the principle of freedom of expression, designed to protect the rights of others (Article 10(2) of the European Convention on Human Rights).

In the Groppera decision (28 March 1990), the ECHR links pluralism to Article 10(2) of the Convention (which provides for the possibility of restriction if the measure is prescribed by law, if it relates to a legitimate objective and if it is necessary in a democratic society), referring to the legitimate aim of protecting the rights of others (clause 70). The European Commission on Human Rights had not examined this point (it limited itself to the examination of the condition "prescribed by law"). However, the holders of these "rights of others" are not specified: are they the viewers, who have the right to a diversity of opinions, or are they other beneficiaries of freedom of expression, who have a right of access to such means of expression?

¹¹ In particular in France and Germany (see Annex). In the United States of America too, the Supreme Court has ruled that the right of viewers takes precedence over the right of broadcasters, and that the diversity of opinion on the airwaves serves First Amendment values. In Red Lion Broadcasting v the Federal Communications Commission (FCC) (1969), the Court made the explicit point, with regard to the First Amendment, that "it is the right of the viewers and listeners, not the right of broadcasters, which is paramount" (a concept which is close to the "rights of others" in the European Convention on Human Rights) and, since frequencies are limited, "no one has a First Amendment right to a licence". In Metro Broadcasting v FCC (27 June 1990), concerning the FCC's policy of promoting the racial and ethnic pluralism of programmes by increasing the diversity of radio broadcasting ownership through "minority ownership policies", the Supreme Court ruled that "the diversity of views and information on the airwaves serves important First Amendment values". Lastly, in Post Company National Citizens Committee for Broadcasting (12 June 1978) concerning a cross-media ownership rule of the FCC's (radio-TV/daily news in a same community), the Court held that the rule "did not violate First and Fifth Amendment rights of newspaper owners". As regards the cross-ownership rule which it drew up in 1975, the FCC explained that "the premise is that a

2. The purpose of such limitation is to guarantee diversity of information for the public

The limit placed on the principle of freedom of expression, on the grounds of pluralism, is justified by the fact that the objective is to ensure diversity of information for the public. In the interests of access to such diversity of views, it may indeed be necessary, in certain cases, to limit application of the principle of freedom of expression because it would result in preventing another beneficiary of that freedom from using it. Such is the case, for instance, where there is a shortage of means of broadcasting or where access to them is limited.

In accordance with the interpretation placed on the European Convention on Human Rights,¹² the "information" whose diversity is sought must be understood as a generic term in the broad sense, i.e. not just newspapers or the news bulletin but all kinds of ideas, all types of programme, communication and content.¹³ Only in supervising the lawfulness of the restrictions on freedom of expression may the differences in the nature of such information be accounted for.

¹² As regards advertising, see in particular the judgment of the ECHR of 20 November 1989 in Markt Intern Verlag and Klaus Beerman v Federal Republic of Germany, series A, No 165, paragraph 26.

Diversity of information can be achieved in one of two ways. A media operator can be asked to provide, in its communication activity, diversity of existing opinions (internal pluralism) or to make several media available to the public, the combination of which represents diversity, each medium being one element in that diversity (external pluralism). In the case of internal pluralism, the measures adopted relate either to the internal organization of the media company whose control structure will have to represent the various currents of opinion, or to the editorial content of the newspapers or broadcasts. In the case of external pluralism, the measures are directed at organizing relations between the various media companies so as to ensure a degree of autonomy between them (anti-concentration measures are part of these). Similar to this type of measure are those which are aimed at facilitating access to media activities, for instance by increasing the number of broadcasting licences (TV or radio) available on a particular territory and thus making it possible to increase the number of media available to the public.

CONCLUSION

The concept of pluralism can be defined both in terms of its function and in terms of its objective: It is a legal concept whose purpose is to limit in certain cases the scope of the principle of freedom of expression with a view to guaranteeing diversity of information for the public. In this report, the term "pluralism" will be used to mean the objective, that is "diversity of information" in the broad sense.

II. PLURALISM AND CONCENTRATION

Mergers in the media industry do not have, in themselves, a positive or a negative effect on pluralism. Such an effect can only be measured by reference to a general environment comprising the public concerned and the diversity of information offered to that public at a given place.

Depending on its impact on that environment, the merger may have a positive or negative effect on pluralism. The effect will be positive if the diversity of information offered to the public is increased, e.g. if the merger makes it possible to extend the geographical area served, or is preserved when it would diminish (if the merger prevents the disappearance of a media operator). On the other hand, the effect will be negative if the diversity of information offered to the public is reduced (if a merger leads to the disappearance of titles or channels). One and the same operation could have both consequences, depending on the public concerned: thus, the public in a media operator's new broadcasting or circulation area will take a positive view of a merger even though it restricts the choice of the public in the original broadcasting or circulation area covered by the media operators which were the subject of the merger.

To determine how far concentration may create problems of pluralism it is therefore necessary to define what is meant by diversity in the choice of information offered to the public at a particular place.

Diversity of information. Diversity can be assessed in many ways: according to the editorial content of the broadcasts or the press, according to the number of channels or titles, and according to the number of media controllers or owners. These three methods vary in importance. Diversity of content is the most logical criterion but it is also difficult to apply given the complexity of the analysis which it requires¹⁴ and its subjectivity. The *number of channels* or titles is easily measurable as a criterion but not very significant as regards diversity of editorial content, which may remain weak and virtually controlled by a single operator. Nor does the criterion of the *number of media controllers* reflect editorial content, but it is a more sensitive indicator than the previous one since it lays stress on autonomy and structural independence among controllers, which, without being able to guarantee it, constitutes a minimum condition of the diversity of choice offered to the public.

¹⁴ It would indeed be necessary to take account of all the editorial characteristics of the medium in question (such as type of medium, type of programme or column, editorial opinions, frequency and duration of broadcast or circulation, etc.) and also to see whether the consumer.

Control of a collection of media by a single person, even if the objective is only commercial, has the potential effect of making the spreading of ideas dependent on acceptance by a single person and of restricting alternative means. Whatever the editorial content or the number of information carriers, concentration of control of media access in the hands of a few is by definition a threat to the diversity of information. Conversely, multiplying the number of alternative controllers increases the probability of diversity of information, even if this is not automatic. Economically speaking, effective competition among controllers may lead to qualitative differentiation between the products offered by each of them and, hence, favour editorial diversity.

Control. Since it may serve as a criterion for measuring the diversity of information, the question of control is essential, for it is necessary to know who controls what.

The controller. It is not possible simply to use the concept of owner or majority shareholder in a media company since, under the influence of anti-concentration rules, there may be several shareholders with the same proportion of ownership.¹⁵ While the notion of controller is more suitable, it may also be difficult to identify clearly who is the controller with decisive influence.

Diversity of control. To assess choice in a given area, account must be taken of the consumption of all media, i.e. not just of each type (monomedia) but of all types. Consumption of the media indeed shows that one type may constitute an alternative and a substitute for another: since the large majority of individuals (except in Spain, Portugal and Greece) consumes three types of media every day - radio, television and the press (see Table 1) - somebody who is a reader and captive viewer of the products of the same controller may nevertheless listen to radio programmes broadcast by another controller. This highlights the problems of multimedia control, since if one controller dominates the three media there is no longer any alternative, either within one medium or between types.

Reference to the public. Logically, everybody to whom the media are addressed should be taken as a reference (viewer, listener, reader) in order to determine the number of independent media offered to that person where he lives. As this is impossible, it is necessary to focus on the notion of consumption area and determine the choice of media offered in such areas (which may not be precisely delineated or homogeneous).

CONCLUSION

The effects of a media merger on pluralism must be assessed by reference to the environment in which it occurs. Mergers can have negative effects on pluralism, since they can limit the diversity of media controllers, one of the essential conditions for the diversity of information offered to the public.

TAB I

HERE IS A HIGH-LEVEL OF CERTAINTY THAT MULTI-MEDIA CONSUMPTION IS VERY COMMON IN THE NORTHERN COUNTRIES

APPROXIMATE MINIMUM PERCENTAGE OF POPULATION (OVER 13 YEARS) WITH MULTI-MEDIA REACH (DERIVED FROM MEDIA REACH DATA - 1989/90)

| | TV AND RADIO | TV AND DAILY NEWSPAPER | RADIO AND DAILY NEWSPAPER | TV, RADIO AND DAILY NEWSPAPER |
|------------------|--------------|------------------------|---------------------------|-------------------------------|
| • Belgium | 70 | 61 | 64 | 53 |
| • Denmark | 93 | 70 | 69 | 67 |
| • France | 85 | 50 | 45 | 43 |
| • Germany | 85 | 80 | 75 | 73 |
| • Greece | 37 | 26 | 18 | 0 |
| • Italy | 76 | 67 | 56 | 55 |
| • Netherlands | 55 | 61 | 76 | 51 |
| • Portugal | 65 | 17 | 13 | 0 |
| • Spain | 43 | 25 | - 7 | 0 |
| • United Kingdom | 83 | 85 | 81 | 77 |

Note: - All figures refer to weekly reach except Germany (bi-weekly), Netherlands and Spain (daily)
- 50% of unreached audience is assumed to overlap (after rounding up)

Part Two

THE LEVEL OF MEDIA CONCENTRATION

The level of concentration can be assessed using many different criteria, with the analysis then producing divergent results or no figures at all. To be able to draw on an economic analysis which addressed the problems of concentration and pluralism, the Commission ordered an economic study (see above).

I. GENERAL

In view of the problems which mergers raise with regard to pluralism in the media and which have been outlined in Part One, it is necessary to start from the effects of concentration on actual patterns of media consumption (see Tables I and II).

For the reasons already given, the study gives a picture of the diversity of media ownership by measuring the audience reached by media controllers in the Member States (see Table III). Though still imprecise, this method is appropriate to the objective of measuring the effect of mergers on pluralism, since it focuses on media consumption and provides an interesting comparison between Member States. It does not use the criterion of the number of media carriers (titles, channels, radio) owned by a single controller, which is not as such a sufficient criterion for assessing the impact on pluralism. In the United Kingdom, for instance, the two largest newspaper publishers hold only 2% of titles but account for 58% of circulation (see Table IV).

Taking the audience of the two largest controllers in each country, it is possible to make a comparison between Member States (see also Table V):

- * Television. Highest level: P (100%), DK (95%), UK (89%)
 Lowest level: (French-speaking) B (59%), D (62%);
- * Press. Highest level: IRL (76%), GR (60%), UK (58%)
 Lowest level: E (24%), F and D (33%);
- * Radio. Highest level: UK (96%), D (93%), DK (88%)
 Lowest level: GR (21%), F (43%), NL (51%).

- As regards the number of acquisitions of (minority or majority) holdings in the media industry, the study shows (Table VI) that between April 1990 and April 1991 there were 81 deals, 37 of them in the television broadcasting sector, 33 in production and 20 which were classified as "television monomedia"; there were only six multimedia acquisitions where the press moved into television broadcasting. The latter figure is the same as that for financial investors' operations in the television broadcasting sector.

- Another characteristic is that there were very few media takeovers by foreign operators (see Table VII), who most often acquired a minority interest only. The situation, therefore, is one where most large controllers (see economic study, Tables 4.14 to 4.20) focus their activities on a particular country. As regards television broadcasting, Spain is the only possible exception, where in two of the three new concessions Canal Plus and Fininvest play an important part. As regards operators, only Canal Plus (in E, B and D) and RTL (in B, D and NL) have opted for a more ambitious strategy on foreign markets. This prevalence of essentially minority holdings creates a dense, complex web of ownership, the principal consequence of which is to create a strategy of agreement and non-aggression rather than dynamic competition. Such a situation may prove to be precarious if one of the large groups breaks the status quo.

II. OBSERVATIONS BY TYPE OF MEDIA

1. Television/radio

- Contrary to what is sometimes maintained, the diversity of controllers increased between 1980 and 1990 in the television broadcasting sector (mostly as a result of new private entrants), except in Denmark and the United Kingdom (see Table VIII).

- "Public" controllers account for the majority of the audience in most of the Member States (see Annex I, Table 3.3).

Television: P (100%), DK (93%), NL (76%), IRL (73%), E (71%), D (71%), Flemish-speaking B (53%), GR (50%), I (50%), UK (49%), French-speaking B (47%), F (38%);

Radio: D (83%), DK (78%), French-speaking B (66%), Flemish-speaking B (64%), UK (64%), IRL (62%), P (47%), NL (42%), I (38%), F (22%), GR (19%), E (15%).

- The study shows that the restrictions on maximum shareholdings which exist in certain Member States do not prevent a single group from exercising a dominant influence. It emphasizes, in this respect, the importance of the concept of "controller" and the difficulty of defining it.

2. Press

In some countries, only a few groups control a large proportion of newspaper circulation, the two largest publishers accounting for more than 50% of the circulation figures. In certain specific markets, the market share of the two largest owners is bigger than their share of total circulation (D: Axel Springer Verlag has 32% of the total circulation but 82% of national dailies; E: Comcosa has 12% of the total newspaper circulation but 77% of the circulation of regional newspapers in the Basque Country).

III. OPERATORS' STRATEGIES

From the review above, three types of strategy emerge:

. Multimedia developments are due more to publishers investing in the audiovisual sector than to audiovisual companies investing in publishing. The interest of publishers in the television industry is attributable to the latter's growth prospects and to the value added which the multimedia represent for advertisers or the advertising industry and for programme suppliers (for instance, coverage of events by both press and TV can be a decisive advantage when acquiring exclusive rights to sports fixtures).

. Two strategies would appear to emerge in the television field: one is a strategy of vertical integration, the weakness of independent production pushing broadcasters into production; the other is a strategy of expansion with a view to reaching a certain critical size that can lead either to expansion at national level (resulting in monomedia concentration or multimedia activities) or, if the national scene is limited, to international expansion (a licence in another Member State or cross-border broadcasting). For instance, special-interest channels will naturally look to foreign markets to supplement their domestic "niche" market, which is necessarily limited.

. The role of institutional investors is considerable, probably in part because of the restrictions on media ownership which limit control and shareholdings and which make it necessary to find neutral financial partners (sleeping partners). Financial investors for their part are probably interested in the long-term prospects.

Conclusion.

The media sector is characterized by a fairly high level of concentration compared with other sectors and by a complex web of shareholding and media ownership networks centred around a few large national operators. Although they often have minority holdings, the latter exercise control over media companies by forming alliances with sleeping partners. Large national operators generally focus their activities on a particular country and have minority holdings, with a passive role, in other countries. However, the status quo seems increasingly fragile given that operators, particularly in the television sector, are forced to expand and become active in other countries in order to create synergies.

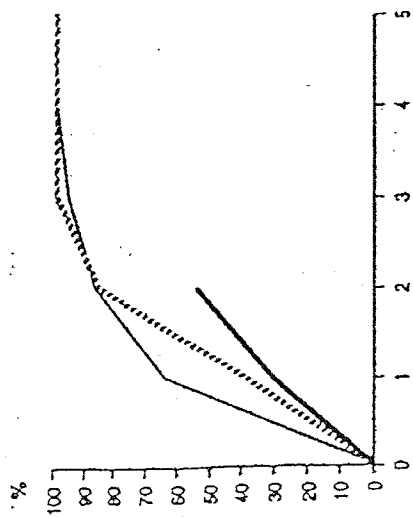
WHILE TV AND RADIO HAS A HIGH REACH ACROSS THE COMMUNITY, DAILY NEWSPAPERS
HAVE A RELATIVELY LOW REACH IN THE SOUTHERN COUNTRIES

MEDIA REACH
1989/90

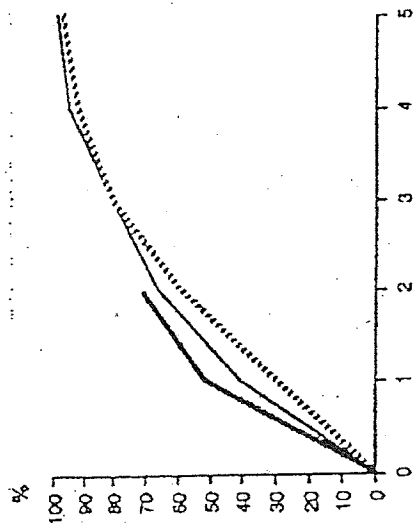
| | TV | RADIO | ANY DAILY NEWSPAPERS | BASIS | SOURCE |
|----------------|----------------|-------|-------------------------|---------------------------|--|
| BELGIUM | 78.0 | 85.0 | 72.0 | Weekly % of adults | CIM 1989-L'heure du temps, IBP 1989 |
| DENMARK | 96.9 | 95.2 | 71.6 | Weekly % of adults | Brogger & Nygart |
| FRANCE | 97.0 | 87.3 | 52.3 | Weekly % of population | CESP 1990 |
| GERMANY | 96.8 | 87.3 | 82.1 | Bi-weekly % of adults | MA '90/ Gruner & Jab |
| GREECE | 64.3 | 55.0 | 44.3 | Weekly % of population | Geo/Young & Rubican |
| ITALY | 98.5 (monthly) | 77.2 | 68.4 | Weekly % of adults | ISPI/ISEGII Auditel/ Audradio |
| NETHERLANDS | 65.0 | 80.0 | 93.0 | Daily % of adults | Het Media Institute/ Gear |
| PORTUGAL | 83.8 | 77.5 | 23.8 | Weekly % of adults | Team-Young & Rubican |
| SPAIN | 85.5 | 50.0 | 31.5 | Daily % of adults | E.M.G. May-June '90 |
| UNITED KINGDOM | 93.2 | 86.8 | 89.0 | Weekly % of adults | BARB, JICNARS, JICRAR |

CUMULATIVE SHARE (%) OF CONSUMPTION BY TOP RADIO STATION/TV CHANNEL CONTROLLERS AND NEWSPAPER PUBLISHERS

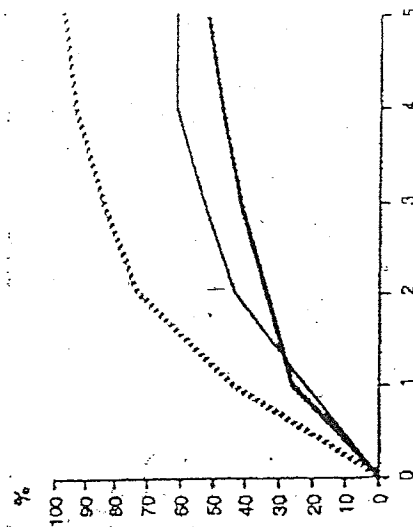
BELGIUM-FLEMISH



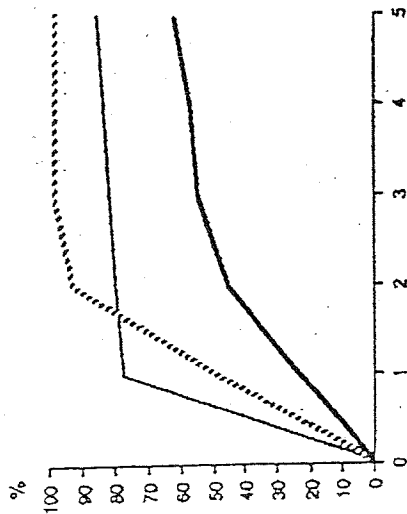
BELGIUM-FRENCH



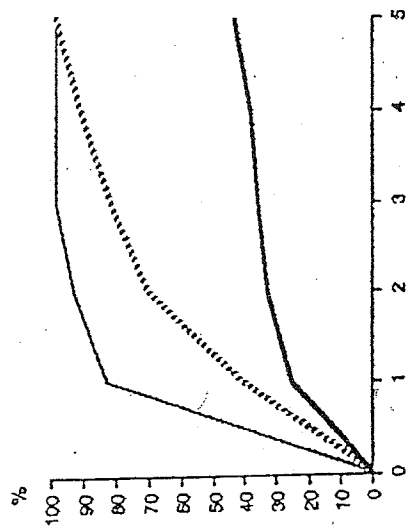
FRANCE



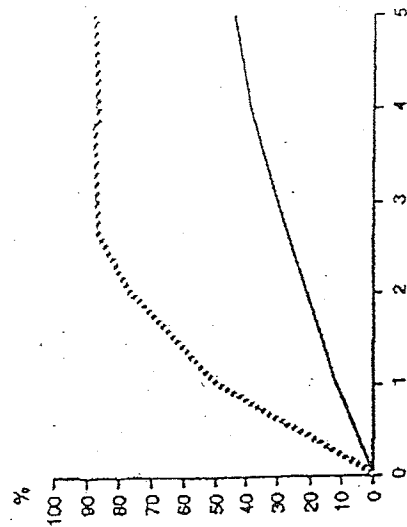
DENMARK



GERMANY (OLD LÄNDER)



GREECE



LEGEND

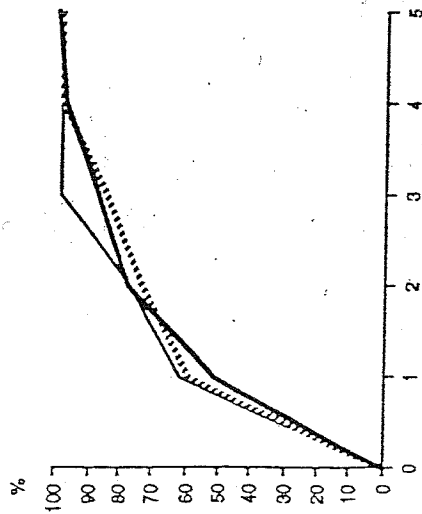
- Radio station controllers
- TV channel controllers
- - - Newspaper Publishers

Source: Project Database

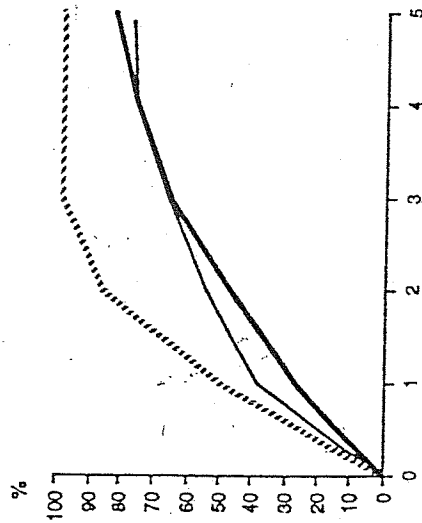
TAB III (suite)

CUMULATIVE SHARE (%) OF CONSUMPTION
BY TOP RADIO STATION/TV CHANNEL CONTROLLERS
AND NEWSPAPER PUBLISHERS

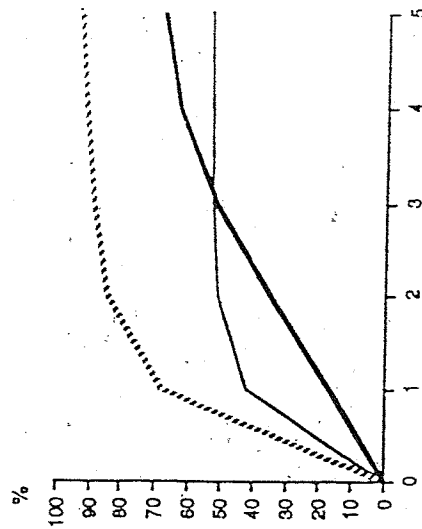
IRELAND



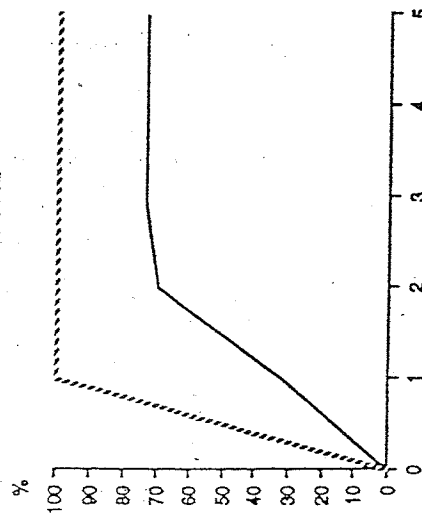
ITALY



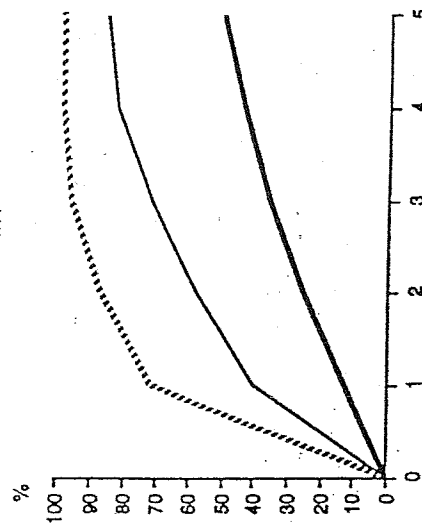
NETHERLANDS



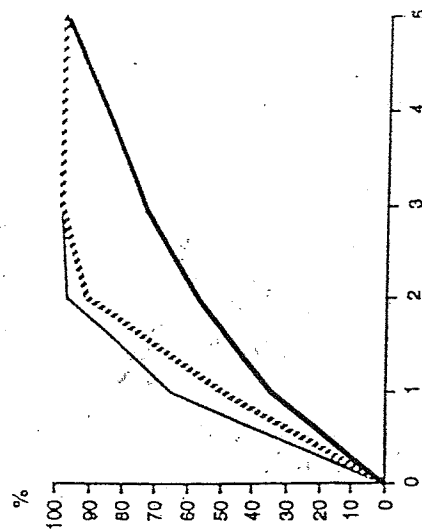
PORTUGAL



SPAIN



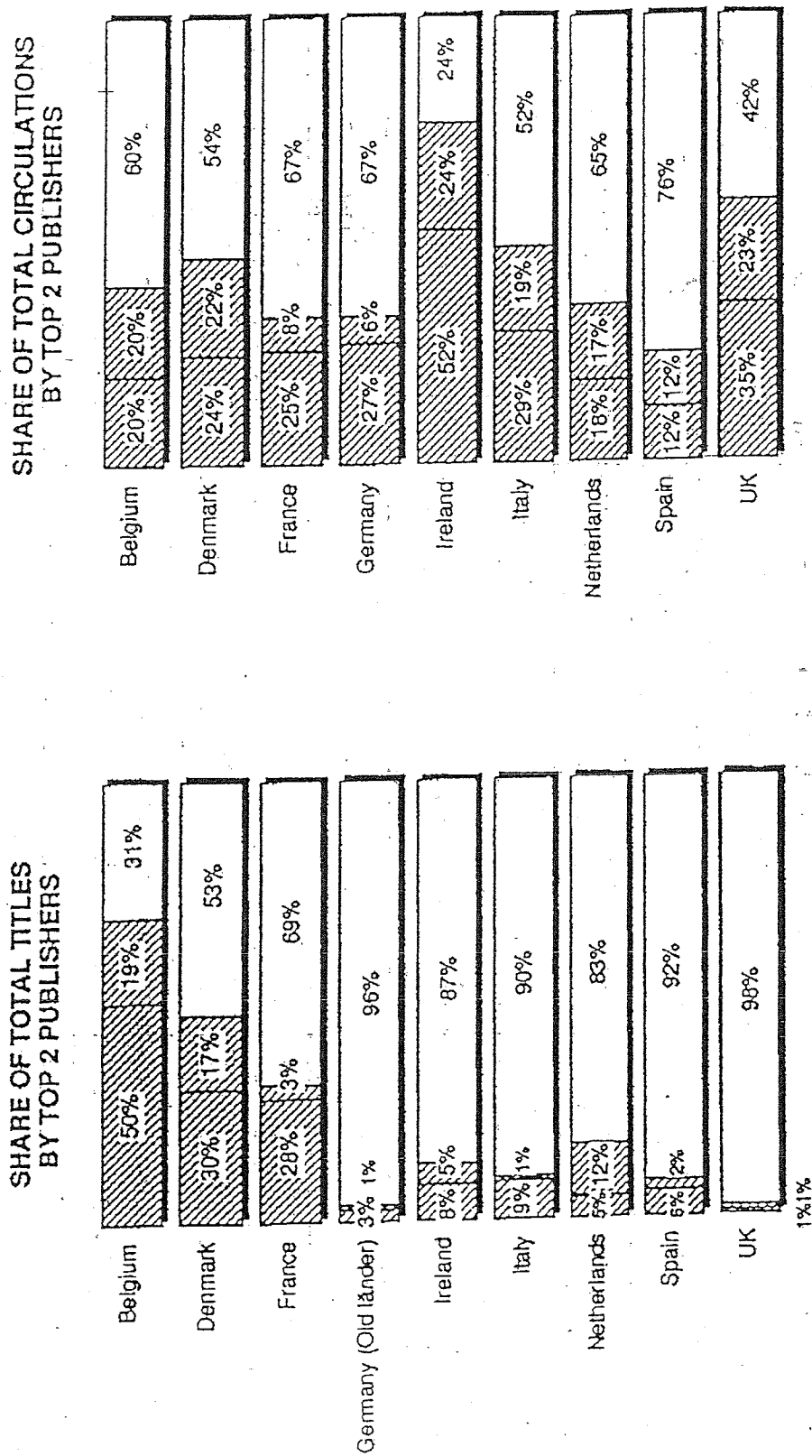
U.K.



LEGEND

- Radio station controllers
- ... TV channel controllers
- Newspaper Publishers

THERE APPEAR TO BE SIZEABLE INCENTIVES FOR SCALE IN NEWSPAPERS

CONCENTRATION IN DAILY NEWSPAPERS
IN EXAMPLE EC COUNTRIES

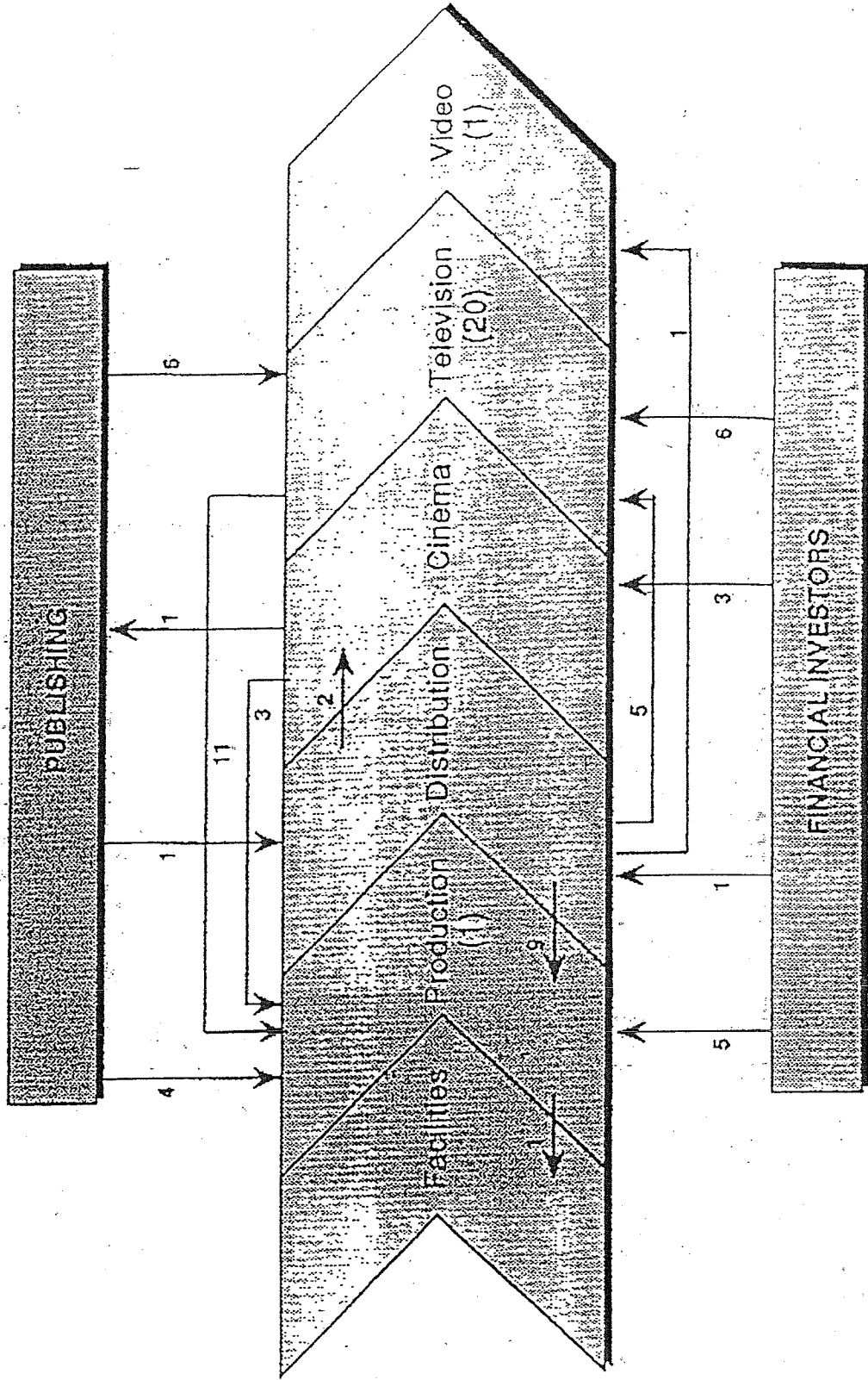
MEDIA CONCENTRATION IN THE COMMUNITY IS HIGH IF GOVERNMENT-OWNERSHIP IS INCLUDED

ANALYSIS OF CONSUMPTION-BASED CONCENTRATION IN THE EC MEDIA FOOTPRINTS

| CONSUMPTION FOOTPRINTS | POPULATION (Million) | % SHARE OF CONSUMPTION BY TOP IWO MEDIA CONTROLLERS | | | NOTES |
|-----------------------------|----------------------|---|-------|------------|--|
| | | TV | Radio | Newspapers | |
| • Belgium - French speaking | 3.4 | 59 | 80 | 38 | |
| • Belgium - Flemish | 6.1 | 86 | 86 | 46 | |
| • France | 56.3 | 73 | 43 | 33 | |
| • Denmark | 4.2 | 95 | 88 | 46 | |
| • Germany (Old lander) | 61.4 | *62 | *93 | 33 | ARD is composed of 7 independent regional broadcasters |
| • Greece | 9.9 | 77 | 21 | 60 | |
| • Ireland | 3.5 | 73 | 77 | 76 | |
| • Italy | 57.4 | 86 | 54 | 48 | |
| • Netherlands | 14.9 | 86 | 51 | 35 | |
| • Portugal | 10.0 | 100 | 57 | 51 | |
| Spain | 37.7 | 87 | 58 | 24 | |
| United Kingdom | 55.6 | 89 | 96 | 58 | ITV should perhaps be split into regions |
| AVERAGE | | 81 | 67 | 46 | Weighted 79, 68, 41 |

IN ADDITION TO CONSOLIDATION, TV BROADCASTERS ALSO ACQUIRED TO INTEGRATE INTO PRODUCTION

NUMBER OF MERGERS AND ACQUISITIONS IN THE EC BY SECTOR
(based on an analysis of the publicly announced deals in 1989-1990)

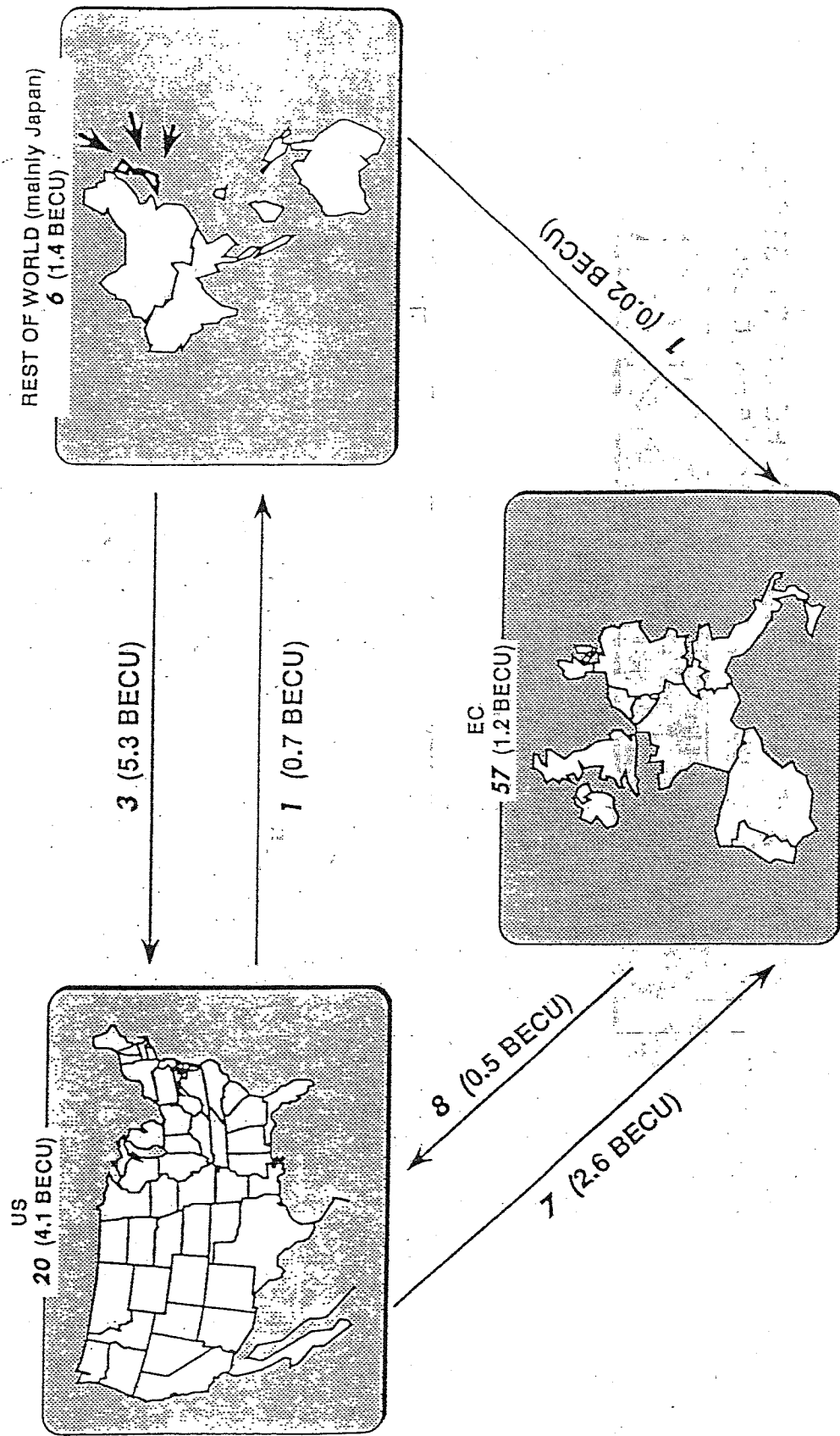


Figures in brackets indicate acquisitions within the sector by companies of the same sector

Source: Booz.Allen's Media Databank

WHILE THE LEVEL OF ACQUISITION ACTIVITY INITIATED IN EUROPE HAS BEEN SIGNIFICANT, IT IS DWARFED (IN VALUE) BY THAT FROM THE US AND JAPAN

NUMBER AND VALUE OF M&A TRANSACTIONS IN THE MEDIA INDUSTRY 1990



* One main deal involving MCA/Universal and a British consortium for an investment in studio facilities at Rainham Marshes in the U.K. accounts for most of the 2.6 BECU (from U.S. to the EC)

CURRENTLY, THERE ARE ONLY A FEW ESTABLISHED CROSS-BORDER TV CHANNEL CONTROLLERS (THESE ARE HAVAS, CLT AND FININVEST)

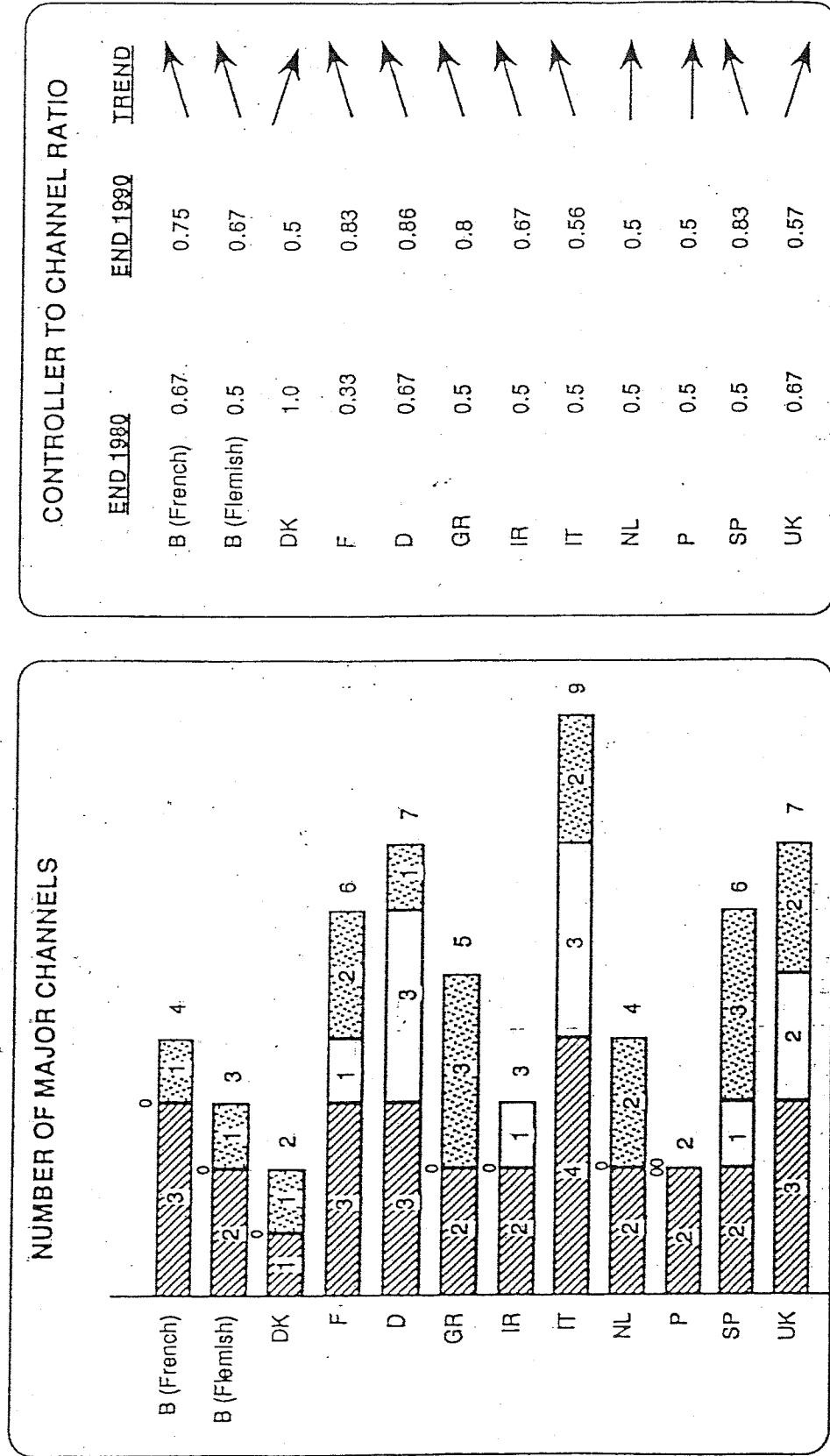
| Country | TV Controllers In 1990 | Channels |
|----------------|---|---|
| B (French) | <ul style="list-style-type: none"> French authority CLT Canal Plus | <ul style="list-style-type: none"> RTBF 1, Télé 21 (100%) RTL-TV1 (100%) Canal Plus (33%) |
| B (Flemish) | <ul style="list-style-type: none"> Flemish authority VTM | <ul style="list-style-type: none"> BRT 1, TV 2 (100%) |
| DK | <ul style="list-style-type: none"> State | <ul style="list-style-type: none"> TV 1 & 2 (100%) |
| F | <ul style="list-style-type: none"> State Bouygues Havas Hersant CLT | <ul style="list-style-type: none"> Antenne 2, FR3 (100%) TF1 (25%) Canal Plus (25%) La Cinq (25%) M6 (25%) |
| D | <ul style="list-style-type: none"> State Regional authorities (9) L. Kirch CLT Tele Muuchen G. Ackerman | <ul style="list-style-type: none"> ZDF (100%) ARD I, ARD III (100%) Sat 1 (40%) RTL Plus (46.1%) Télé 5 (45%) Pro 7 (51%) |
| GR | <ul style="list-style-type: none"> State Teletypos ? | <ul style="list-style-type: none"> ERTI 1, 2 & 3 Megachannel Antenna |

| Country | TV Controllers In 1990 | Channels |
|---------|--|--|
| IR | <ul style="list-style-type: none"> State TVS | <ul style="list-style-type: none"> RTE 1, Network 2 TV-3 |
| IT | <ul style="list-style-type: none"> State Fininvest Globo Parretti/Parini Italia | <ul style="list-style-type: none"> RAI 1, 2 & 3 Canale 5, Italia 1, Rete 4 TMC Odeon TV Independents |
| NL | <ul style="list-style-type: none"> State (with several broadcasters on time share basis) | <ul style="list-style-type: none"> Nederland 1, 2 & 3 |
| P | <ul style="list-style-type: none"> State | <ul style="list-style-type: none"> RTP 1 & 2 |
| SP | <ul style="list-style-type: none"> State Regional authorities La Vanguardia Havas Fininvest | <ul style="list-style-type: none"> TVF 1, 2 & 3 TV 3, TVGa, ETB-1 & 2, Canal 9, Canal Sur, Canal 33, TM3, TV Murcia Antenna 3 Canal Plus (25%) Télé 5 (25%) |
| UK | <ul style="list-style-type: none"> State Independents (incl. several UK media groups) | <ul style="list-style-type: none"> BBC 1 & 2 ITV regional channels |

Source: Carat International

TAB VIII

THE ENTRY OF NEW — MOSTLY PRIVATE — CHANNELS HAS IMPROVED THE CONTROLLER TO CHANNEL RATIO, IN MOST COUNTRIES



010: 1. Regional returns are considered as one channel

2 While it is recognized that each national channel has a separate controller in the Community and Council

Part Three

REVIEW OF MEASURES TAKEN
AT NATIONAL LEVEL

The measures taken by Member States to promote or safeguard pluralism take various forms and have various objectives. A distinction can be made between measures which are specifically intended to promote diversity in the media in view of concentrations and *related measures* with a wider objective, such as assistance for the sector (aid for production, distribution) or journalistic independence. The latter are of particular importance for the press sector since they can either facilitate the activities of media companies or guarantee certain editorial standards but do not in themselves ensure diversity in the media when mergers occur.

Measures specifically intended to safeguard pluralism may be aimed at either the *content of broadcasts* or the ownership structure of the companies. The rules on programme content applicable in the broadcasting sector are not intended to restrict mergers but to ensure that there is a degree of diversity of information within a particular medium, whether or not it is the result of a merger.

Finally, a distinction should be made between anti-concentration rules on pluralism and *discriminatory rules* which restrict access to media ownership by other Community nationals (still to be found in B, GR, P). The purpose of these rules, which are in breach of Community law (Articles 59 and 221 of the EEC Treaty), has no connection with the objective of safeguarding pluralism.

I. SITUATION IN EACH COUNTRY

The following tables have been drawn up on the basis of the study appended and are designed to give an overview¹⁶ of the main features of national laws on company ownership.

¹⁶ These tables attempt to describe the main features of the legislative provisions but display certain inaccuracies inherent in this type of presentation and due also, in some cases, to the difficulty of obtaining or interpreting certain laws.

BELGIUM (French Community)

| CONSTITUT. PROVISIONS | KEY LEGISLATIVE PROVISIONS | MONOMEDIA RESTRICTIONS | CROSS MEDIA RESTRICTIONS | FOREIGN OWNERSHIP RESTRICT. | OTHER OWNERSHIP RESTRICTIONS | TRANSP. REQUIREMENTS |
|--|--|--|---|---|---|--|
| Constitution of 7/2/1831, as amended, Articles 14, 18 and 98 | Penal Code, Articles 299 paragraph 1, and 300 Law of 19/7/1979 | | | | | |
| Constitution of 7/2/1831, as amended Article 14 | Law of 6/2/1987 Decree of 17/7/1987 as amended by Decree of 19/7/1991 | <p>* Individual/Cie cannot hold directly or indirectly > 24% of capital in > 5 private radio stations, nor participate to the extent of > 1/3 in management bodies of > 5 private radio stations, nor be a manager/director of > 5 private radio stations. The Executive may derogate from this principle in exceptional circumstances.</p> <p>* Individual or Cie cannot, within same geographical zone, hold directly or indirectly > 24% of capital in > 1 private radio station, nor participate to the extent of > 1/3 in management bodies of > 1 private radio station, nor be a manager/director of > 1 private radio station.</p> | <p><u>TV - Radio</u></p> <p>Individual or Cie which holds directly or indirectly more than 24% of capital in a private TV station of French Community cannot hold directly or indirectly more than 24% of capital in more than 5 private radio stations.</p> <p><u>Cable - TV</u></p> <p>Distributor and his manager cannot hold together more than 24% of capital in a private broadcasting body, nor have a participation of more than 1/3 in management bodies, nor be a manager or director of a private broadcasting body or a local / Community TV station.</p> | <p>Application for private radio licence to be signed at least by two persons of Belgian nationality whose domicile is within the broadcasting zone of the radio station concerned.</p> | <p>Private radio station must be independent of bodies representing employers, workers or a political party.</p> <p>Public administrations cannot control directly or indirectly one or several private radio stations, nor their information content</p> | <p>All shares in private radio station must be nominative</p> |
| | | <p>Individual or Cie which holds directly or indirectly > 24 % of capital in a private TV station of French Community cannot hold directly or indirectly > 24 % of capital in another private TV station of French Community.</p> <p>In principle only 1 public local and Community TV station may be authorised within same administrative area. Where 2 adjacent areas have common cultural characteristics, the Executive may treat them as a single area so that they will not be covered by > 1 local and Community TV station of French Community.</p> <p>Public broadcasting bodies can only participate in capital/management bodies of private TV stations of French Community if their capital participation in these does not exceed 24 %.</p> | | | <p>* Public administrations and public interest bodies cannot participate directly or indirectly in capital or management bodies of private TV stations of French Community. Exception for distributors and for public broadcasting bodies whose capital participation in private TV stations does not exceed 24%.</p> <p>* A private TV station of French Community must have its Cie seat and its centre of operations in French Community/bilingual regions of Brussels-Capital.</p> <p>* A local and Community TV station must be incorporated in conformity with Belgian laws.</p> | <p>All shares in private TV station of French Community must be nominative</p> |

BELGIUM (Flemish Community)

| EDIUM | CONSTITUTIONAL PROVISIONS | KEY LEGISLATIVE PROVISIONS | MONOMEDIA RESTRICTIONS | CROSS MEDIA RESTRICTIONS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTRICTIONS | TRANSPARENCY REQUIREMENTS |
|-------|--|---|--|---|--|---|---|
| ESS | Constitution of 7/2/1831, as amended, Articles 14, 18 and 98 | Law of 17/7/79 Article 299, paragraph 1 of Penal Code | | <u>TV - Press</u> Private TV company serving whole Flemish Community must have a min. of 51% of its shares held by publishers of daily and weekly newspapers in Flemish language, established in Flemish Community or in bilingual region of Brussels-Capital. | | | |
| DIO | Constitution of 7/2/1831; as amended, Article 14 | Decree of 6/5/82 Law of 6/2/87 | Only one broadcaster serving whole Flemish Community can broadcast advertisements. | <u>TV - Cable operators</u> Participation by cable operators in capital of private TV Cie serving whole Flemish Community is restricted to less than 20%. | | | |
| ABLE) | | Decree of 28/1/87 Law of 6/2/87 Decree of 12/6/91 Decree of 23/10/91 | 1. Only one private company may broadcast to whole Flemish Community. 2. Same as for radio. 3. Only one private regional company may broadcast within each zone. | | See Cross Media Restrictions: TV-Press 51 % restriction. | Only private cics established in Flemish Community or bilingual region of Brussels-Capital can broadcast. Regional private TV cics must: 1. be non-profit making; 2. have regional TV broadcasting as exclusive object; 3. operate a single regional TV service; 4. be independent of any political or professional group, or any commercial organisation. | * Private TV cie serving whole Flemish Community to notify the Executive of any changes in its capital structure. * Annual report to be presented to the Executive, indicating the manner in which it has complied with the legislation. * All shares in private TV Cie serving whole Flemish Community must be nominative. * Private TV cics serving a regional/local Community must submit annual report to the Executive, indicating the manner in which they have complied with the legislation. |

DENMARK

| MEDIUM | CONSTITUTIONAL PROVISIONS | KEY LEGISLATIVE PROVISIONS | MONOMEDIA RESTRICT. | MULTIMEDIA RESTRICT. | CAPITAL PARTICIPATION LIMITS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTRICTIONS | TRANSPARENCY REQUIREMENTS |
|--------------------------|--------------------------------------|---|---------------------|----------------------|--|--|--|---|
| PRESS | Constitution of 5/6/1953, Article 77 | Law No. 533 of 1986 | | | | | | All Danish publications must print publisher's name. Periodicals must contain details of editor's name and place where printed. |
| CABLE / RADIO / CABLE TV | | Order No. 339 of 22/5/90 | | | See Other Ownership Restrictions, point 3. | A majority of members of board of a company, or association which has local radio or TV licence, must be resident in the locality. | 1. Licences granted only to Cities or associations which have radio or TV activities as their sole object. 2. Licences may be granted to local authorities provided that their purpose in engaging in programme activities is solely to make available production and broadcasting facilities for citizens or to provide information concerning the local authority. 3. Commercial entities (with the exception of national and local newspapers) may not have a "decisive influence" in local radio and TV organisations. | |
| CABLE RELAY | | Order No. 339 of 22/5/90 Order No. 678 of 23/10/87 Order No. 651 of 22/9/86 | | | | | Licences granted for SMATV/MATV systems only to: - regional PTT's - non-profit antenna societies - local gov't bodies - owners of apartment blocks | |

FRANCE

| Medium | Constitutional Provisions | Key Legislative Provisions | Monomedia Restrictions | Cross Media Restr. Authorisation for terr. radio/TV/cable net. given if no more than 2 of following holdings (by column) | Capital Participation Limits | Foreign Participation Limits | Other Owner Ship Restr. | Transparency Requirements |
|--------|---|--|---|--|---|--|---|--|
| Press | Article 11 of the 1789 declaration | Law n° 86-897 of the 1/10/1986 completed by law n° 86-1210 of 27/11/1986 | No acquisition/taking control of a daily political or general newspaper when this gives an entity or group of entities possession or control of in excess of 30 % of diffusion in France of all daily papers of same type | National daily political + general newspaper with 20% or more of total diffusion of similar publications on national territory Regional 1 or more daily newspapers national or not, distributed in the given zone | | Save for intern. or reciprocity undertakings foreigners cannot acquire shares if it brings holding directly or indirectly above 20% of social capital or voting rights of Cie publishing a paper in French language | | 1. Forbidden to lend name in obtaining shares 2. All shares to be nominative 3. Must print in all publications: name of owner + editor, Cie seat, legal representative, objects 4. Readers to be informed of transfers involving 1/3 share or voting capital + transfer of titles |
| RADIO | 'Pluralism' recognised by the Conseil constitutional as an objective of constitutional value, both in the press and audiovisual sectors | Law of the 30/09/1986 as modified by law n° 89-25 of the 17/01/89 | 1 authorisation only at the national level (>30 Mio inhabitants) cumulated with: 1 or several authorisations where population served remains <15 Mio | Radio serving >30 mio 1 or more channels nat. or not, of which potential audience in given zone is > 10% of potential audience for similar service in that zone | | Save for international undertakings: no foreign national (non EC citizen) can make acquisition bringing total capital held by strangers to more than 20% of social capital or voting rights in a Cie with author. for hertzian radio + TV service in French language Foreign national: * individual of foreign nationality * Cie with majority of shares in non French hands. * Associations + foreign managers | Cies foundations, and certain specified associations only | Provisions relating to all auth. services * Prohibited lend name to applicant for authorisation * Shares in authorised society must be nominative * Auth. Cie must have available for public: - name of Cie owner/ - name, objects, seat, legal represent. + 3 principal associates - name of director - of publication + editor - list of publications edited by the enterprise + other communication services provided by the firm |
| TV | | | - 1 authorisation only at the national level (>6 Mio inhabitants) or not cumulated several authorisations at regional level so long as service zone does not exceed 6 Mio inhabitants + only if in distinct zones - If holds > 15% and < 25% share-holdings/voting rights in 1 Cie cannot hold > 15% in a second. - If holds > 5% + < 15% in 2 licensed Cies then can hold no more than 5% in others. | Terr. television serving > 4 mio inhabitants 1 or more terr. TV whether or not national in the given zone | National Hertzian TV > 6 Mio Cannot hold more than 25% of social capital - /voting rights of national TV licence holder hertz TV > 200,000 < 6 Mio no more than 50% interest in any Cie. | | Companies only | |
| TELE. | | | - 2 authorisations only - If holds > 33% and < 50% in one society can hold up to 33% in a second - If holds > 5% and < 33% in 2 societies then can hold no more than a 5% in others. | Up to 50% of social capital/ voting right | | | Companies only | * all entities holding 20% of share capital or voting rights in authorised society must inform C.S.A. within a month of exceeding the threshold |
| CABLE | | | More than 1 autho. possible where co-verage not > 8 mio | cable net > 6 mio inhabitants cable (s) networks in given zone | | | only Cies obtain authoris. | |

GERMANY

| MEDIUM | CONSTITUTIONAL PROVISIONS | KEY LEGISL. PROVISIONS | MONOMEDIA RESTRICTIONS | MULTI MEDIA RESTRICT. | CAPITAL PARTICIPATION LIMITS | FOREIGN OWNER. RESTRICTIONS | OTHER OWNERSHIP RESTRICTIONS | TRANSPARENCY REQUIREMENTS |
|---------------------|--|--|--|---|--|-----------------------------|--|--|
| PRESS | Article 5 Abs.1 Satz 2 of the Grundgesetz (Basic Law) of 23.5.1949 | § 22; 23; 24 of the Law against restraint of competition (competence of Federal Government) | Mergers of Cies dealing with publishing, production or distribution of newspapers and magazines can be prohibited when their turnover together is more than 25 Mio DM and the danger of a dominant position arises | Press - Audiovisual: no rules in the RuStV. But the Länder broadcasting laws e.g. in Bavaria, Schleswig-Holstein, Hessen have introduced provisions to prevent "double monopolies". The | | | Can only be a private company | If the press company is a limited one, it is governed by the general provisions of the corporation Act (Aktengesetz) Obligatory regular report of the Länder institutions for the media on the concentration tendencies: - between broadcasting and Press companies - between broadcasting companies - between international media companies |
| RADIO- BROADCASTING | and : 6 rulings of the Bundesverfassungsgericht (Constitutional Court) of 1961, 1971, 1981, 1986, 1987, 1991 | "Rundfunkstaatsvertrag" (RuStV) 31.8.1991 Treaty between all the 16 Länder, | Operator may disseminate throughout the entire federal area 2 radio programmes. Of these 2 only one may be a "full programme" or a "specialised programme" with priority in information | broadcasting licence may not be granted if applicant for a "full programme" within transmission area holds a dominant position in the daily press sector. | | | Licence for Broadcasting cannot be granted to local, public authorities, political parties | Requirements in economic (federal) law; like press (see above) Requirements in broadcast (Länder-) law : Every change in capital participation has to be permitted by the Länder institutions for the media Satellite-TV: The Länder institutions for the media have to be informed about vacant satellite channels |
| TV BROADCASTING | Competence of the Länder | §21 Abs.1 RuStV §21 Abs. 3 RuStV Procedure for distribution of vacant satellite channels: §§ 34 Abs. 3 Buchstabe c) u. d); 36 RuStV | - Operator may disseminate throughout the entire federal area 2 TV-programmes. Of these 2 only one may be a "full programme" or a "specialised programme" with priority in information (more specific restrictions in several Länder - Broadcasting Laws.) - Shareholders owning more than 25 % but less than 50 % of a full programme or "specialized information" programme can hold interest only in 2 other corresp. programme with less than 25 % and no important influence | | No shareholder is allowed to own 50 % or more of social capital of a "full programme" or "specialised information programme" | | Länder - Broadcasting-Law also: public broadcasters or their employees cannot be granted a licence. Broadcasting has to be free of state influence | |
| CABLE RELAY | | see the Länder broadcasting laws Licence for cable transmission obligatory | | | | | | |

GREECE

| MEDIUM | CONSTITUTIONAL PROVISIONS | KEY APPLICABLE LEGISLATION | MONOMEDIA RESTRICTIONS | Cross Media | CAPITAL PARTICIPATION LIMITS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTRICT. | TRANSPARENCY REQUIREMENTS |
|---|-------------------------------------|---|---|-------------|---|--|--|--|
| PRESS | Article 14 of the 1975 constitution | Law n°: 1806/1988 1746/1988 | | | | | | <p>PRESS/RADIO/TV</p> <p>1) Cie shared must be named and transfers notified.</p> <p>2) Bank of Greece and deputy of the attorney of the high court can examine the finances of daily and periodical, press, radio and TV Cies.</p> <p>3) Principal of banking confidentiality cannot be called in aid by certain key administrative figures, editors and directors of daily/periodical papers, radio and TV stations, nor by individuals/-Cies which have as their object the edition of daily periodical papers or the creation/running of radio and TV stations, nor by Cies in which the above-mentioned Cies or individuals hold at least 20% of the social capital</p> <p>4) The entities in 3 above must declare annually the origin of their finances which have been used to participate in press/radio/TV enterprise</p> |
| RADIO-BOASTING | Article 15 of the 1975 constitution | Presidential decree n° 25 of 1988: Laws n°: 1806 of 1988 1746 of 1988 | <p><u>One</u> local radio licence for a given individual or Cie.</p> <p>Individual/Cie not in receipt of radio licence can hold shares/act as manager or member of administration of only one licence holder or applicant</p> | | | <p>licenses can only be granted to:</p> <p>a) Individuals of <u>Greek nationality</u></p> <p>b) Legal entities controlled by <u>Greek citizens</u></p> | | |
| BOASTING-able + elite transmission facilities | | Laws n°: 1730/1987 1746/1988 1806/1988 1866/1989 | <p>Individual/Cie cannot participate in more than one local TV station whether as</p> <p>* owner</p> <p>* shareholder or as member of the administration or manager</p> | | <p>No shareholder can own more than 25% of social capital of a local TV channel.</p> <p>Totality of shares held by persons related to the fourth degree cannot exceed 25% of social capital</p> | <p>Foreign capital cannot amount in total to more than 25% of social capital</p> | <p>Local TV stations can be held by:</p> <p>a) limited liability co's</p> <p>b) local collectivities</p> | <p>RADIO</p> <p>1. Publication of annual accounts required in 2 daily papers, one of which must be published in area covered by station and copy to special media service.</p> <p>2. The national radio + TV council, substituted by the 89 legislation for commission for local radio can order an examination to establish whether there is a concentration in control of local radio stations by a single individual or Cie, or whether there has been an unauthorised regroupment. The inspection is to be carried out by the commissioner for accounts.</p> |

IRELAND

| MEDIUM | CONSTITUTIONAL PROVISIONS | KEY LEGISLATIVE PROVISIONS | MONOMEDIA RESTRICTIONS | MULTIMEDIA RESTRICTIONS | CAPITAL PARTICIPATION LIMITS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNER RESTR. | TRANSPARENCY REQUIREMENTS |
|---------------------|---|--|---|--|------------------------------|--------------------------------|---|--|
| WIRELESS | Article 40.6.1.i of the 1937 Irish Constitution | Mergers, Takeovers and Monopolies (Control) Act 1987 Restrictive Practices (Amendment) Act 1987 S.I. n° 17 of 1979 | All mergers/takeovers involving Cies at least one of which is involved in printing/publishing newspapers must be notified to the Minister for Industry and Commerce who may call on the Director of Fair Trade to report on merger. The Minister may also call on the Director of Fair Trade commission to investigate apparent monopolies + report on whether these are against the "common good". | | | | | |
| RADIO | | Broadcasting and Wireless Telegraphy Act 1988 / Radio and TV Act 1988 | IRTC in awarding sound broadcasting licences "have regard" to desirability of allowing any person, or group of persons, to have substantial or controlling interest in an undue number of sound broadcast services. | Sound and TV contracts IRTC in granting both radio and TV contracts "to have regard" to the desirability of allowing any person, or group of persons, to have control of, or substantial interest in, an undue amount of communication media in the area of the contract | | | Licences may contain conditions prohibiting assignment or material changes in ownership; or, if none Commission's prior consent must be obtained. | * Licence issued by Minister to be open for public inspection at IRTC's registered offices. * IRTC has power to investigate financial or other affairs of radio/TV contractor |
| NATIONAL TV SERVICE | | Broadcasting and Wireless Telegraphy Act 1988 / Radio and TV Act 1988 | 1 TV licence only to be awarded. Same restriction as for radio above. | | | | | |
| MICRO-WAVE RELAY | | S.I. n° 39 of 1989 | Minister in awarding licences have regard to desirability of allowing a person, or group, to have control of, or substantial interests in, an undue number of programme retransmission systems; multiple holdings have been allowed | | | | | Must furnish such information relating to the service as the Minister may require and allow inspection of records. |

ITALY

| CONSTITUTIONAL PROVISIONS | KEY LEGISLATIVE PROVISIONS | MONOMEDIA RESTRICTIONS | MULTIMEDIA RESTRICTIONS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTRICTIONS | TRANSPARENCY REQUIREMENTS |
|--|--|--|--|--|--|---|
| Articles 21, 41, 43, and 42 of the 1948 constitution | Law n° 416 of 5/8/81 as amended by Law n° 67 of 25/2/87 and Law n° 223 of 6/8/90 | A) Transactions giving rise to "dominance" held to be null. Dominance occurs where firm owns or controls daily newspaper publishing Cie whose publications attain: 1) Circulation in excess of 20% of total circulation for all Italian daily newspapers. 2) > 50% of titles edited in a given region. 3) Circulation in excess of 50% of total circulat. of daily papers published in same inter regional area. B) See note C Multimedia Restr. | A) <u>Daily newspapers - Nat. TV</u> 1) No concession for nat. TV if "control" of firm publishing daily papers whose annual circulat. in the last year exceeds 16% of total daily paper circulat. in Italy. 2) One nat. concession only if "control" of firm publishing daily papers whose circulat. exceeds 8% of total circulat. of Italian daily papers. 3) max. two national TV concessions if "control" of firm publishing daily papers whose total circulation does not exceed 8% of total circ. of daily papers in Italy. B) <u>Local TV - Local Radio</u> Holder of local TV licence can obtain local radio licence only if within same "basin" demands for radio frequencies are fewer than those available. Second additional licence may be obtained within same zone under the same conditions. C) <u>Global Media</u> Transfers, hire/management contracts, transfers of shares etc. between Cies active in mass media sector are void if directly/indirectly give to one person > 20% of total revenues in mass media sector. Limit raised to 25% where person raises at least 2/3 of his revenues from mass media sector. | 'Foreign firms' cannot hold majority or "controlling" holding in Cie publishing daily newspapers. The same restriction applies to shareholding in firms which directly or indirectly control the publishing Cie | Trustee Cies prohibited from holding majority/controlling interest in firms publishing daily newspapers. Object must not be other than editing, publishing or activities relating to information. | Daily papers, periodicals + reviews (not foreign language, monthlies or with less than 12 issues a year) and national press agencies must be inscribed in <u>national press register</u> + details of owner, legal representative, other papers edited by firm + place of publication. Notification to the <u>servizio dell'editoria</u> - of: - shareholders' names + n° of shares held - share transfers of > 10% (2% if listed) |
| Law n° 103 of 14/4/75 Law n° 223 of 6/8/90 | 1) National concessions granted to a given entity cannot exceed 25% of number of national channels foreseen in overall frequency plan and in any case can be no more than 3. 2) Cannot obtain licences at both national and local level. 3) For local radio: only 1 concession in any "basin"; total of 7 concessions possible for contiguous "basins"; in total "basins" must have no more than 10 mill. inhabitants. 4) See note C, Multimedia Restr. | | | Holders of commercial radio + TV licences must be of <u>Italian</u> or <u>European community nationality</u> Majority shareholdings or controlling interests in radio + TV licensee or in Cie controlling licence holder cannot be owned by non-European Community nationals. Exception made for nationals of countries which offer Italy reciprocal rights. | * Persons disqualified from obtaining private radio/TV licence: 1) Cies not having as corporate object radio + TV broadcasting, publishing of information or activity relating to information + visual arts; 2) public Cies; 3) Cies having majority public shareholding; 4) credit institutions; 5) persons convicted under general law; 6) persons from whom licence has been withdrawn. * Majority shareholding/controlling interest in radio/TV licensee (or controlling Cie) cannot be held by trustee Cies. * Commercial national radio + TV licences can only be granted to Cies or cooperatives having a specified min. capital. * For local radio + TV licences similar rules apply. These can be held also by individuals. * Community radio licences only granted to foundations, associations of cultural, ethnic, political or religious groups, and cooperatives seeking to serve such ends. | National register kept of radio + TV firms: Ownership + extent of individual shareholdings must be notified. Share transfers of over 10% (2% for listed Cies) must be notified. TV and radio news services must register under terms of 1948 Press Act with Chancellor of Tribune in area served. |
| Law n° 103 of 14/4/75 Law n° 223 of 6/8/90 | 1) Same as for Radio 1 above. 2) Same as for Radio 2 above. 3) For local TV: only 1 concession in any "basin"; total of 3 concessions possible for different "basins" (which may be contiguous); in total basins must have no more than 10 mill. inhabitants (4 contiguous "basins" possible in southern region). | | | | | |

LUXEMBOURG

| MEDIUM | CONSTITUTIONAL PROVISIONS | KEY APPLICABLE LEGISLATION | MONOMEDIA RESTRICTIONS | MULTI MEDIA RESTRICT. | CAPITAL PARTICIPATION LIMITS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTR. | TRANSPARENCY REQUIREMENTS |
|-------------------|--|----------------------------|--|-----------------------|--|--------------------------------|---|---|
| PRESS | Constitution of October 1868, as amended Articles 19 and 24 | | | | | | | |
| DIO-ROAD-STEERING | | Law of 30th July 1991 | - local radio: 1 authorisation - regional radio: share only in one company. | | regional radio: no one can hold more than 25 % | | - local radio: only non-profit making association - regional radio: only company | 70 % of shares in C.L.T. must be nominative and cannot be transferred without the consent of the Luxembourg government. |
| ROAD-STEERING | | Law of 30th July 1991 | | | | | | Control right of an independent commission. |

THE NETHERLANDS

| Medium | Constitutional Provisions | Key Legislative Provisions | Mono Media Restr. | Multi-Media Restrictions | Capital partic. limits | Foreign Owner. Restr. | Other Ownership Restrictions | Transparency Requirements |
|--------|--|--|-------------------|--|------------------------|-----------------------|--|---|
| ESS | Articles 7 and 90-95 of the Constitution of 19/1/1983 Article 7(1) in particular | The Netherlands Media Act (21st April 1987) | | <p><u>Press - Audiovisual</u></p> <p>1) Private commercial broadcasting licence refused where (i) Applicant holds directly/indirectly 25% or more of daily newspaper market; or (ii) Legal person holds directly/indirectly 25% or more of daily newspaper market and, individually/collectively, with/without agreement with others having voting rights, can either control more than 1/3 of voting rights at meeting of shareholders in applicant or can appoint/discharge more than 1/3 of Members of Board/Commissioners of applicant.</p> | | | | |
| DIO | Articles 7 and 90-95 of the Constitution In particular Article 7 (2). | as amended by: * Decree of 19/11/87 * Law of 13/12/90 * Decree of 09/07/91 * Law of 18/12/91 | | <p>2) Private commercial broadcasting licence revoked where: (i) Commercial broadcaster holds directly/indirectly total share of 25 % or more of daily newspaper market during 2 consecutive calendar years; or (ii) same as 1) (ii) above.</p> <p>3) Institutions having broadcasting time must not engage in any activities other than provision of their programme. Exception for government institutions, religious organisations, political parties and groups, and spiritual organisations. Restriction inapplicable to private commercial broadcasters.</p> | | | <p>Institutions having national broadcasting time cannot acquire the ownership of staff and equipment required for programme production. Exceptions: religious and spiritual organisations, political parties and groups, and broadcasting organisations which owned radio broadcasting studios on 15/2/85.</p> | |
| | same as for radio | | | <p><u>Cable: public - private broadcasters</u></p> <p>Public institutions, bodies having broadcasting time (excl. religious and philosophical associations), owners/operators of cable networks and NOB are not authorised to provide programmes for broadcasting by cable. Limited exceptions.</p> | | | <p>* Disqualified persons for private TV: 1. NL's Broadcasting Production Cie 2. Public authorities 3. Owners/operators of cable networks 4. Institutions having broadcasting time * Same restriction as for radio above.</p> | <p>Before applying for a private broadcasting licence or participating in a private commercial broadcaster, a body which has been allocated broadcasting time must inform the Media Authority</p> |

PORTUGAL

| MEDIUM | CONSTIT. PROVIS° | APPLICABLE LEGISLATIVE PROVISIONS | MONOMEDIA RESTRICTIONS | CROSS MEDIA RESTRICT. | CAPITAL PARTICIPATION LIMITS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTRICTIONS | TRANSPARENCY REQUIREMENTS |
|------------------|----------------------------------|--|---|--|---|---|---|---|
| SS | Articles 37, 38, 39 (as revised) | Law n°: 85-C/75 | Generalised legislative condemnation of concentration in the press but as yet no specific legislation on this point. | | | <p>1) Only entities of portuguese nationality, residing or with Cie seat in Portugal can own periodicals.</p> <p>2) Foreign share in press Cies limited to 10% and must not give voting rights</p> <p>3) Directors/-managers of press Cies must be Portuguese</p> | <p>Owners must have full civil and political rights</p> <p>Press agencies/-publishers, editing houses can only have 'inherent or complementary' objects to their principal object</p> | <p>* Minister for social communication is to keep following registers:</p> <ol style="list-style-type: none"> 1. Periodical publications + title, seat, owner, direction and management 2. Press Cies, 3. National press agencies, 4. Editing houses + various details as to seat management etc. 5. Foreign press agencies and seat, constitution + responsible person in Portugal 6. Journalists of the foreign press <p>* Press council to provide annual report on state of Portuguese press</p> <p>* Shareholders + their holdings to be published each April in all periodicals owned by the Cie in question</p> <p>* Shares in press cics must be nominative, (applies also to partner companies)</p> <p>* Periodicals must have printed inter alia, names of director, owner + seat</p> |
| DIO | | Law n°: 87/88 Decree law n°: 338/88 | <p>Positive factor for award of licence applicant is not an existing radio licence holder.</p> <p>Individual/Cie can only hold capital in one radio broadcasting Cie. *</p> | <p>Positive factor for licence award</p> <ol style="list-style-type: none"> 1) Majority share holding by professionals in communication field. 2. Company owning regional journal of at least 3 years standing | <p>Company can only hold shares in one radio broadcasting Cie, and this participation cannot exceed 30% of social capital</p> | | Licences awarded to companies only | |
| DAD-BROADCASTING | | Law n°: 58/90 TV Broadcasting may be by means of hertzian waves or cable networks: Art. 3-4 | Individuals/Cies cannot participate in capital of more than one candidate society. | The sole object of a licence company must be: "TV activities". | Individuals or companies cannot hold shares in excess of 25% of capital of one candidate society | Licences granted only to Portuguese companies with head office in Portugal. Foreign capital participation in a TV operator cannot exceed 13% of total social capital | <p>Licences only awarded to Cie with as sole object "TV activities".</p> <p>Such activities cannot be performed or financed by:</p> <ul style="list-style-type: none"> - political parties or associations - local authorities. - trade unions | <p>- Shares must be nominative</p> <p>- Programmes to include indication of title, responsible person, cast, author's name, producer and director</p> <p>- Director General for social communication is to keep records of TV operators: inter alia Cie statute, capital participation in other mass media organisations and identities or persons responsible for programming</p> <p>- TV broadcasters are to record + make public time allowed for reply + for political response</p> <p>- TV operators to publish in a national paper each year Cie report and accounts, indicating origin of finance either from own operations or from external sources.</p> |

SPAIN

| MEDIUM | MAIN CONSTIT. PROVISIONS | MAIN LEGISLATIVE PROVISIONS | MONOMEDIA RESTRICTIONS | MULTI Media Restrict. | CAPITAL PARTICIPATION LIMITS | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTRICT. | TRANSPARENCY REQUIREMENTS |
|--------|--|--|--|--|--|--|--|---|
| RESS | Constitution of 1978 Articles 20, 128 and 149 | Law n°: 21/1984 2nd August | | | | | | |
| ADIO | | Law n°: 31/1987 of the 18th December | A Cie can only hold 1) 1 radio concession for medium wave 2) No more than 2 for frequency modulation stations. Cie cannot hold majority participation in more than 1 station if substantial overlap in zone of service. | | | 1) Concessionary must have Spanish nationality 2) Foreign investment limited to 25 % of total capital (Restrictions not applicable to EEC citizens) | | All shares must be nominative, as must those of companies owning shares in the concessionary. All alterations in shareholding or increase in Cie capital which changes existing ownership balance must obtain previous authorisation from the administration |
| V | | Law n°: 31/1987 of 18th December Law n°: 10/1988 of 3rd May | - 1 licence only. - No Cie can hold shares in more than 1 concessionary. | Licensed Cie must have sole object the management of a public TV service | Cies cannot hold more than 25 % of the capital of a concessionary. | Holders of concessions must have Spanish nationality and be domiciled in Spain. Total foreign participation cannot exceed 25 % of share capital. (Restrictions not applicable to EEC citizens). | Concessions granted only to Cies which have as sole object the management of a public TV service Min. capital of 1,000 mio pesetas | All shares must be nominative. Special register of concessionary societies established under Ministry of transport, tourism and communi- cations (ITC). All changes to Cie statute and administration must be notified to special register. All share transfers must have prior administrative authorisation. |

UNITED KINGDOM

| KEY LEGISLAT. PROVIS. | MONOMEDIA RESTRICTIONS | PRESS - AUDIOVISUAL CROSS OWNERSHIP RESTRICTIONS | MULTIMEDIA RESTRICTIONS IN THE AUDIOVISUAL FIELD | FOREIGN OWNERSHIP RESTRICTIONS | OTHER OWNERSHIP RESTRICTIONS | TRANSPARENCY REQUIREMENTS |
|---|---|--|---|--|--|--|
| | Transfer of newspaper or assets to newspaper proprietor whose papers plus the transfer paper have an average daily circulat. of 500,000 or more copies requires consent of Secretary of State. Provision made for reference to MMC to report on "public interest" of transfer | A) Proprietor of national or local newspaper cannot hold more than a 20% interest in Cie holding: 1. Channel 3 or 3 licence 2. national radio licence Does not apply to local papers + regional Channel 3 TV service where no significant overlap in service area. | | | | |
| BROADCASTING Act 1990. Fair Trading Act 1973, as amended. | * Any one person can hold a max. of: - 1 national radio licence - 20 local radio licences - 6 restricted radio licences. * See provisions A & B relating to satellite below. * Any one person can hold a max. of: - 2 regional Channel 3 licences - 1 national Channel 3 licence - 1 Channel 5 licence. * Holder of licence for: - regional Channel 3; or - national Channel 3; or - Channel 5, cannot hold > 20 % interest in Cie which holds licence for either of the other two categories. | Provision applies vice versa to limit those with licences in categories 1 and 2 from holding more than a 20% interest in Cie running a national or local paper. Proprietor of a national newspaper who holds more than a 5% interest (and up to 20% interest) in Cie holding: 1. Channel 3 or 5 TV licence. 2. national radio licence, cannot hold > 5% interest in any other such Cie. Provision applies also vice versa. B) Restriction on local accumulations: Proprietor of a local newspaper cannot hold more than a 20% interest in Cie holding licence to provide: 1. local radio service 2. local delivery service where there is a significant overlap of zones. Provision applies vice versa to limit those with licences in categories 1. and 2. holding > 20 % in a local newspaper Cie. | A) Holder of licence for 1. regional/nat. Channel 3 or Channel 5; or 2. domestic satellite; or 3. national radio cannot hold > 20% interest in Cie holding licences for either of the other 2 categories. B) Holder of non-domestic satellite licence or foreign satell. broadcaster with service intended for general reception in UK cannot hold > 20% interest in Cie holding licence for any of categories A 1, 2 or 3 above. Provision applies also vice-versa. C) Holder of licence for: 1. regional or nat. Channel 3 or Channel 5; or 2. national radio cannot hold > 20% interest in Cie holding satellite radio licence. Provision applies also vice-versa. D) Holder of licence for: 1. local delivery services; or 2. local radio; or 3. regional Channel 3 cannot hold > 20% interest in Cie holding licence for either of the other 2 categories if there is a significant overlap of zones. | Persons disqualified from holding ITC/RA licences: 1. Individual: not being EC national ordinarily resident within EC; nor ordinarily resident in UK/Isle of Man/Channel Islands. 2. Cie: not formed under law of EC Member State with regd/head office or principal place of business within EC; nor incorporated under law of Isle of Man/Channel Islands. 3. body controlled by any one or more of 1 or 2 above. Disqualification does not apply to licences for: - local delivery services (cable and MVDS); non-domestic satell. radio + satell. TV services; - licensable programme (i.e. non-TV) and licensable sound programme services; - additional services. | Persons disqualified from holding ITC/RA licences: 1) For radio only: body (other than local authority) receiving > 50% of its income in last financial year from public funds; certain related bodies; Cies in which they have > 5% interest. 2) local authority & Cie in which it has > 5% interest. 3) body whose objects are wholly/mainly of a political nature; certain related bodies; Cie in which they have > 5% interest. 4) body whose objects are wholly/mainly of religious nature; certain related bodies; Cie in which they have > 5% interest. Disqualification does not apply to licence for non-domestic satellite service; licensable programme service; and non-national independent radio service where ITC/RA deems this to be appropriate. 5) Person subject to "undue influence" of local authority or political body and certain related bodies where ITC/RA deems this contrary to "public interest". For radio: disqualification applies also where such "undue influence" is exerted by bodies in 1) above. 6) BBC, Welsh Authority and certain related bodies. 7) Advertising agencies and certain related bodies; Cie in which they have > 5% interest. 8) Secretary of State may disqualify nat. public telecoms operators + certain related bodies. | ITC has wide powers to obtain information from licencees. It may impose a licence condition requiring licencees to give advance notice of proposals affecting share-holdings or directors. RA also has wide powers to obtain information from its licencees. May also impose conditions requiring notification or proposals affecting share-holdings or directors. |
| TELECOMMUNICATIONS Act 1984, as amended. | A) Holder of satellite radio licence cannot hold > 20 % interest in Cie holding national radio licence. Provision applies also vice-versa. B) Holder of "domestic" satellite radio licence cannot hold > 20 % interest in Cie holding "non-domestic" satellite radio licence. Provision applies also vice-versa. C) Holder of non-domestic satellite licence or foreign satell. broadcaster with service intended for general reception in UK cannot hold > 20 % interest in Cie holding domestic satellite licence. Provision applies also vice-versa. | | | | | |

II. OVERVIEW

The position regarding national laws on media ownership may be summed up as follows:

1. Aim of the measures: to regulate access to the capital of media companies

There are four types of restrictions on media ownership.

(a) Restrictions on multiple ownership in the same medium (monomedia)

In order to prevent a situation where a single business controls or influences several media of the same category (newspapers, radio, television) certain national laws prohibit the cumulation of radio (D, F, GR, I, L) or television (D, E, F, GR, I, UK) broadcasting licences, holdings in other broadcasters (D, E, F, I, P, UK), or circulation in excess of a certain market share for all daily newspapers (F, I) or require that prior consent be obtained before a particular circulation figure is exceeded (UK).

(b) Restriction on multiple ownership across several media (multimedia)

In order to prevent the same operator from controlling or influencing several media of different types, certain national laws prohibit the possibility of having a broadcasting licence or acquiring holdings in a broadcasting company if the applicant exceeds a certain press circulation figure (D, E, F, I, L, NL, UK). These restrictions also exist between television and radio in some countries (DK, B Fr. + Fl, E, F, I, P, UK).

(c) Restriction to a fixed maximum level of the first holding in a broadcasting company

Some laws restrict the maximum stake of one shareholder in a television (E, F, GR, P, D) or radio (D, GR, P) broadcasting company or prevent an operator from having a decisive influence (DK). This type of provision seeks to dilute the influence that a majority shareholder could have and to promote a diversity of shareholders which could be reflected at the programming level by a diversity of programme content.

(d) Restriction on holdings in a broadcasting company because of the nature of the activities of certain licence applicants

Some laws (B Fr., I, NL, P, UK) do not allow holdings in broadcasting companies by applicants whose activities could give rise to problems from the point of view of diversity of information or editorial independence (e.g. political parties).

(e) Measures aiming to ensure transparency

To complement these measures and ensure that they are properly applied, requirements regarding the identification of all the operators involved and of their activities are laid down, to varying extents, in most Member States.

2. Type of measures: regulations and powers of discretion

The anti-concentration regulations may either lay down maximum limits or specific conditions, or establish very broad criteria which leave wide-ranging powers of discretion to the authorities responsible for applying them. The latter type of regulation can be found in Ireland (press: "common good"; radio: "undue number of radio contracts"; multimedia: "undue amount of communication media"), in the United Kingdom (press: "public interest") and in Denmark (radio/TV: "decisive influence"). Outside those countries, the regulations lay down fairly specific rules, even if they leave a not insignificant role to the authorities responsible for interpreting them.

Moreover, more specific action on the part of the supervisory authorities may in some cases be aimed at finding an ad hoc solution to the question of the ownership structure of a company. For example, in the United Kingdom, the IBA and the ITC (its successor) intervened in December 1990, following the BSkyB merger (which constituted a breach of BSB's programme contract), calling for the setting-up of a specific decision-making structure consisting of two independent directors, one appointed by BSB, and the other by News International, who will have to be approved by ITC and will have a right of veto in the "Compliance Committee of the Board". Similarly, when the Hachette group acquired control of the French channel "La Cinq", the Conseil Supérieur de l'Audiovisuel gave its accord to the capital restructuring plan on 23 October 1990 subject to certain conditions, including an obligation to seek its authorization for any holding acquired in a radio station and to inform it in advance of any proposed holdings in companies in the communications sector.

3. The disparity of the measures: differences in scope and in the degree of the restrictions

The legislative provisions vary to a considerable extent (see table) particularly as regards the *type of restriction* (see section 1), the *scope of restrictions* on media ownership (particularly for the monomedia press or for the multimedia), the *degree of constraint* (number of licences or holdings that may be cumulated, possible percentages), the *methods of applying the restrictions* such as the reference basis (TV - satellite/terrestrial (F, UK), general/specialized information programme (D), national/regional (F, I, UK)) or assessment criteria other than the percentage levels (see section 2 above).

4. Origin of the measures: a recent legislative development

Laws on media ownership are a fairly recent phenomenon, their adoption having coincided with the liberalization of the audiovisual sector. This new generation of laws can be dated fairly definitely to the second half of the 80s (86: F; 88: E, GR; 90: I, UK, DK, P; 91: D, B, FR, L) and is still expanding (92: NL), with some Member States taking advantage of the amendments to their legislation on the audiovisual sector required by the transposition of the Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

In the case of the press, the rules on the multimedia belong to this same legislative movement, while the monomedia provisions specific to it cannot be attributed to a definite period: UK: 73; IRL: 78 (+ 87); D: 80 (+ 85); I: 81 (+87, 90), F: 86. This is because there was no "liberalization" phase in this sector.

5. Special cases: politically sensitive laws responding to specific circumstances

These regulatory measures often display the common feature of having been adopted in a politically charged context (as the debates in national parliaments reveal) and having been conceived in response to national circumstances of the moment. This clearly applies, for example, in the case of the French, Italian, United Kingdom or German laws which have been tailored to the circumstances of the main operators in those countries. The effect of this political dimension is to create regulatory frameworks which are sometimes difficult to administer, because of the very delicate and vulnerable balances which have been achieved, which are not always attuned to changes in the sector and differ significantly from one another because each deals with a specific situation.

Conclusion

Since the mid-80s, Member States have adopted a whole range of regulations restricting ownership of the media in order to safeguard pluralism. It is typical of these restrictions, which should not be confused with those which discriminate against Community nationals, that they differ widely.

Examples of disparities:
possibilities of controlling a Television Channel depending on
the characteristics of the acquiring company*

| PRESS Circulation > 8% | PRESS Circulation > 20% | PRESS Circulation > 25% | TELEVISION |
|--|--|--|---|
| Channel 3 and 5: No Satellite: No restrictions | Channel 3 and 5: No Satellite: No restrictions | Channel 3 and 5: No Satellite: No restrictions | Channel 3: 2 Satellite: No restrictions |
| 1 | No | No | 3 |
| No restrictions | No restrictions | Terrestrial: 1 Satellite: No restrictions | Terrestrial: 1 Satellite: 2 |
| 1 | 1 | No | No restrictions |
| Lender | Lender | Lender | 2 (of which only one general or specialized information programme) |

Implied presentation which does not take account of all the possible combinations, particularly at local level, and which relates only to restrictions
control (licence) and not to those on minority holdings.

Part Four

ASSESSMENT OF THE NEED FOR ACTION

The need for action by the Community has to be assessed in the light of Community objectives, the requirements flowing from them, and the principles of subsidiarity and proportionality.

Chapter I. COMMUNITY OBJECTIVES

The sole objective of safeguarding the pluralism of the media, as such, is neither a Community objective nor a matter coming within Community jurisdiction as laid down in the Treaty of Rome or the Treaty on European Union. This situation does not, however, affect the other existing Community objectives and powers. A look therefore needs to be taken at those Community objectives which might be affected by questions of pluralism.

I. The completion and functioning of the internal market

One objective in this category is that of establishing the internal market, set out in Article 8a of the EEC Treaty and Article G § B 3 of the Treaty on European Union, since, in the media sector, it could be affected by national regulations brought in to safeguard pluralism of the media. This aspect was stressed in the Parliament resolution of 16 September 1992.¹⁷ Moreover, the achievement of this objective could help to increase pluralism by providing opportunities for media companies.

¹⁷ Resolution on media concentration and diversity of opinions, paragraph W: "whereas differing national laws on media concentration can disadvantage the operation of the single market, as this creates the risk of circumvention of the law and distortion of competition between media companies in various Member States as well as different start-up conditions for those embarking on activities in the media;"

II. Industrial policy

The objective of strengthening the competitiveness of Community industry was the subject of a Commission communication of 26 November 1991 on industrial policy and is expressly laid down in Article G § B 3 of the Treaty on European Union. In the case of the audiovisual sector, this objective is also referred to in the Commission communication of 21 February 1990 on audiovisual policy.

This objective is affected since the national regulatory framework for mergers influences the competitiveness of media companies. Moreover, the achievement of this objective can also contribute to pluralism in the media by fostering the competitiveness of media companies. In this respect, Parliament, in its resolution of 16 September, stressed the importance of having *"an economically viable media sector, permitting the formation and development of a variety of media companies of all sizes"*,¹⁸ and of facilitating *"the formation and development of media companies at European level so as to promote pluralism by increasing the provision of information"*.¹⁹

18 Paragraph K

19 Paragraph M.

III. Audiovisual policy

In its communication on audiovisual policy²⁰ the Commission expressly stated that "the establishment of the European audiovisual space does not derive merely from its wish to promote the audiovisual industry but also from the importance attached by the Community to the requirements of a democratic society, such as, notably, the respect for pluralism in the media and for freedom of expression. The Community's audiovisual policy seeks therefore, also, to ensure that the audiovisual sector is not developed at the expense of pluralism ...". The objective of implementing audiovisual policy therefore requires that pluralism should not be affected. Parliament focused on this objective of safeguarding pluralism both in its resolution of 15 February 1990²¹ and in that of 16 September 1992.²²

IV. Respect of fundamental rights

Respect of fundamental rights is essential to the way in which the Community works. Article F(2) of the Treaty on European Union reaffirmed the case-law of the Court on fundamental rights in which respect for fundamental rights forms an integral part of the general principles of law which the Court of Justice ensures are respected. The Court has thus explicitly ruled that fundamental rights must be protected within the framework of the structure and objectives of the Community.²³ Given the close links between the question of protecting pluralism and freedom of expression,²⁴ it is, then, an obligation which embraces the three previous objectives and which determines how they are defined and achieved.

²⁰ COM(90)78 final.

²¹ Resolution on media takeovers and mergers, OJ C 68, 19.3.1990; see paragraph B: "whereas restrictions on concentration are essential in the media sector, not only for economic reasons but also, and above all, as a means of guaranteeing a variety of sources of information and freedom of the press".

²² Resolution on media concentration and diversity of opinions, paragraph C.

²³ Case 11/1970 Internationale Handelsgesellschaft [ECR] 1970 1125.

²⁴ See Part One above.

Chapter II. NEEDS IN THE LIGHT OF COMMUNITY OBJECTIVES

The need for action must be assessed in the light of the objectives set out above. These objectives can be grouped around, firstly, completion of the internal market (which includes industrial policy) and, secondly, audiovisual policy which seeks to ensure that the sector does not develop at the expense of pluralism.

The nature of these objectives differs: those associated with the single market, expressly set out in the Treaty on European Union, involve an obligation to eliminate obstacles to the establishment or functioning of the single market and to strengthen the competitiveness of industry in the Community; the objective linked to the safeguarding of pluralism, which is not mentioned as such in the Treaty on European Union, requires the Community to ensure, *within the limits of its powers*, that such pluralism is not undermined or indeed is promoted.

The distinction between these two types of objective does not, however, mean that they are necessarily conflicting. On the contrary, they may complement each other since the single market and industrial policy may contribute to pluralism by promoting the economic development of the media sector.

Making this distinction enables us to tackle the two questions that have to be answered in order to determine what action is needed at Community level:

- to what extent do media mergers and the regulatory framework governing them at national level have negative effects on the functioning of the single market?
- to what extent are there risks to pluralism which could be dealt with at Community level in the framework of Community objectives and powers?

This second question will be looked into first, given that it is the one of most concern to Parliament.

Section 1. IDENTIFICATION OF NEEDS IN THE LIGHT OF THE OBJECTIVE OF PLURALISM

In order to identify what measures might be needed, the present methods of limiting the effects of mergers on pluralism have to be assessed to see whether they show any shortcomings in terms of the Community framework. It is not a question of assessing in abstracto the qualities of protective systems but of determining to what extent the Community environment has an impact on their effectiveness in terms of safeguarding pluralism and could affect them.

To this end, the two existing levels of action to control mergers will be looked at: at national level, competition law and the anti-concentration rules specific to the media; at Community level, Community competition law.

Subsection 1. Effectiveness of national safeguards

A distinction has to be made between needs arising from any deficiencies in a national system for safeguarding pluralism and those arising from the fact that national systems cannot cover situations with a Community dimension. In the former case, the deficiencies are attributable to the choices which have been made by the national authorities themselves,²⁵ whereas in the latter, the deficiencies could be due to circumstances outside the national authorities' control. Only the latter will be considered here.

²⁵ Thus, the example occasionally referred to of the BskyB merger falls into the first category, since this merger is not in breach of the UK system introduced by the Broadcasting Act and cannot be considered as an example of the limits of the application of a national law alone. The recent dispute between Mr Berlusconi and Mr Benedetti also comes into the first category.

The Commission has not so far come across any obvious case where the application of national rules alone has not been sufficient to protect pluralism because of their purely national scope. However, reference is generally made to certain aspects to underline the virtual limits of national systems set up to safeguard pluralism in the face of concentration: the risks of circumvention, the impossibility of controlling mergers at the national level and the problem of transparency.

1. Risks of circumvention

The problem. It is theoretically possible that a media company would seek to circumvent the anti-concentration law of one Member State by establishing itself in another Member State and broadcasting programmes from there to an audience in the first State. To this end, it could invoke the principles of free movement of services and, in the case of television, the "Television without frontiers" Directive. For example, a broadcaster could establish itself in a country in which there are no anti-concentration rules in order to broadcast by satellite to another country in which it would not have obtained a licence, had it requested one, because it would have exceeded the limit for cumulating licences. Although such a case has never arisen, it is often referred to to underline the inadequacies of the protection granted by national laws. The press sector is less affected since the restrictions generally regulate the granting of broadcasting licenses.

Legal assessment. The situation in question must be assessed in the light of the principle of free movement of services laid down in Article 59 of the Treaty and in Directive 89/552/EEC "Television without frontiers". Television broadcasts from another Member State must be regarded as services normally provided for remuneration within the meaning of the Treaty.²⁶

²⁶ See "Television without frontiers, Green Paper on the establishment of a common market in broadcasting, especially by satellite and cable"; COM(84) 300 final, part 5, A, 1; and Case 352/85 Bond van Adveteerders et al. 26 April 1988 [ECR] 2085.

A measure aimed at preventing the reception or retransmission of a broadcast originating from another Member State because it would be in breach of laws on pluralism would constitute a restriction on the free movement of services. It is therefore necessary to determine to what extent a Member State may restrict the free movement of services on grounds relating to pluralism. For this purpose, a distinction needs to be made between a discriminatory restriction, i.e. discrimination against the person providing the service on the grounds of his nationality or the fact that he is established in a Member State other than that in which the service is provided, and a restriction applied without distinction to both nationals and persons from other Community countries. The measure would be discriminatory if, for example, it restricted shareholdings by non-nationals or non-residents. The restriction would be applied without distinction if, for example, the limit on the shareholding applied to both nationals and foreigners.

§1. Discriminatory restrictions

A Member State may impose a discriminatory restriction in terms of nationality reasons only on one of the referred to in Article 56 of the Treaty (public policy, public security or public health) and even then subject to checks of its proportionality.²⁷

²⁷ Case 229/83 Leclerc [ECR] 1985, paragraph 30. The Court has already had occasion to rule, in relation to Article 36 of the Treaty, that "since it derogates from a fundamental rule of the Treaty, Article 36 must be interpreted strictly and cannot be extended to cover objectives not expressly enumerated therein".

Pluralism could not be invoked as a reason for discrimination, since it cannot be associated with any of these three reasons. In its *Groppera* judgment,²⁸ the European Court of Human Rights linked pluralism not to the requirements of public order or public security but to respect for the rights of others, which is not mentioned in Article 56 of the Treaty. As the Court of Justice stated in its judgment of 18 June 1991, "the limitations imposed on the power of the Member States to apply the provisions referred to in Article 66 and 56 of the Treaty on grounds of public order, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights" (Case 260/89, paragraph 45). This means that Member States cannot invoke grounds which would go beyond what is permitted by paragraph 2 of Article 10 and, in this case, could not therefore invoke public order which was not used by the European Court of Human Rights.

§2. Indistinctly applied restrictions

In the absence of any harmonization of laws, a Member State could restrict a television broadcast from another Member State which would not conform to its rules on pluralism only if such a restriction is applied without distinction and if the following conditions are observed: the restriction is justified on imperative public interest grounds; the requirements which the relevant law meets are not already satisfied by the rules imposed on the provider of the services in his own State; and the restriction is not disproportionate to the objective sought (since the measure is likely to ensure that the objective is achieved and does not go beyond what is strictly necessary to that end).

In order to assess whether restrictions which are applied without distinction can satisfy these conditions, the measures giving rise to the restriction must be divided into those relating to the services themselves and those applied to the provider of the service.

28. See Part One above.

A Measures relating to the provider of the service

(a) Restriction

The restriction would consist in applying to a broadcaster from another Member State the regulations on media ownership applicable to national broadcasters and preventing the retransmission of its broadcasts since it does not satisfy the conditions laid down by that legislation. For the purposes of measuring the level of concentration, the laws of some Member States put foreign broadcasters whose broadcasts are received on their territory on a par with national broadcasters.

In *Germany*, Article 21 of the Treaty of August 1991 concluded between the Länder on broadcasting in the unified Germany restricts to two the number of national programmes (of which only one general or special interest); it provides to this end that the other German-language programmes from the same broadcaster which can be received in the entire Federal area must be included in the count. Thus an Austrian broadcaster also broadcasting in Germany, without intending to circumvent German legislation (the programmes have an "Austrian" content for example), will none the less be counted for the purposes of monitoring compliance with Article 21 and, for example, will not therefore be able to have a second general channel retransmitted in Germany (with "German" content). Should a channel be involved which comes under the rules of a Member State and circumvention covered by the Van Binsbergen Judgment does not occur, this provision might give rise to a restriction of the freedom to provide services.

In *France*, Article 41(3) of the Law of 30 September 1986 treats the operator of a satellite television channel broadcast from abroad and normally received in French on French territory in the same way as a licence-holder. This rule could possibly be invoked to restrict the retransmission of such channels where the position of the broadcaster was incompatible with anti-concentration rules such as those restricting the maximum shareholding by one person to 50% or limiting the number of licences for satellite channels to two. Similarly, the system of agreements set up for the cable retransmission of channels enables the CSA to impose obligations to safeguard pluralism.

In the *United Kingdom*, the 1990 Broadcasting Act²⁹ subjects persons who have a satellite television channel broadcast on a frequency which has not been allocated by the United Kingdom and which according to the ITC is intended for general reception in the United Kingdom (even if it is also intended for reception elsewhere) to the same restrictions on the ownership of other channels as those applicable to "non-domestic satellite services". The channels of the other Member States could therefore be affected by the application of such a provision.

Apart from these cases, it is reasonable to assume that where there is no specific provision to this effect, the licensing authorities use their discretionary powers to take account of the applicant's position in respect of concentration. This might go as far as including media holdings and control in other States even if the media are not broadcast or circulated in the territory of the State granting the licence.³⁰ In this respect, an improvement in the exchange of information on cross-border concentration as called for by the Council of Europe³¹ for example could assist such assessment.

(b) Absence of similar rules in the Member State of origin

This condition would probably be met in most cases because the laws on this matter differ and because national laws usually deal only with national situations.

²⁹ Schedule 2, Part III, paragraph 6(2).

³⁰ This case does not appear to exist, at least not explicitly, in anti-concentration laws since they refer in most cases either explicitly to the country ("total print run of newspapers in Italy", for example) or to a reference area (local, for example) or, again, to the "national" character of the channel or distribution network.

³¹ Resolution adopted at the third European Ministerial Conference on mass communications policy, Nicosia, 9 and 10 October 1991.

(c) Imperative reasons of public interest

The objective of safeguarding pluralism may be one of the imperative reasons of public interest justifying restrictions applied without distinction. This may be deduced from the case-law of the Court in Strasbourg on Article 10(2) of the Convention for the protection of human rights and fundamental freedoms which includes pluralism among the legitimate objectives that may justify derogations to the principle of freedom of expression contained in Article 10(1). Moreover, in the two judgments of 25 July 1991³² the Court of Justice of the European Communities held that *"cultural policy might afford an imperative reason of public interest justifying a restriction on the freedom to provide services. Indeed, the preservation of pluralism which the Netherlands' policy sought is related to freedom of expression, as upheld by Article 10 of the Convention for the protection of human rights and fundamental freedoms"*.³³

In the case in question the Court did not accept the grounds invoked by the Netherlands Government not because of the objective pursued but because of the condition of proportionality.³⁴ Conversely, this means that the objective of safeguarding pluralism may justify non-discriminatory restrictions on the free movement of services as long as the measures which seek to achieve that objective do not create a disproportionately restrictive effect.

(d) Proportionality of the restriction

In order to be justified, the restrictive measure must be appropriate to the purpose of achieving the objective sought and not exceed what is strictly necessary to that end.

³² Judgments of 25.7.91 in Cases 288/89 and 353/89, not yet reported.

³³ Case 353/89, paragraph 30. The wording used by the Court might be taken to suggest that it is more cultural policy than the protection of pluralism which constitutes the public interest. Yet the next paragraph removes the ambiguity by stating that the measure in question "exceeds its aim of protecting freedom of expression" (paragraph 31).

³⁴ See below.

Case-law of the Court of Justice. The two judgments of 25 July 1991 on the Dutch law on the media constitute, so far, the only cases examined by the Court in which pluralism was invoked to justify a restriction. In these two judgments the Court ruled that the condition of proportionality was not met because one of the provisions³⁵ subject to complaint exceeded the objective sought³⁶ and the other³⁷ was not appropriate to the objective.³⁸

It is not possible to deduce from this particular case that, a priori, any restriction on the free movement of services with pluralism as its objective would be disproportionate and thus unjustified. In this case, the provisions in question were not specific to the preservation of pluralism (as on the ownership of the media, for example) but were rules on advertising aimed at preserving the non-commercial character of broadcasters. It was therefore difficult to claim that application of these provisions was appropriate to the objective of preserving pluralism.

The case where the restriction consisted in applying a provision specific to pluralism, such as that restricting ownership of the media, to a broadcaster from another Member State has not yet been examined by the Court. Having regard to certain national provisions,³⁹ it is not, however, impossible that such a case could one day be brought before the Court.

35 On the obligation to use the services of the Bedrijf for the production of all, or part, of their radio or television broadcasts.

36 Since pluralism in the audiovisual sector of a Member State cannot in any way be affected by enabling the various national broadcasting organizations to call upon the services provided by persons established in other Member States (paragraph 31).

37 The conditions governing the structure of broadcasting organizations established in other Member States.

38 "In order to guarantee pluralism in the audiovisual sector, it is far from essential for national legislation to require broadcasting organizations established in other Member States to conform to the Dutch model [...]. For the purpose of guaranteeing the pluralism which it seeks to preserve the Netherlands Government could properly confine itself to formulating the internal rules of its own organizations in an appropriate manner" (paragraph 42).

39 See above.

Using the yardstick of proportionality, the restrictive effect caused by the application of national anti-concentration rules to a broadcaster from another Member State is difficult to justify.

- Proceeding on a case-by-case basis, it will be necessary to assess whether the restrictive measure is appropriate to the objective of pluralism. For example, this condition would be difficult to satisfy in a case where a Member State took account of the extent of ownership of media other than those broadcast or circulated on its territory. A foreign broadcaster would thus have his holdings in other Member States taken into account in any check on whether the limits laid down in the receiving State had been exceeded. Aggregating such holdings would rapidly lead to a situation where reception of foreign broadcasters was prevented in a particular State. Such a multiterritorial criterion should be regarded as unjustified since it is not apparent how the control of media in one State could affect pluralism in another when those media do not operate there.

Similarly, the condition of appropriateness would not be satisfied where the restrictive measure preventing the reception of a broadcast by a broadcaster established in another Member State also prevented that broadcaster from broadcasting programmes in the territory in which it is established or in that of other Member States. In such a case the measure could have the effect of preventing the broadcaster from contributing to pluralism in its own country or in others. Application of the national law is not, then, an appropriate means of preserving pluralism since it has the effect of restricting it in another State.

- It will also be necessary, still on a case-by-case basis, to assess whether the restrictive measure does not exceed what is strictly necessary.

This condition would not be easy to meet in a case where a Member State applied its rules to channels originating from other Member States which did not really threaten pluralism because of, for example, a very small actual audience, because of the language (or languages) used, or because of a programme's content that is not specifically geared to the general public. In such a case the measure would not be "objectively necessary"⁴⁰ to achieve the desired objective which is not to apply national legislation as such but to preserve pluralism.

In all these cases, the Member State of origin would actually be attempting to give an extra territorial effect to its conception of pluralism. However, there is no doubt that the monitoring of proportionality soon becomes a very delicate exercise because of the subjective element in the assessment that it requires and the difficulty of distinguishing it from cases which could be covered by case-law on circumvention in the strict sense of the term.

(e) Case-law on circumvention of legislation

In the light of the so-called "van Binsbergen" judgment,⁴¹ the circumvention of anti-concentration law could, subject to the conditions laid down by the Court being satisfied, justify a restriction on the free movement of services.

According to this judgment, the *conditions necessary* for a restriction to be justified are as follows: the activity in question must be entirely or principally directed towards the territory of another Member State (objective condition), for the purpose of avoiding the professional rules of conduct which would be applicable in the Member State of origin (subjective condition), and the situation comes under the chapter relating to the right of establishment and not the one on the provision of services.

⁴⁰ Judgment of 26.2.1991 in Case 180/89 Commission v Italy, not yet reported, paragraph 17.

⁴¹ Case 33/74, [ECR] 1974, 1299, paragraph 13; see also the "co-insurance" judgment in Case 205/84 [ECR] 1986, 3755, paragraph 22.

The *legal basis* for this case-law is not explicit apart from the fact that it has to do with the dividing line between the right of establishment and freedom to provide services.⁴² The basis may lie in the implementation of a general principle which would prohibit the abuse of a right, but also in the case-law on the actual definition of what is a service. In the former case, the basis would be purely judicial, while in the latter it would rest on the inapplicability of Article 59 of the Treaty since the situation could not be described as a service within the meaning of Article 60 of the Treaty because the condition relating to its cross-border character would not be met. In certain instances of circumvention of legislation it would be possibly necessary to consider that all the relevant elements had to be confined within the same Member State,⁴³ which, as the Court has ruled,⁴⁴ would prevent the application of provisions on the free movement of services. Such an approach would moreover complement that of the actual and permanent establishment developed by the Court in its *Factortame*⁴⁵ judgment on the right of establishment. However, as the Court has not yet applied this judgment to a specific case, this question remains open.

42 As is confirmed, firstly, by the last part of paragraph 13 of the *van Binsbergen* judgment and, secondly, by the fact that in the same judgment the Court (contrary to its practice in subsequent judgments relating to Article 59) did not devote a special paragraph to the question of whether there was indeed a service within the meaning of Article 60; if this had been the case, it would have been possible to conclude that the question of circumvention is quite separate from that of the nature of the activity in question (whether or not it is a cross-border service).

43 Judgment of 18.3.1992 in Case 52/79 [ECR] 833, paragraph 9.

44 *Idem* and Judgment of 26.2.1991 in Case 198/89, Commission v Italy, not yet reported, paragraph 9.

45 Case 221/89, not yet reported; paragraph 20 states that the concept of establishment, within the meaning of Articles 52 *et seq.* of the Treaty, implies the effective exercise of an economic activity by means of a fixed establishment in another Member State for an unspecified period".

The *difficulties of interpreting* and applying this case-law are clear. The objective and subjective conditions give the Court wide discretionary powers, particularly the latter which requires the identification of intent,⁴⁶ i.e. the actual motive of the person providing the services. It would be necessary, in particular, to prove that the intention to circumvent anti-concentration rules, as such, and not other rules,⁴⁷ had played a decisive role in the choice of location. Moreover, the appraisal would have to take account of the fact that an operator may legitimately attempt to use the opportunities provided by the single market in the Community. Reliance on a set of indices will not prevent this control from being very discretionary in nature.⁴⁸

B Measures relating to services

Compared with the measures relating to the provider of the services (rules on media ownership), those relating to the services themselves (rules on the content of broadcasts), the application of which to broadcasts from another Member State would give rise to the restriction, raise different questions. The "Television without frontiers" Directive already coordinates those areas relating to the content of broadcasts which, in accordance with the Debaue judgment, could have justified restrictions on the free movement of television broadcasts.

⁴⁶ Even in a case which would involve identifying the cross-border nature of the service (and not abuse of a right) since the process of determining the State in which the "relevant elements" of the activity are confined or of the "effective exercise" (Factortame judgment, *op cit.*) of the latter could also cover the actual intentions of the person providing the services.

⁴⁷ In particular if they do not pursue an objective in the public interest.

⁴⁸ Apart perhaps from cases involving a broadcaster whose audience was entirely in the receiving country, whose programmes were prepared in the receiving country, whose management bodies were also located there and which had no other similar channels broadcast to other countries from the same country of origin. In this case one could dispute the existence of a cross-border service since all the relevant elements would in reality be in one and the same State.

The fact that provisions relating to pluralism such as obligations concerning neutrality, objectivity, the sharing of air time, political advertising, the ban on publishing or broadcasting opinion polls, etc. do not form part of these coordinated areas means that a priori they were not identified as being likely to give rise in practice to risks of restrictions on the free retransmission of broadcasts from another Member State which would have justified their harmonization.

However, this does not mean that these provisions could never justify certain restrictions in the light of Community law. As with measures relating to the provider of the services, the condition relating to the pursuit of a public-interest objective would be met. The condition concerning the absence of a similar rule in the State would also be met in most cases. The requirement that the measure must not be disproportionate would however make it unlikely that the programmes of a particular channel would be interrupted.⁴⁹ Certain obligations could not reasonably be imposed (threatening a ban on retransmission) on a cross-border channel, such as those requiring the various shades of opinion in society to be reflected. Moreover, only the particular programming complained of, such as a political advertising clip regularly broadcast over a fairly long period and aimed at a country in which it would be prohibited, could be the subject of an interruption.⁵⁰ It should be stressed that "circumventions" will be more blatant here than in cases involving rules on media ownership⁵¹ and therefore the control of proportionality should be less difficult and give rise to fewer conflicts and less legal uncertainty.

49 Article 10 of the European Convention on Human Rights would provide a very important framework for assessing the need for the restriction.

50 It would still be necessary to prove that this is the least stringent measure in relation to the interest to be protected and that the same measure would be applied to national broadcasters committing the same infringement. Moreover, if the clip was not intended for that country it would be disproportionate to prevent its retransmission when it could be authorized in the country at which it is aimed.

51 Since it will be easier to show that the particular programme is adapted to the receiving country because of the national character of political life in the Member States (publicity for a national political personality for example) and therefore that only a restriction on the programme in question is an appropriate means of putting an end to the situation. In the case of rules on media ownership it will be difficult to prove that the restriction is necessary to safeguard pluralism (see above) since the incompatibility resides in capital holdings and not in programming on the screen.

However, in practice the risk of a circumvention taking place is not great because the financial stakes are low⁵² and because operators' strategy would generally seem to be dictated by commercial rather than political objectives.⁵³

CONCLUSION

In the light of the legal assessment, Member States would be able, if certain conditions are met, to restrict television broadcasts from another Member State which would circumvent national rules to safeguard pluralism and would threaten pluralism. Apart from cases of circumvention in the strict sense, it would be more difficult (control of proportionality), although not impossible, for a Member State to restrict the retransmission of a channel from another Member State which was in breach of national rules on pluralism, albeit not intentionally.

However, giving practical effect to this possibility of restricting broadcasts could be a difficult matter where rules on media ownership are involved and could give rise to disputes because of differences in assessing a given situation. In this connection, particular attention needs to be given to two factors:

⁵² Contrary to broadcasts such as commercial advertising, programmes of a political nature which circumvented national rules would probably not generate enough revenue to make the risks worthwhile.

⁵³ See "Study on pluralism and concentration in media-economic evaluation" cited on p. 10 above.

. Uncertainties regarding the definition of circumvention

The application of Court judgments on circumventions of the law will give rise to major problems of interpretation, since the same situation can be seen in different lights by the States in question. In particular, it will always be possible for the broadcaster to invoke the fact that it broadcasts to other countries to contest that circumvention has taken place. These other countries could also adopt the broadcaster's position and contest the fact that the State whose legislation has been circumvented should in the process challenge the State of establishment's approach to pluralism. Moreover, given that broadcasting is an activity which requires authorization by the public authorities, the State which had granted a licence would be indirectly involved in the event of a dispute. Therefore the discussion would concern the substance i.e. the ability of each system to genuinely protect pluralism.⁵⁴ This legal uncertainty is not a theoretical problem because even in areas already coordinated by the "Television without frontiers" Directive, fears of circumvention are sometimes invoked;⁵⁵ this will a fortiori happen even more frequently in areas of pluralism which are not coordinated by a directive.

. The difficulty of taking technical measures against an operator whose activities were circumventing a law. In the case of satellite broadcasting this aspect should not be overlooked, even if it would mainly concern cases of individual reception (cable networks being easier to control). It is probable that in the event of a prolonged dispute as to whether legislation had been circumvented, the broadcaster would continue its activities because it would be materially impossible for the State whose law had been circumvented to stop them. The latter would have to make direct representations to the State responsible for the broadcaster and thus give the dispute a political dimension.

⁵⁴ Why should the restriction of cumulation to one national terrestrial channel as in France be more (or less) legitimate than a limitation to three as in Italy?

⁵⁵ E.g. in the case of the plan to set up a Luxembourg French language film channel broadcasting by satellite.

II. Merger control at the national level

In competition law, too, Member States are legally entitled to defend themselves against operations with a Community dimension which may be covered by the Community principles of free movement: the fact that a merger has a Community dimension, and consequently falls within Community competition law rather than national competition law, does not prevent Member States from taking measures to protect pluralism at national level.

Article 21(3) of the Merger Control Regulation expressly allows Member States to go on taking appropriate measures to protect "plurality of the media" even where the Commission does not act against a merger. If no provision of this kind had been made, paragraphs 1 and 2 of the same Article would have deprived the Member States of authority over any merger within the scope of the Regulation; such mergers would have become a matter exclusively for the Commission and the Court of Justice.

The discretion given to the Member States by Article 21(3) is not unlimited, however, as the measures they take must be "compatible with the general principles and other provisions of Community law" (first subparagraph of Article 21(3)). This means in particular that the measures must not be incompatible with the principle of free movement enshrined in Article 59 of the EEC Treaty and in the "Television without frontiers" Directive. The reference to general principles is important; in the light of the case-law on fundamental rights developed by the Court of Justice, it means that any restrictions those measures may impose, being in the nature of exceptions to general rule (Part One), cannot go beyond the exceptions permitted by Article 10(1) of the European Convention on Human Rights.⁵⁶

⁵⁶ Judgment of 18 June 1991 in Case 260/89 ERT v DEP and Kouvelas, not yet

The measures taken must be "appropriate measures to protect ... plurality of the media", which would appear to exclude measures which are not designed specifically for that purpose. So that, while rules on concentration which are intended specifically to safeguard pluralism in the media may provide a basis on which the national authorities may examine a merger which the Commission has found to be compatible with the common market, general competition rules which are not specific to this area would not do so.

Finally, it is important to note that Member States cannot take advantage of this possibility of national merger control in order to authorize a transaction which the Commission has declared incompatible with the common market. Article 21(3) is concerned only with the contrary case, that of a transaction which is compatible with the common market but incompatible with the national laws safeguarding pluralism.

III. Transparency

The need for transparency has been pointed out repeatedly, especially by the European Parliament⁵⁷ and the Council of Europe.⁵⁸ But it is by no means clear that transparency as such raises problems which have to be dealt with at Community level. Two separate questions can be distinguished.

- The collection and exchange of information

At Member State level, the authorities have access to certain kinds of information either because they have been given investigative powers or because certain classes of information have to be supplied to satisfy legal obligations. The volume of data collected and the amount of investigation which takes place vary from one Member State to another, depending in particular on whether there are authorities supervising the media and competition and what powers they have.

⁵⁷ Resolution on media concentration and diversity of opinions, 16 September 1992.

⁵⁸ Resolution adopted at the Third Ministerial Conference on Mass Media Policy, held in Cyprus.

A distinction has to be drawn between broadcasting and the press. The fact that broadcasters must have prior authorization puts the authorities in a strong position to obtain the necessary information (no information, no authorization). This is not so with the press, except in some merger cases where the public authorities intervene on competition grounds.

The collection of information has also to be distinguished from the divulagation of information. Some data collected by competition authorities are confidential and are not accessible to the public. It does not follow that the national authorities are unable to obtain such information.

. *At European level* the question of obtaining information on an operator in another Member State has often been raised, particularly in the Council of Europe. The Resolution adopted at the Council of Europe's Third Ministerial Conference proposes that a mechanism be set up for consultation between states.

It should be pointed out that the authorities' need to exchange information hinges in the first place on their capacity to obtain information direct from the companies involved. In the case of broadcasting the fact that a company is based abroad will not necessarily be an obstacle, for the reasons already outlined.

The exchange of information between authorities will ultimately be restricted by the limits to their power to obtain the kind of information which a foreign authority might want and their willingness to do so. National authorities are likely to be interested primarily in information which is specifically domestic and which may not necessarily meet the requirements of foreign authorities. A difficulty of that kind could be overcome only by allowing an authority to have direct access to sources of relevant information located in another Member State, without having to pass through another authority. But the Commission has not been notified of any obstacles in this respect. In any event, if the need arose for an exchange of information between competition authorities, it appears that they would be able to make arrangements directly, without the need for any institutional mechanism.

- The use and processing of information

The purpose of the rules on transparency is to allow it to be established "who controls what". The real difficulty, then, is to define the concept of control, and to establish suitable tests. The problem is not specific to the media; it arises wherever there is any form of supervision of concentration. The task can be a delicate one, as account has to be taken both of the internal structure of the company and of shareholders' outside links.

Data may also be collected in order to monitor the development of concentration. With monitoring of this kind, which is undertaken for purposes of analysis, the question which arises is one of processing and of the establishment of a system of analysis suited to precise needs, rather than a question of the actual collection of data. There are already private firms, public authorities and institutes specialized in this type of activity. Lastly, monitoring the development of concentration does not in itself provide a solution to any problem of pluralism which may arise in the media.

In conclusion, transparency as such is not at present seen as a need which would justify specific action on the part of the Community, as long as there are no obstacles to exchanges of information between national authorities. But it is likely that the international dimension will be additional to the existing factors which sometimes make for less transparency.

Subsection 2. The effectiveness of Community competition law

Specific action to guarantee pluralism at Community level will be necessary only if the need to maintain pluralism cannot be met using Community competition law as it stands (Article 85 and 86 of the EEC Treaty and the Merger Control Regulation).

In its Resolution of 16 September 1992 Parliament took the view that "diversity of opinion and pluralism in the media cannot be guaranteed by current competition rules alone".

The relationship between competition law and pluralism can be described as follows.

1. Convergence between the maintenance of competition and the maintenance of pluralism

A competitive environment and a properly working market are good for pluralism, because the market will be open to new entrants - in this case new media enterprises - and because publishers and broadcasters will be encouraged to adopt distinctive approaches to editorial content and quality, and thus to broaden the diversity of information.

There is thus convergence between the objective of maintaining pluralism and the objective of maintaining competition. Competition law, and in particular Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (the Merger Control Regulation, hereinafter referred to as "the Regulation"), helps to provide an environment favourable to pluralism by preventing transactions which create or strengthen "a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it" (Article 2(3) of the Regulation).

A transaction of this kind is bad for competition, but it is also bad for pluralism. Indeed it is difficult to imagine a case in which what is bad for competition would be good for pluralism. This means that a merger which was found to be incompatible with the common market could not then be exempted on the ground that it had positive implications for pluralism (see above).

Some mergers which raise questions of pluralism, therefore, can be regulated by applying competition law. In the purchase of advertising space, for example, a merger might leave the media heavily dependent on a central buying agency. This could damage pluralism: by lowering the price of advertising space it could limit market access by new media enterprises by reducing the revenue available, and provoke a reaction in the form of further media concentration. Similarly, competition law might prevent a vertical link-up between a broadcaster and a satellite operator or a deal linked to the application of a new technology (e.g. access control systems) limiting access to the satellite channel market. The same would apply where an operator abused a dominant position on the market in the sale and acquisition of programme rights.

II. Limits to the convergence

Community competition law will serve the interests of pluralism only if the situation raises problems which can be expressed in its terms. But that is not always the case.

§1 Pluralism and competition: different criteria

Although there is convergence between them, competition and pluralism are fundamentally different things. Effective competition is concerned with the economic behaviour of undertakings, while pluralism is concerned with the diversity of information. Competition between undertakings may be reflected in competition between ideas, but the two approaches work on quite separate lines.

In order to apply the Regulation it has to be determined whether a dominant position is being created or strengthened, and whether effective competition would be significantly impeded.

An assessment of the effect on pluralism, on the other hand, has to be based on an analysis of the diversity of information available to the public affected, regardless of the competitive position of the undertakings concerned.

§2. The impossibility of applying competition law in certain situations where pluralism may be affected

Because of the difference in the nature of the two criteria, situations may arise in which pluralism is threatened without competition being significantly impeded in the common market or in a substantial part of it.

- Multimedia mergers

Multimedia mergers fall under the scope of the Regulation only if they raise a problem of competition on the relevant market or markets. With mergers of this kind the definition of the relevant markets can be a complex matter, and it appears difficult to focus on a multimedia market as such, with the possible exception of the sale of multimedia advertising space. An analysis would more probably have to be based on the competition problems arising within one of the submarkets, that is to say one medium alone. Thus a merger between a multimedia group and a monomedia group (a television group for example) might create a dominant position on the broadcasting market or its submarkets. It is the monomedia impact rather than the multimedia character of the group's activities which would be questioned.⁶⁰ In terms of pluralism, on the other hand, multimedia activity may raise difficulties even though it is compatible with competition law. From the point of view of a media consumer who listened to the radio in the morning, read the newspaper at lunchtime and watched television in the evening, a multimedia merger might have the effect that all the media he consumed would come to depend on the same controller even though the controller's market share in each of the media was not

60 This may reduce the scope for reference to a market in the sale of multimedia advertising space, since the creation or strengthening of a dominant position will most often be more clearly visible on a monomedia market. It appears very unlikely that a multimedia merger could create or strengthen a dominant position on the market in the sale of multimedia advertising space without doing so on a monomedia market.

sufficient to impede competition. Diversity of information and of media controllers has to be assessed not just within one medium but between different media as well, and given media consumer practices the convergence between the maintenance of competition and the maintenance of pluralism is weaker in the case of multimedia mergers than in the case of monomedia mergers.

- Monomedia mergers

Even a monomedia merger where no dominant position is created or strengthened, and effective competition is not impeded, may endanger pluralism nevertheless.

The Regulation applies only where a dominant position is created or strengthened, and it is probable that a situation where pluralism might be endangered will also involve a dominant position. However, the definition of the relevant market might cause difficulty, as it might mean that a situation with implications for pluralism would not be considered a dominant position. In a merger between a group operating a terrestrial network and another group operating a non-specialized pay channel, for example, the pay television market might be distinguished from the rest of the television market, because of the different nature of its resources, leading to the conclusion that there was no dominant position. But the same controller would now have a general channel on both markets, which seen from the information consumer's point of view might limit pluralism. The factors looked at for competition purposes may thus be different from those which are relevant for purposes of pluralism. In particular, the more the markets are fragmented the less easy it will be to take account of aspects involving pluralism.

Then there is the requirement that effective competition be significantly impeded in the common market or a substantial part of it: it would appear that this could limit the scope for applying the Regulation in cases where pluralism is an issue, since the mere fact that a dominant position is created or strengthened will usually be enough to raise a problem of pluralism, even if competition is not impeded. For purposes of pluralism, therefore, control would be tighter than for purposes of competition.

- The problem of thresholds

The three thresholds laid down in Article 1(2) of the Regulation limit the scope for applying the Regulation to the media. To date two media cases have been notified (Canal+/ESPN and Sunrise). The Sky/BSB merger, on the other hand, fell outside the scope of the Regulation because each of the undertakings concerned achieved more than two thirds of its aggregate Community-wide turnover within one and the same Member State.

But the high level of the thresholds is not a justification for a specific Community measure; if the problem is one of thresholds, they could be lowered under Article 1(3) of the Regulation.

§3. The difficulty of a broad interpretation of competition law

It does not seem possible to overcome the difficulty of having two criteria of a different nature by applying competition law in a specific way. In the absence of any legal basis for doing so, an effect on pluralism cannot in itself be taken into consideration in merger control. The references in Article 2(1 b) to "the interests of the intermediate and ultimate consumers" and "the development of technical and economic progress provided that is to consumers' advantage" do not provide such a basis.

Article 21(3) expressly takes plurality of the media into the national framework; at least in spirit, this runs counter to the idea of interpreting the Regulation broadly so as to include considerations of pluralism.

The convergence of antitrust supervision and the monitoring of pluralism thus goes no further than the positive effects which competition policy may have on pluralism; competition policy cannot be made to include the maintenance of pluralism.

§4. Potential limits

The limits which have been identified here have not so far been tested in reality. This is partly because the Regulation has entered into force only recently, and partly because mergers of this kind have not arisen.

It is difficult to evaluate the possibility of such cases occurring in reality. One factor which might limit the prospect is that the new anti-concentration laws specific to the media may prevent mergers which would otherwise have been caught by the Regulation. It may be, therefore, that any such cases will arise in the Member States which have not adopted rules of this kind, or whose rules are not severe. As it is mainly the small countries which have little in the way of strict rules, because of the small number of private broadcasters there, it is probable that sensitive mergers affecting them would be a matter primarily for national competition law rather than for Community competition law.

CONCLUSION OF SECTION I

The objective of maintaining pluralism as it is defined in the various bodies of national law does not in itself seem to necessitate any specific Community action. The Member States are legally entitled to restrict the retransmission of broadcasts originating in another Member State if there is real circumvention of their laws on pluralism. Mergers which are compatible with the Merger Control Regulation but which raise difficulties of pluralism can be dealt with under the national measures safeguarding pluralism.

Community competition law does not provide a suitable instrument for maintaining pluralism, even though it may be of some assistance; but this is not enough to create a need for Community action.

In practice, however, the application of national rules on pluralism may run into certain problems of legal uncertainty, due to the difficulty of giving a legal definition of what constitutes circumvention and the consequent possibility of tension between national authorities.

Section 2. IDENTIFICATION OF NEEDS LINKED TO THE PROPER FUNCTIONING OF THE SINGLE MARKET

National anti-concentration laws specific to the media are not neutral in their effects on the single market. The laws are different from one country to another. The disparity itself is not necessarily a reason for action at Community level. But action would be needed if their effect was to create real obstacles interfering with the proper functioning of the single market as defined in Article 8a of the EEC Treaty and Article G § B. 3 of the Treaty on European Union. Six classes of obstacle can be identified.

1. Restrictions on free movement of services imposed where there is circumvention of legislation

The disparity of national laws may lead to cases of restriction on the free movement of services which are justified in Community law (a legal analysis of cases in which the free movement of services is restricted was carried out in Section 1). This might happen especially where there is circumvention of national legislation on the ownership of the media, which would be covered by the judgment in van Binsbergen.⁶¹

⁶¹ See above, sub-section 1.

No such restrictions have been imposed hitherto. The danger of such restrictions arising cannot be ruled out, however, given the regulatory environment in the Community. An assessment of the danger of circumvention has to look at two factors: the difficulty of *entering the market* occasioned by anti-concentration rules and *the market's growth prospects* (economies of scale) and *economic attractiveness* - the more access to a promising market is impeded by stringent anti-concentration rules, the greater the danger of circumvention.

All the obstacles to market entry which are described below are also factors leading to a danger of circumvention. A system in which it is very difficult to obtain a licence (for a new channel, to renew an existing licence or to take control of an existing licensee) automatically creates a danger of circumvention. But the danger seems a more real one in broadcasting than it is in the press, because restrictions on media ownership are concerned not so much with the press as with radio and TV broadcasting and multimedia operations, and because the movement of broadcast programmes is more difficult to restrict than the movement of newspapers.

Circumvention is more likely to take place by means of satellite broadcasting than by terrestrial transmission. Countries which are heavily cabled or which have a high level of satellite dish ownership are most at risk (B, NL, D, UK).

II. Restrictions on the right of establishment

Constraints on media ownership in a Member State have a restrictive effect on companies wishing to establish themselves there. This is so particularly where the company is already established in another Member State and the levels of the candidates' holdings and control in other Member States are counted towards the limits, as is the case in France or Germany, for example.⁶² An applicant for a licence who already operates a channel in another Member State which is retransmitted in the state in which the licence is applied for will in that case reach the concentration thresholds, and consequently be refused it, more rapidly. Applicants without channels in other Member States will have an advantage.

Restrictions which apply without distinction to nationals of the country and other Community nationals, as the restrictions aimed at maintaining pluralism do, are not in themselves incompatible with Article 52. The Court of Justice has held, notably in Case 221/85 Commission v Belgium, which concerned clinical biology laboratories, that Article 52 requires national treatment but nothing more; *only discrimination based on nationality* and disguised discrimination are incompatible with it, unless of course they are justified under Article 56.⁶³ Restrictions which apply without distinction to nationals of the country and to other Community nationals are not caught by Article 52 as the Court has interpreted it.⁶⁴

⁶² See Section 1.

⁶³ The maintenance of pluralism is not a basis which can be invoked under Article 56(1).

⁶⁴ The Court has sometimes left a little doubt on this point; see for example the judgment of 7 May 1991 in Case 340/89 Vlassopoulos, 1991, J, 2357.

Restrictions which are applicable without distinction are in themselves legitimate for purposes of Article 52, but that does not mean that they can be applied in order to restrict the movement of services originating in another Member State. As we have seen,⁶⁵ such a restriction would be incompatible with Article 59 since it does not satisfy the tests developed by the Court of Justice, particularly the presence of imperative reasons in the general interest and the requirement of proportionality.

III. Restrictions on competition

There are some methods of limiting concentration which might have the indirect effect of discouraging foreign investment in a Member State, and thus protecting operators already established in that state as compared with those from another Member State wishing to set up in the first state in order to have access to its market. Two examples may be given.

- In broadcasting, there are rules in France, Greece, Portugal and Spain restricting to 25% the maximum stake which can be held by an operator in a television channel; in Germany the ceiling is 50%.⁶⁶ Foreign operators may be reluctant to seek control of a television channel with a holding of only 25%, such fragmentation of the capital making the management's position weak. In these countries licensees have a measure of protection against takeovers. They are protected against both nationals and foreigners, but perhaps those who feel the effect most are operators in Member States whose legislation imposes no such restriction. In such countries companies may be taken over by foreign firms which are not there subject to any ceiling on their holdings, while the target company would

⁶⁵ Section 1 above.

⁶⁶ In Portugal there is a 30% restriction for radio.

have great difficulty in doing the same thing in Member States which do impose such ceilings. Against the background of current economic strategies, involving international cross-holdings between media, this imbalance or absence of reciprocity could be a source of real difficulty, and could upset the present status quo.⁶⁷ The ITV companies in Britain recently expressed concern at the ownership restrictions which exist in some countries at a time when a Community operator can acquire 100% of an ITV company in the United Kingdom.

- Another example is provided by the legislation which takes into account the activities of foreign broadcasters for purposes of the control of concentration; this may also have the effect of protecting established firms.⁶⁸ In Germany, for example, the Treaty between the Länder which includes foreign channels broadcasting in German on German territory in the calculation could have the effect of preventing these channels from establishing another German-speaking channel specifically for the German public, and thus from competing directly with domestic German channels, as the threshold of two channels would then be exceeded. The same problem could arise under French law, which contains a similar provision.

IV. Distortion of competition

Anti-concentration laws specific to the media impose limits on media ownership which vary from one Member State to another. The disparity in the ceilings imposed can have consequences of two kinds.

⁶⁷ Part Two above.

⁶⁸ Above.

- It may produce a drain of investment from countries with closed ownership access to countries with more open access. Concentration would thus rise to a higher level in countries with open access than it would in countries where access was relatively closed. Countries with open access might then react by imposing more restrictive systems themselves. An investment drain of this kind might occur particularly inside an area in which the language spoken is the same, always supposing that there is a wide disparity between the systems in operation. An investment drain is thus sometimes alleged in connection with the Hersant group's holding in the Belgian press.⁶⁹

- It may simultaneously, in the opposite direction, enable operators established in an open-access country to build up a strong competitive position before entering the market in other countries. An example in broadcasting is Fininvest, which developed on an open domestic market.

V. Legal uncertainty regarding circumvention

In theory the circumvention of national rules on pluralism could lead Member States to impose restrictions which would be justified under Community law. But as we have seen⁷⁰ it will be very difficult in practice to say whether a restriction on free movement is indeed justified in the light of the case-law of the Court of Justice, particularly the principle of proportionality or the rules on what constitutes circumvention for these purposes. In addition to the implications for Member States, the consequence of this legal uncertainty as far as industry is concerned is that it constitutes a *barrier in the way of Community investment*. The danger that a Member State might invoke the circumvention argument against a firm which was in fact taking legitimate advantage of the opportunities

69 It is argued that the ceiling of 30% of the daily newspaper market laid down by French law led the Hersant group to prefer a 42% holding in the Belgian newspaper *Le Soir*.

Within the European Economic Area there could be an investment drain of this kind between Germany and Austria.

70 See above.

offered by the single market, and the risks of tension between Member States which have already been described, are liable to deter firms from entering the market, which they already regard as a risk area quite apart from this question of pluralism. A situation of that kind could not be reconciled with the industrial policy objective laid down in Article 130 of the Treaty on European Union, which is to encourage an environment favourable to initiative and to the development of undertakings throughout the Community.

VI. Obstacles to access to media activity in the Community

These laws by nature limit access to media ownership and thus restrict entry to the broadcasting and press market. Moreover, the disparity of national laws on media ownership has the effect of limiting access to media activity. In the internal market such obstacles may be contrary to the industrial policy objectives set out in Article 130 of the Treaty on European Union, which aims, in accordance with a system of open and competitive markets, at encouraging an environment favourable to initiative and to the development of undertakings while maintaining an open approach to markets.

(a) Restrictions on media ownership at national level

The anti-concentration rules specific to the media constitute a particularly strong barrier to entry, because they are concerned with the very principle of ownership, which is at the basis of all economic activity, and not solely with limits on the way in which economic activity is to be undertaken.

Broadcasting. National anti-concentration laws which are designed specifically to ensure pluralism in the media place restrictions on both of the only two ways of entering the broadcasting market: obtaining a licence in one's own right or taking a stake in a broadcaster who already holds a licence. The restrictions imposed weigh equally heavily on applicants for licences and on those interested in acquiring shareholdings; they derive from the following factors.

- The limited number of licences granted. The number of licences is limited in all Member States, but it is not necessarily set solely by reference to objective criteria, such as the shortage of frequencies, or on the basis of an assessment of the market; there may also be a measure of discretion which takes account of the media policy followed by the Member State. Paradoxically, this limitation is a factor which encourages concentration, because where there are no new licences the only course open to a new entrant is to take control of an existing licensee. Increasing the number of licences would reduce concentration by providing more opportunities for new entrants.

- The conditions to be met in order to qualify for a licence or for a holding in the capital of a broadcaster. Examples are conditions preventing any sort of holding, even a minority one; rules disqualifying certain persons (UK, 1); limits on the maximum holding allowed; and conditions preventing or limiting monomedia or multimedia holdings by a licensee in another media enterprise. The conditions of access to the market may vary according to the type of channel concerned (e.g. special interest, local or cable). Measures dealing with multimedia concentration can produce greater obstacles to market access, because they broaden the number of operators potentially concerned.

Press. Access to press activities is more open than access to broadcasting, because:

- monomedia anti-concentration rules specific to the press exist in only five Member States;
- those rules are not based on a system of prior authorization or licensing;

- they are for the most part concerned only with daily newspapers, and leave scope in respect of other products such as magazines (business and finance, sport or women's magazines). It is worth pointing out that statistics show that it is precisely the category of magazines which is mainly concerned in cross-border transactions;⁷¹
- except in France and Italy they are not based on automatic thresholds, and thus leave greater scope for press publishing;
- in the case of the press the obstacles are mainly due to multimedia rules.

(b) Consequences of the disparity between limits at Community level

Apart from the restrictions on competition referred to under point III above, the effect on the industry will be to increase costs.

There will be *an increase in the cost of research* needed to develop strategies. The disparity of laws makes strategic planning more complex and risky, and thus requires substantial investment.

There are *the costs of a constraint-based strategy*. The disparity between national anti-concentration rules may force operators to adopt a strategy which is not the most efficient one for the market, being to some extent dictated by the scope for access to national markets left by restrictions on media ownership. The constraints imposed by such restrictions may play a part in certain choices, such as:

. *Establishment/distribution strategies.* Among a media enterprise's different development options, the disparity of restrictions may persuade it not to take the one of establishing itself in another Member State but instead to supply its services from across the border, even though this may be more costly and less selective. An operator unable to establish itself on certain closed national markets may find itself compelled either to fall back on one market or to follow a large-scale strategy. In the first case the scale effect of the single market is prevented; in the second case it would be difficult to exploit the specific features of the various national or sub-national markets. If there is open access to terrestrial broadcasting in a Member State a broadcaster can follow a more finely-tuned and selective strategy.

. *Monomedia/multimedia strategies.* The limits to development on markets in other Member States which are imposed by restrictions on media ownership might for example encourage monomedia companies to fall back on a multimedia strategy in their home country. This could be particularly damaging to the market in special-interest channels; given the limited public which will be available in any one country, their viability depends to a great extent on the scope for development in other Member States.

(c) Compatibility of these obstacles with Community law

The simplest way of removing these obstacles would be to dismantle the national restrictions on media ownership which cause them. As we have seen, however, these restrictions are not in themselves incompatible with Article 52, and cannot simply be removed.

Nor is it possible to invoke the second paragraph of Article 57 in order to contest the legitimacy of these restrictions. Article 57 states the objective of facilitating the right to take up and pursue activities as self-employed persons, but one cannot conclude a contrario that measures making such activities more difficult are necessarily incompatible with the Treaty.

Since the measures restricting media ownership cannot be removed, the disparity can be ended only by harmonizing them.

CONCLUSION OF CHAPTER II

In the light of the objectives of the Community and of the analysis carried out here the need for possible Community action can be described as follows.

1. The objective of ensuring pluralism, as it is understood and pursued by the Member States, does not as such create a need for Community intervention. The operation of the Community is not in itself a threat to pluralism; quite the reverse, it may have a positive effect on two factors which determine the level of pluralism: the number of broadcasters and newspapers and the diversity of their controllers. Member States have the legal capacity to safeguard pluralism, particularly where there is real circumvention. The only possible sources of difficulty are tension between national authorities regarding the definition of circumvention and questions regarding the transparency of media ownership and control.

2. Among the methods used by Member States to safeguard pluralism, the disparity between the anti-concentration rules specific to the media constitutes an obstacle to the functioning of the single media market:

- . It may result in restriction of the free movement of services where there is circumvention
- . It may result in restrictions on freedom of establishment
- . It may produce restrictions on competition
- . It may distort competition
- . It may cause legal uncertainty regarding the question of circumvention
- . It limits access to media activity.

Any need for action on the part of the Community, then, has more to do with ensuring that the single market functions properly than with maintaining pluralism as such.

3. For the present the obstacles are for the most part potential obstacles, because the relevant laws are recent and the strategies adopted by operators are often still national.

4. Potential obstacles can be seen mainly in broadcasting, and particularly television broadcasting, which has the highest measure of regulation. The press is affected essentially by multimedia ownership rules rather than monomedia rules.

5. The restrictions on media ownership which underlie the obstacles identified are not incompatible with Community law.

QUESTION 1

The Commission would welcome the views of interested parties regarding the needs for action, and in particular on:

- *any cases where the Community dimension of media activity has meant that restrictions on media ownership imposed for the purpose of maintaining pluralism have become ineffective, for example because they are circumvented or because of transparency problems;*
- *the existence of restrictions or restrictive effects other than those identified here;*
- *practical instances where ownership restrictions have actually impeded the activity of economic operators in the sector;*

- *the sectors and activities which are especially affected by restrictions on ownership (for example, is the press subject to restrictive effects not only in respect of multimedia aspects but also in respect of monomedia aspects?).*

Chapter III. NECESSITY FOR ACTION IN THE LIGHT OF NEEDS

Are the needs identified above of sufficient importance to justify action, particularly since the nature of the obstacles is if anything potential?

From the point of view of completing the single market, it should be noted that the questions raised here are not among the obstacles that were to be removed under the 1985 White Paper on the subject. The body of legislation that produced the restrictive effects did not start to develop until the mid-1980s. Nevertheless, from the point of view of the *functioning* of the single market, which the Commission must also help to ensure, restrictive effects have been identified which might affect the implementation of the single market in the media industry. The task is therefore to determine whether media enterprises are to benefit to the full from the opportunities created by the single market or whether this industry, like others, should not be the focus of specific measures.

Taking the sectoral policies launched by the Commission, the audiovisual sector and the media in general have been given clear priority by the Community, as is demonstrated by the "Television without Frontiers" Directive, the Commission communication on audiovisual policy the MEDIA action programme, the Council Directive on Standards for Satellite Broadcasting of Television Signals and the proposals for Directives in the field of copyright. Newspaper publishing is an industry concerned more by the application of general Community law, in particular competition law, than by specific measures.

Among the horizontal policies, the Commission's industrial policy as set out in its communication of 16 November 1990 is particularly relevant. The problems raised by concentration in the media are indeed typically problems of structural adjustment in an industry. These problems are directly linked to market structure because they relate to the very principle of access to economic activities (media ownership) and not to certain secondary conditions governing the pursuit of an economic activity, and because they are a reflection of radical change in an industry in the throes of liberalization. Against the background of liberalization, the disparity of anti-concentration regulations may be perceived as a brake on structural adjustment. An industrial policy approach requires that such structural adjustment be launched, encouraged and accelerated and, to help the process, that an enterprise-friendly, competitive and stable environment be created. Applied to the media industry, the implementation of industrial policy might justify a dynamic approach to secure the speedy elimination of obstacles to adjustment by harmonizing media-specific anti-concentration laws. The prospect of structural adjustment in the conditions governing access to media ownership is not new in itself since the 1984 White Paper "Television without Frontiers" explicitly provided for it.⁷²

In the light of both the needs which have been identified and the horizontal and sectoral policies already launched by the Commission, a case is seen for action. However, the more important question is when any action should be taken. Since the restrictions are merely potential, measures adopted in anticipation might be premature or ill-suited because the situation was still fluid or not clear enough. Conversely, a wait-and-see attitude might cause the obstacles identified to become entrenched. This might happen as a result of the following factors.

⁷² "Not until the provisions on right of establishment for broadcasting stations are made more flexible - for which Article 57(2) is of use as well as for ensuring freedom to provide services - will the harmonization of some provisions on the taking-up of broadcasting activities become essential. In the Commission's opinion, this should be the second step towards achieving the framework legislation demanded by Parliament. It is difficult to carry through before or at the same time as the first step. This would be asking too much of both the Member States and the Community" (p. 181).

. National laws will probably go on expanding, particularly in Member States which as yet have no specific, or only light, anti-concentration rules and which will want to guard against a drain of operators from closed countries to open countries.

. The European Parliament⁷³ and the Council of Europe⁷⁴ are also pressing for the formulation of national anti-concentration rules.

. The European activities of media operators are set to expand and may call into question the status quo concerning foreigners' holdings (usually minority, not controlling interests). The liberalization sparked off by the "Television without frontiers" Directive should strengthen the trend towards the Europeanization of activities as well as the Europeanization of economic activity and of the advertising industry.

The advantages and drawbacks of a wait-and-see attitude are analysed below (Chapter V).

CONCLUSION

Given the objectives of the single market and of the Commission's industrial and audiovisual policies, there would seem to be a case for action since needs such as those described above have been identified. However, the timing of any action raises questions.

QUESTION 2:

The Commission would welcome the views of interested parties on whether the needs identified are of sufficient importance, in the light of Community objectives, to require action in the media industry and, if so, when such action should be taken.

⁷³ Resolution of 15 February 1990 on media takeovers and mergers, point 4, and Resolution of 16 September 1992 on media concentration and diversity of opinions, point 7.

⁷⁴ Resolution No 1 "Media economics and political and cultural pluralism" adopted at the Third Conference.

Chapter IV. NECESSITY FOR ACTION AT COMMUNITY LEVEL

Since there is no exclusive competence in the area of pluralism and concentration of the media, the principle of subsidiarity as set out in the second paragraph of Article 3b of the Treaty on European Union needs to be applied and hence the question asked at which level - Member State or Community - action must be taken to achieve the desired objectives. This means deciding (i) whether the objectives of the action cannot be sufficiently achieved by the Member States and (ii) if appropriate, whether they can be better achieved at Community level.

As the objective of possible action would be to remove the obstacles to the proper functioning of the internal market created by the disparity of national laws, it could not be sufficiently achieved by action solely at Member State level. Harmonization of restrictions on media ownership which would result from the purely voluntary amendment of Member States' laws seems unrealistic and ineffective. Even if formal consultations were to take place between Member States in order to lay down common rules, the absence of the institutional and legal framework provided by the Community legal system would render it ineffective and would deprive the industry of sufficient legal certainty. Therefore Community harmonization is the only effective way of achieving the objective of coordinating national laws in order to eliminate restrictive effects.

CONCLUSION

Since action to eliminate disparities between national restrictions on media ownership seems necessary, maximum effectiveness can only be achieved at Community level.

QUESTION 3

The Commission would welcome the views of interested parties on the effectiveness, in the light of Community objectives, of action which would be taken solely at Member State level.

Chapter V. THE TYPE OF ACTION IN THE LIGHT OF THE PRINCIPLE OF PROPORTIONALITY

The object of the action must be based on the principle of proportionality, as laid down in the last paragraph of Article 3b of the Treaty on European Union, which specifies that any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty.

In view of the needs identified and the proposals already made in other contexts, the object of the actions which might be envisaged from the start could be to resolve various questions.

I. Harmonization of restrictions on media ownership

A. Objectives of action

The general objective would be to enable media companies to benefit fully from the opportunities provided by the internal market. The sectoral objective of harmonization would be (i) to facilitate access to media activities and (ii) to guarantee the diversity of media controllers. The two aspects are inseparable: the first, by itself, would mean liberalization without a framework and would no doubt permit the emergence of new media but ones which might be dependent on the same controller, a dangerous situation from the point of view of pluralism. The second, by itself, would guarantee the independence of a number of media but would limit the arrival of new entrants even though these are essential in order to increase the diversity of controllers and therefore pluralism. Ideally,

harmonization should therefore seek to ensure that there is the greatest possible number of media and that these are independent of one another. In this way it would be possible both to remove the obstacles to the internal market and to promote pluralism.

B. Competence

The legal basis of Article 57(2) seems appropriate since the intrinsic object of harmonization is to make it easier to take up media activities. There is nothing on this basis which would prevent harmonization from placing limits on media ownership. As indicated in the 1984 Green Paper "Television without frontiers", *"'making it easier' means eliminating difficulties which arise from legal disparities, it means 'making such safeguards equivalent' (see Article 54(3)(g)) in order to make possible and to promote the taking-up and pursuit of the relevant activities as self-employed persons throughout the Community under equivalent conditions"* (p.155). The legal basis of Article 57(2) would mean use of the directive as a harmonization instrument.

Another legal basis could be Article 100a given the objective of the functioning of the internal market. This would allow, if the situation arose, for the adoption of a regulation as foreseen by certain members of the Parliament.

C. SCOPE

Substantive scope

Harmonization would focus on national, media-specific anti-concentration rules and not on the pluralism rules relating to programme content. The latter rules do not restrict the taking-up of media activities and could therefore continue to apply in the various Member States to broadcasters within their jurisdiction and provided that they were compatible with Community law.

Harmonization would cover both public and private broadcasters, since the former have to be included in the general quest for diversity of media controllers. However, this would have no effect on the principle of the existence of a public broadcasting sector subject to specific rules.

Harmonization would cover all restrictions on media ownership. This does not necessarily mean laying down restrictions of the same type as those existing at national level: these would be replaced by harmonization, even if it used restrictions of a different kind.

Geographical scope

Harmonization would also cover in all activities of media companies, whether local, national or transnational, since the anti-concentration rules cover them equally and therefore have implications for the taking-up of broadcasting activities. Local or regional activities, such as Channel 3 licences in the United Kingdom, may be of interest to operators from other Member States in the same way as wider markets, and would therefore need to be covered by harmonization.

Sectoral scope

The media types covered by harmonization could be defined pragmatically by reference to the restrictions existing in national laws. Harmonization should cover only those media subject to ownership restrictions under national laws. Here two variants may be envisaged.

VARIANT A

The scope of harmonization could be *monomedia television broadcasting, monomedia sound radio, and multimedia broadcasting/daily press*. The press sector would be dealt with only through the multimedia ownership rules, to the exclusion of monomedia press aspects. The taking-up of press activities is not as restricted as is broadcasting since there is no licensing system and there are fewer anti-concentration rules applicable to them than to broadcasting. Only two Member States (F, I) have automatic ownership limits on newspaper publishers. Other Member States (D, UK) have specific thresholds above which a merger or acquisition is subject to general competition law and to the relevant supervisory mechanisms.

VARIANT B

In contrast with Variant A the scope would be extended to the *monomedia daily press* in order to cover the restrictions in countries which have them.

D. General structure

In view of the principle of proportionality, the provisions of substantive law should reflect a balance between the objective of guaranteeing minimum media controller diversity and the objective of making it easier to take up media activities. For harmonization to be of maximum effectiveness it is essential that both objectives be achieved.

The principle of harmonization would be that Member States could not grant broadcasting licences or concessions if the harmonized conditions were not met. In exchange, Member States could not invoke other conditions relating to pluralism⁷⁵ in order to reject an applicant.

⁷⁵ Provisions relating to the maintenance of pluralism in programme content will always apply to broadcasting itself, but should not, prior to that level, govern the award of a licence.

The object of the substantive law provisions could be:

- (a) to define the concept of controller,
- (b) in view of the balance which needs to be struck, as mentioned above, to establish rules limiting the cumulation of stakes or controlling interests in several media at once; because of this balance, rules limiting the first holding in a medium (even if there is no cumulation of interests in several media at once) seem unnecessary,
- (c) to specify the levels of media controller diversity, the chief point of reference being the service areas covered, the number of controllers present within those areas, and the media audience which they control,
- (d) to identify disqualified persons who may not become media controllers,
- (e) to establish transparency rules,
- (f) to make provision for changes in the situation such as transfer of interests, change of controller, changes in diversity levels,
- (g) to provide, if necessary, for a common statistical methodology for audience measurement.

Paragraph (b) proposes taking the audience as the main criterion for setting restriction thresholds. This method seems suitable because it would have two advantages. First, it takes the consumer as the point of reference and would therefore be of maximum effectiveness in relation to one of the objectives sought, namely that of serving the interests of the media consumer. Second, it does not use abstract criteria which, because they apply automatically and disregard the market, could penalize economic operators. Given the importance of audience measurement for other related matters such as copyright or advertising, the Commission has already launched a study programme on audience measurement in the Community.

The relationship with general competition law will also have to be clarified. Since competition law and ownership restrictions do not serve the same purpose, application of the latter should be without prejudice to the application of the former and vice versa.

QUESTION 4

The Commission would welcome the views of interested parties on the content of a possible harmonization instrument as envisaged above, and in particular on the two variants for its scope, on the use of the real audience as a basis for setting thresholds, on the delineation of distribution areas, on any other possible references, and on ways of defining the concept of controller.

II. Transparency

The object of action at Community level could also be to improve transparency, i.e. precise information on media ownership and control. Transparency rules are generally the corollary of the rules which limit media ownership. So, if there were to be harmonization at Community level, its implementation would require transparency measures.

But measures to promote transparency may also represent specific action in themselves, independently of the restrictions on ownership.

In its Resolution of 16 September 1992 on media concentration and diversity of opinions the *European Parliament* emphasized the importance of this objective and called for this responsibility to be assigned to a European Media Council.

In the *Council of Europe*, the Resolution of the third Ministerial Conference on Mass Media Policy also proposes that consideration be given to the establishment of a consultation mechanism providing for regular reporting by the participating Member States on the evolution of media concentration.

If there were really a need with regard to transparency, this would be to make it easier for information to be gathered and exchanged between the authorities concerned by means of a legal obligation on media enterprises to disclose information (so that, where appropriate, controlling interests can be identified) and on the competent authorities to communicate information to other authorities. For this purpose a recommendation could be proposed or, if necessary, a legal instrument. Indeed action confined to gathering information on a purely voluntary basis might not give rise to the required effects. Such an action should be complementary to rather than trespass on the work of research institutes or other institutions such as the European Audiovisual Observatory.

However, such legal action on transparency would raise problems with regard to the legal basis. It would be possible to rely on Article 57(2) or Article 100a of the Treaty only to the extent that the purpose of such action is to make it easier for persons to take up and pursue activities as self-employed persons (Article 57(2)), or to ensure the establishment or functioning of the internal market (Article 100a).

QUESTION 5

The Commission would welcome the views of interested parties on the desirability of action to promote transparency which would be separate from a harmonization instrument.

III. Establishment of a special body

The establishment of a special body is not, strictly speaking, a way of limiting concentration but is sometimes envisaged, as Parliament or the Council of Europe have done, as a measure which could be taken.

In its Resolution of 16 September 1992 on media concentration and diversity of opinions, *Parliament* proposes the setting-up of a European Media Council which, in addition to ensuring transparency as mentioned above, would be responsible for the submission of reports and opinions on proposed mergers with a Community dimension and the submission of proposals to the Commission on possible deconcentration measures.

In the *Council of Europe*, the Resolution of the third Ministerial Conference also refers to the establishment of a consultation mechanism, which, as indicated above, would have duties relating to transparency in general and to ad hoc consultations on particular situations raised by one or more participating States.⁷⁶

The duties mentioned in these proposals may be summarized as the exchange of information between members of the body, the settlement of conflicts and the provision of advice or opinions.

The case for setting up such a body, independently of a harmonization instrument, may be contested in view of the principle of maximum effectiveness. Such a body would do nothing to resolve the difficulties created by the disparity of national restrictions on media ownership.

⁷⁶ For the time being, work relating to this consultation mechanism does not seem to be moving towards the establishment of a formal body but instead towards duties being handled by the Council of Europe's Committee of Experts on media concentrations.

On the other hand, the establishment of a special body in the context of a harmonization instrument seems to be a possible option because it could assist in the implementation of harmonized provisions and would therefore indirectly serve the objective of eliminating obstacles to the functioning of the internal market. According to Parliament's resolution, such a body should not be of the same type as the committees provided for under the committee procedure in Community law, i.e. bodies consisting of government representatives, but instead should be of the "committee of wise men" type which is notable for the independence of its members. Such independent bodies are nevertheless not unknown to Community law, the proposal for a Directive concerning the protection of individuals in relation to the processing of personal data being one example. The advantages and drawbacks of such a committee will be considered below in Chapter VI.

QUESTION 6

The Commission would welcome the views of interested parties on the desirability of setting up a body with competence for media concentration.

Chapter VI. SUMMARY OF POSSIBLE OPTIONS

In the light of the above analysis as a whole, the decision which the Commission might have to take after consulting the interested parties could be on the lines of one of the three options set out below.

1. No specific action at Community level (OPTION I)

Presentation

The Commission's position might be not to propose any specific action at Community level at this stage. The objective of this position would be to leave it to Member States, in accordance with Community law, to deal with the subject of "pluralism and concentration of the media" either because the needs identified are insufficient to justify action, or because it is too soon to act now or because action does not have to be taken at Community level, since the national level is sufficient.

Arguments in favour

- + This option would permit a better assessment of whether obstacles really existed and, if necessary, a more fitting response;
- + It would enable an assessment to be made of whether disparity creates obstacles to free movement or solely distortions of competition which, in themselves, are not sufficient in all instances to justify Community action;
- + It would allow each Member State to impose its own restrictions in keeping with its national situation.
- + This option would make it possible to wait for contentious cases which demonstrated a real need for action.

Arguments against

- + It would not reflect the wishes of the European Parliament.
- + It would make it impossible to forestall any future difficulties due to such restrictions and to the malfunctioning of the internal market.

- + In the meantime obstacles could harm this market and influence the strategy of operators who already have to take account of the effects of such rules.
- + The obstacles could become worse as Member States might go on introducing and developing their national laws along dissimilar lines.
- + More and more obstacles will be put in the way of media companies, given that their European activities are set to expand.
- + Implementation of the "Television without frontiers" Directive could be made more difficult. It is precisely because the Directive has entered into force that it might be preferable to act rapidly, without delay, in order to make it easier to implement. For an operator, the Community regulatory framework seems imbalanced because it favours the "services" approach (broadcasting from one Member State to others) over the "establishment" approach (establishment in several Member States). In some cases, this imbalance could therefore push the market into the artificial and extensive use of the "services" approach as a substitute for an "establishment" approach, leading to borderline and conflictual situations such as the circumvention of legislation or moves to impose a system of supervision on broadcasts from another Member State.

2. Specific actions that might be envisaged at Community level (OPTIONS II to V)

OPTION II. Action relating to transparency

Presentation

The Commission's position might be to propose cooperative action between the Member States, the objective being to obtain greater transparency of media ownership and control in the Community. This action would relate solely to transparency and would be independent of any action to harmonize national restrictions on media ownership. It would involve a recommendation seeking to facilitate the disclosure and exchange of certain information concerning media ownership. If this recommendation were not to give rise to the sought effects, a legal instrument could equally be contemplated.

Arguments in favour

- + This option could facilitate the task of national authorities responsible for monitoring the application of anti-concentration laws;
- + It could create a degree of solidarity between national authorities;
- + it would help to improve knowledge of the level of concentration in the Community;
- + it would be a first stage before other Community action is taken.

Arguments against

- + This type of action would not solve the problems created by the effect which restrictions on media ownership have on the functioning of the internal market;

+ in the light of the subsidiarity principle it is not certain that it is necessary because at the moment the Commission does not know of a case in which it would have been impossible for national authorities to exchange information owing to the lack of a suitable Community instrument.

OPTION III. Action to harmonize laws

Presentation

The Commission's position might be to propose action with the objective of eliminating differences in national restrictions on media ownership. To this end three potential approaches can be envisaged.

Sub-option A : co-ordination of national legislations by means of a Council directive

A proposal for a directive harmonizing national laws on media ownership on the basis of Article 57(2). The purpose of the directive would be to establish common rules which would replace the national restrictions of the twelve Member States and which would strike a balance between the objective of guaranteeing ownership diversity and the objective of making it easier to take up media activities.

Arguments in favour

+ This option would eliminate the obstacles to the functioning of the internal market created by the differences in national restrictions on media ownership;

+ it would leave Member States some room for adjustment to national situations;

+ it would facilitate the tackling of the transparency question in terms of the legal basis.

Arguments against

- + This option might be considered premature;
- + it would not be effective enough because of the room for manoeuvre left to Member States;
- + it would be difficult to prepare, in particular to ensure that the content of the directive was balanced.

Sub-option B : approximation of the differing laws by means of a Council regulation

The Commission's position might be to propose action with the same objectives as the preceding option but with the difference that the instrument used would be a regulation and not a directive. The legal basis would be Article 100a.

Arguments in favour (compared with a directive)

- + Harmonization would be more effective because a regulation is directly applicable in the Member States and does not have to be transposed into national law;
- + the level of consumer protection would have to be high in accordance with Article 100a(3).

Arguments against (compared with a directive)

- + The substantive content would have to be more precise for it to be directly applicable.
- + the regulation would reduce the flexibility for measures at the national level.

Sub-option C : approximation of legislations accompanied by the establishment of an independent committee

The Commission's position might be to propose action at Community level, the objective being the same as under the last two options but with a difference, because in addition to harmonization (by directive or regulation) a body would be set up. It would consist of independent authorities from each Member State and its task would be to assist in implementing the harmonization instrument and to give opinions on questions relating to media concentration.

Arguments in favour

- + The national authorities would be in touch with one another and could exchange information and experience;
- + the knowledge and experience pooled in this way would be useful for the Commission in carrying out its task of guardian of Community law.

Arguments against

- + Under this option Member States would have to be asked to set up independent authorities competent for audiovisual matters; these do not always exist, and their creation would have far-reaching implications for the structure of national audiovisual systems, going beyond the anxieties connected with restrictions on media ownership;
- + the risk would be that the handling of questions which must be dealt with at national level in accordance with the general principles for the application of Community law would be centralized at Community level.

QUESTION 7

The Commission would welcome the views of interested parties on each of these foreseeable options.

ANNEX

RULES GOVERNING MEDIA CONCENTRATION IN THE MEMBER STATES OF THE COMMUNITY(*)

1. Introduction

Concentration in the media takes different forms, and so do the legal measures which can be used to counter the threat to pluralism which concentration poses. This study draws several distinctions between different types of concentration and between different types of rule.

1. Rules specific to monomedia concentration

"Monomedia" concentration refers to the accumulation or control by a single enterprise of resources or market shares in a particular medium of communication (e.g. television, radio or the press). Thus in broadcasting there will be concentration where one enterprise organizes or controls several channels. To prevent concentration, and to maintain as pluralist a structure as possible, rules have been enacted which limit the number of channels which can be broadcast or controlled by the same enterprise. Limits of this kind are intended to ensure that there is pluralism in the channels on offer by ensuring that they are supplied by different broadcasting organizations.

2. Rules specific to multimedia concentration

There is "multimedia" concentration where one enterprise operates both in

(*) This study is based on the replies which most Member States provided to a request for information from the Commission dated 17 April 1990.

telecommunications, particularly radio and television broadcasting, and in the press, particularly daily newspapers. Cross-ownership of this kind increases the influence such an organization can exercise over public opinion, but it also is a factor in competition, because it allows cross-marketing of the organization's products and may give it an advantage over competitors operating in only one of the two areas. In some Member States there are rules restricting ownership in more than one medium at a time.

3. General competition rules

Multimedia concentration also involves the accumulation of economic resources in the hands of a small group of powerful enterprises, and may result in the establishment of dominant positions restricting competition on various markets. Competition law in general, and at Community level Articles 85 and 86 of the EEC Treaty and the Merger Control Regulation,⁽¹⁾ seeks to prevent concentration of this kind. In some Member States, likewise, there are specific rules which can be applied to mergers in order to eliminate concentration liable to restrict competition.

4. Internal structural requirements for licence-holders

For certain media with a strong influence on public opinion - nationwide broadcasting being one - some Member States impose built-in safeguards which ensure that the organization is unable to determine the content of

(1) Council Regulation No 4064/89 on the control of concentrations between undertakings: OJ No L 395, 30.12.1989, p. 1; corrected

its programmes by itself. The law sometimes requires that groupings of broadcasters be set up, with a ceiling being imposed on any one firm's shareholdings and voting rights. Another solution is to require that a broadcaster's programming be supervised by a board which includes representation from different outlooks and which has real authority over the content of programmes. These measures are all intended to build pluralism into the structure of the organization. They form an integral part of the rules on pluralism applying in some Member States, and have been included here accordingly.

5. Measures requiring pluralism in programmes

Lastly, measures to preserve pluralism in broadcasting may take the form of direct obligations governing programmes themselves. This is the case with the internal pluralism system in which programming principles require the broadcaster to maintain a fair balance between all shades of opinion.

6. Disclosure and concentration

If there is to be any monitoring of the development of concentration in the media in general, and in broadcasting in particular, the ownership and control relationships in the companies involved must be known. In order to produce the desired effect the restrictions and ceilings imposed must be supplemented by formal rules which ensure proper disclosure and thus make it possible to monitor shifts in holdings, which are most often reciprocal and can change very rapidly.

II. Systems for limiting concentration and safeguarding pluralism in the Member States

1. BELGIUM

(A) Preliminary

There are three features of Belgian broadcasting which are of special relevance in a discussion of pluralism. Firstly, because of the linguistic and cultural division of the country, the rules governing broadcasting are different in Dutch-speaking and French-speaking Belgium, and private broadcasters are licensed by a separate authority in each language community, each applying its own criteria. Each of these two language groups has its own private broadcasters (RTL-TVI and Canal Plus in French-speaking areas and VTM and Filmnet in Dutch-speaking areas). Secondly, attractive foreign programmes can be received throughout Belgium in their original language; these are broadcast mainly from France and the Netherlands, and compete with domestic programmes. Thirdly, 93% of households are connected to cable, the highest proportion in the Community, which increases the number of programmes available and thus boosts competition.

One of the main objectives of Belgian broadcasting legislation has been to strengthen the position of the domestic broadcasters in each language community. By contrast with the position in other Member States, these broadcasters are not limited in their activities by rules on concentration; quite the reverse, they are helped by laws which give them a strong position particularly as regards advertising. For reasons of profitability there has for a long time been only one commercial television station set up or authorized in each language community, so that the problem of

"multiplicity of broadcasters" does not arise either. These special circumstances mean that we have to depart from the practice we have followed elsewhere, and to distinguish between the two major language communities.

(B) The French-speaking community

(I) General

In the French-speaking community the legal basis for private broadcasting is the Decree of 17 July 1987,⁽²⁾ amended by the Decree of 19 July 1991⁽³⁾ (these decrees are laws enacted by the elected assembly of the community). The Decree distinguishes local community television channels from the others. The two private French-speaking television channels are RTL-TVI (in which the Luxembourg corporation CLT has a 66% holding) and Canal Plus TVCF (the main shareholders in which are RTBF, Canal Plus France and Deficom).

(II) Monomedia concentration

Private radio stations require authorization under the Decree of 19 July 1991; no person, natural or legal, may directly or indirectly hold more than 24% of the capital of more than five private radio stations, nor supply more than one third of the membership of the management bodies of more than five private radio stations, nor manage more than five private radio stations.⁽⁴⁾ The Executive of the French-speaking community may depart from this principle in exceptional cases where it would help to promote radio production with a cultural content, unless the Council on the Audiovisual Industry (Conseil supérieur de l'Audiovisuel) objects. Participation in private radio

(2) Moniteur belge, 22 August 1987, p. 12505.

(3) Moniteur belge, 2 October 1991, p. 21671.

In any one geographical area is restricted on similar lines, but more strictly, to one private radio channel as compared with five.(5) Here there is no provision for exemption by the Executive. The new Decree prevents any natural or legal person from playing a part in the processing of information for more than one radio station in the same geographical area.

As far as private television in the French-speaking community is concerned, the Decree of 17 July 1987 states that any natural or legal person who directly or indirectly holds more than 24% of the capital of a private television channel in the French-speaking community may not directly or indirectly hold more than 24% of the capital in another private television channel in the French-speaking community.(6) Public administrative bodies and bodies recognized as operating in the public interest may not directly or indirectly have any share in the capital or in the management of private television channels in the French-speaking community, unless they are cable network operators(7) or public broadcasters and their holding does not exceed 24% of the capital in the private channel.(8)

(III) Multimedia concentration

As regards television-radio concentration, a natural or legal person who directly or indirectly holds more than 24% of the capital of a private television channel in the French-speaking community may not directly or indirectly hold more than 24% of the capital in more than five private radio stations. The new Decree specifies that a cable

(5) Article 32ter of the Decree of 17 July 1987 as amended.

(6) Article 41.

(7) Defined in Article 21.

network operator and its manager may not between them hold more than 24% of the capital in a private broadcasting organization, nor supply more than one third of the membership of the management bodies, nor manage a private broadcasting organization or a local community television channel.(9)

(iv) Restrictions on foreign participation

To secure authorization a private radio station must among other things have submitted an application drawn up in French and signed by at least two persons of Belgian nationality, indicating their names and their addresses, which must be located in the area to which the radio station is to broadcast.(10)

(v) Other restrictions on participation

The Decree of 17 July 1987 states that a private radio station will be authorized only if it is independent of any organization representing employers or workers, and any political party.(11) Public authorities may neither directly nor indirectly control any private radio station.(12) In order to secure authorization a local television station must be run by a non-profit-making association established in accordance with Belgian law.

In the case of private television, subject to the exceptions listed in paragraph (iii), public administrative bodies and bodies recognized as operating in the public interest may not directly or indirectly have any share in the capital or in the management of private television

(9) Article 21.

(10) Article 31(3).

(11) Article 31(4).

channels in the French-speaking community.(13) A private television channel must have its registered office and main place of business in the French-speaking region or in bilingual Brussels.(14) A similar rule applies to persons who wish to establish or operate a radio or television cable network.(15)

(vi) Measures to safeguard pluralism in the content of programmes

In order to secure authorization a private radio station must set out to advance culture, to provide continuing education, to provide news and information, to play a part in local activities, to provide entertainment or to provide services to the public, separately or at the same time.(16) In designing its programmes it must also give a proper place to the cultural heritage and to artists from the French-speaking community and from the Member States of the European Communities.(17)

A local television channel applying for authorization must in its programmes seek to provide local news and information and to play a part in local activities, cultural development and continuing education.(18)

(13) Article 17.
(14) Article 16(2).
(15) Article 20(3).
(16) Article 31(2).
(17) Article 31(6).

Private television channels in the French-speaking community must in their programmes give a proper place to the cultural heritage of the French-speaking community.⁽¹⁹⁾ They must entertain collaborative relationships with a view to the maintenance and development of pluralism in the press in the French-speaking community.⁽²⁰⁾

The new Decree lays down rules on advertising in broadcasts by RTBF and other broadcasters operating within the sphere of authority of the French-speaking community, under which these broadcasters must help to promote audiovisual cultural production in the French-speaking community and the Member States of the European Communities, and to maintain and develop pluralism in television and the press in the French-speaking community.⁽²¹⁾

(vii) Disclosure of concentration

The only rules on the disclosure of concentration are those which require private radio and television channels in the French-speaking community to be companies whose shares must all be registered.⁽²²⁾

(viii) Competition rules

There are no rules of competition law specific to the media. The Law of 27 May 1960 on protection against the abuse of economic power applies to undertakings generally. The Law of 5 August 1991 (which is to enter into force on 1 April 1993) includes provisions dealing with restrictive practices and with the abuse of dominant positions.

(19) Article 16(4).

(20) Article 16(9).

(21) Article 26(3).

It also contains provisions on mergers and acquisitions. It applies to media undertakings in general.

(C) The Flemish community

(I) General

In the Flemish (or Dutch-speaking) community, private broadcasting is regulated by the Decree of 28 January 1987 (television) and the Decree of 6 May 1982 (radio).⁽²³⁾

The legislation distinguishes three categories of private television corporation: corporations whose broadcasts are addressed to the whole of the Flemish community; corporations whose broadcasts are addressed to a selected public in the Flemish community or to the people of a region or a locality; and corporations which provide a radio or television service against payment.⁽²⁴⁾ A draft Decree under consideration would introduce a further category, that of corporations which offer other categories of service to the public or to a section of it.⁽²⁵⁾

(II) Monomedia concentration

An exclusive licence may be given to a single television corporation, giving it an advertising monopoly. Such a licence has been given

(23) Belgisch Staatsblad, 19 March 1987, p. 4196 (television).

(24) Article 7 of the Decree of 28 January 1987.

(25) Draft Decree of 5 July 1991 on the approval and authorization of radio and television distribution networks and the promotion of the

to VTM, a consortium of nine Flemish press publishers. VTM began broadcasting on 1 February 1989. In radio broadcasting, likewise, only one corporation may broadcast advertising addressed to the public in the Flemish community as a whole.(26) Regional advertising may be broadcast by radio and television broadcasters whose programmes are addressed to a section of the Flemish community or to a local district. Only one private regional television corporation may be approved inside any one broadcasting area.(27)

(III) Multimedia concentration

There is a rule under which at least 51% of the capital in the non-public television corporation whose broadcasts are addressed to the Flemish community as a whole must be held by the publishers of Dutch-language daily and weekly newspapers having their registered offices in the Dutch-speaking region or in bilingual Brussels.(28) The Decree now at the draft stage would repeal this provision, following the initiation of infringement proceedings against it by the Commission.

This rule confers a special advantage on Flemish publishers, and because of its cross-holdings, which have been restricted in other countries, are not only facilitated but institutionalized by the law.(29) The rule is intended to reserve a share of private television

(26) Article 3 of the Decree of 12 June 1991: Belgisch Staatsblad, 14 August 1991, p. 17735.

(27) Article 7(1) of the Decree of 23 October 1991 on the organization and approval of private regional television corporations.

(28) Article 8(1) of the Decree of 28 January 1987.

(29) Cable network operators, however, may not hold a stake of more than

revenue to the Flemish publishers, in order to offset an anticipated loss in advertising revenue. It also seeks to preserve the Flemish character of broadcasts.

(iv) Restrictions on foreign participation

The rule requiring that a 51% stake be held by Flemish publishers has just been described.

(v) Other restrictions on participation

Private television corporations must take the form of legal persons established under private law, and must have their registered office in the Dutch-speaking region or bilingual Brussels.⁽³⁰⁾ Private regional television corporations must be in the form of non-profit-making associations.⁽³¹⁾ In order to secure authorization a private regional television corporation must have as its sole object the provision of regional television broadcasts;⁽³²⁾ must operate one regional television channel only;⁽³³⁾ and must be independent of any political or trade union grouping and of any commercial organization.⁽³⁴⁾

(vi) Measures to safeguard pluralism in the content of programmes

Radio stations have a legal monopoly in their local or regional broadcasting area, but they are subject to very strict pluralism requirements.

(30) Article 5 of the Decree of 28 January 1987.

(31) Article 4(1) of the Decree of 23 October 1991.

(32) Article 4(3).

(33) Article 4(4).

The Flemish legislation provides that private television corporations whose broadcasts are addressed to the Flemish community as a whole must in their broadcasts provide a variety of information, education and entertainment, complying with quotas set by the Flemish Executive.⁽³⁵⁾ Where a private television corporation addresses its programmes to a selected public inside the Flemish community, or to a regional or local public, other rules apply: the corporation must take the form of a legal person established under private law, whose objects are confined to the provision of social, cultural and educational broadcasts.⁽³⁶⁾ A private regional television corporation must provide news and information, regional-interest, education and leisure programmes in order to promote communication between those living in its broadcasting area and to contribute to the general social and cultural development of the region.⁽³⁷⁾ Its news and information broadcasts must comply with the customary standards of ethics in journalism, and editorial impartiality and independence must be ensured.⁽³⁸⁾

The draft Decree of 5 July 1991 would require the operators of radio and television cable networks to provide simultaneous and uninterrupted relay of a number of radio and television channels whose broadcasters were duly authorized by the authorities of their country, and which were addressed to the whole of the relevant community; the number of such channels would be equal to the number of radio and television channels broadcast by the public broadcasting services of the Flemish community; the obligation would apply where the Flemish community authorities established that those Flemish channels were relayed

(35) Articles 9 and 10 of the Decree of 28 January 1987.

(36) Article 5(1) of the Decree of 11 May 1988.

(37) Article 2 of the Decree of 23 October 1991.

on the cable network of that country, and provided the non-Flemish broadcasts were in the language or one of the languages of the relevant country.(39)

(vii) Disclosure of concentration

The private television corporation whose broadcasts are addressed to the Flemish community as a whole is required to inform the Flemish Executive of any change in its share capital. Every year it must supply the Executive with a report showing how it has complied with the requirements of media legislation.(40) Its shares must be registered shares.(41)

(viii) Competition rules

There is in Belgium no form of merger control based on competition considerations which might affect the media.

2 DENMARK

a) Background

Danish broadcasting, inspired by traditional public service objectives and with an essentially national focus, has provided a relatively limited

(39) Article 9(1)(5).

(40) Article 2 of the Decree of 11 May 1988.

(41) Article 3(1) of the Decree of 28 January 1987.

domestic service in comparison with many of its European partners. Denmark has one of the lowest per capita viewing figures in Europe⁽⁴²⁾. Although Danish radio started operations in 1922 as a private enterprise, political consensus was quickly reached that this new medium should be placed under state control as a public service. Thus in 1926, the same year that the British Broadcasting Company received its royal charter and became the British Broadcasting Corporation, Danmarks Radio (DR), a statutory public corporation funded by licence fees, was granted a monopoly over radio broadcasting. This monopoly was extended in 1954 to the television sector. In 1985 existing legislation was amended to open the way to private broadcasters, albeit at the carefully contained local level⁽⁴³⁾. Private broadcasters have consistently been refused entry at the national level, although a degree of competition for DR has now been provided by the new, public television station TV2 which began regular broadcasts in 1988. TV 2, unlike DR, is funded predominantly by advertising revenues and seeks to reflect regional interests through its network of eight regional stations.

Due to the limitations of the public system cable started life early and registered extensive growth in the mid seventies. Localised master antenna networks were established and in 1985 an ambitious cable plan was launched with the intention to establish within six years a national 'hybrid net' using high technology fibre optic cable. Sole rights to install the main cable lines linking satellite receivers to the master antenna systems were granted to the regional telephone companies. These were thus able to capitalise on the high technology, but also high cost, optic fibre cables which they had already started to install. To further encourage this investment the telephone companies were given one other important monopoly: they alone were entitled to capture satellite signals and relay them to master antenna systems over their cable trunk lines. This protection was to last for two years and in 1987 the hybrid net legislation was amended to

(42) Special 1991 edition of *Mediaspouvoirs* by Truffart, F. entitled "Guide des télévisions en Europe"; at p. 21.

(43) *Journal de la Loi*, 1985, 421 of 1973

allow both individual and satellite master antenna (SMATV) reception. Since then there has been a rapid growth in SMATV systems able to relay satellite programmes at significantly lower rates, with the number of households attached to SMATV systems closely vying with that of those connected to the hybrid net. Cable relay has been deliberately structured to retain close local ties but with the development of the hybrid net showing signs of exhaustion there are calls for the relaxation of the existing rules to open the way for a national cable broadcast service. At present, a draft law proposes to make some changes in the audiovisual sector. However, this will not affect the existing position on ownership and pluralism in the media.

b) Principles of Constitutional Law

The policy behind Danish legislation concerning the media is based on the freedom of expression and information. The Danish Constitution of 1953 sets out a general guarantee of freedom of expression in article 77 which provides that "(a)ny person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in a court of justice. Censorship and other preventive measures shall never again be introduced".

c) The Regulation of Concentrations in the Local Radio and Television Sectors

Danish legislation centres on the discretionary award of local licences and few, if any, specific requirements are set down in primary legislation.

Two categories of licence holders are identified⁽⁴⁴⁾: firstly, local authorities; and secondly, private broadcast organisations.

No specific mono or cross media ownership restrictions are contained in the governing legislation. Indeed, the only provision in point is one which favours a specific form of cross media ownership: publishers of national and local newspapers are exempt from the prohibition on profit-making entities having a "decisive influence" in local radio or television stations (section 15 a. (2) of the 1990 Order). The award of a broadcast licence to a company in which newspaper interests predominate is, however, conditional on the broadcast station operating so as "to provide a forum for broad local debate". At the mono media level, licence holders are required to carry out their activities in an 'independent' fashion without cooperation on a long-term basis with other licencees. In particular, section 15 a. (4) provides that their programme activities may not, except in exceptional cases, include programmes which are simultaneously broadcast by another licensee.

d) Foreign and Other Ownership Restrictions for Local Radio and Television Licences

The category of applicants for local licences is closely circumscribed. Although there are no restrictions on foreign ownership as such, a number of legislative provisions serve to deter foreign or indeed more general commercial investment in the private audiovisual sector⁽⁴⁵⁾. The majority

(44) The main legislation for the audiovisual sector stems from the 1973 Radio and Television Act, no. 421 of the 15th of June. This has undergone numerous amendments over time and these were recently consolidated in Bekendtgørelse no. 339 of 1990, hereinafter referred to as the '1990 Order'. The licencing provisions for the private broadcast sector are set out in Chapter 2a of the 1990 Order.

of board members of a licensed company or association are required to be resident in the local area and licence holders must have as their sole object radio or television activities. Moreover, commercial entities, with the exception of national and local newspaper publishers, as noted above, are not allowed to have a "decisive influence" in local radio and television organisations. Licences may also be granted to local authorities but then only if their purpose in engaging in programme activities is solely to make available production and broadcasting facilities for citizens or to provide information concerning the local authority (section 15a (3)).

e) Cable Relay

Tight ownership provisions for private entities have served to fuel the demand for foreign programmes and Denmark now possesses a technologically advanced network of hybrid-cable and SMATV systems. Limitations in the offer at domestic level are thus counterbalanced by widespread access to foreign stations.

Nevertheless ownership of the technical infrastructure is carefully controlled acting to block foreign and commercial entry. Thus, ownership of MATV systems has been restricted mainly to the regional telephone companies and antenna societies, with a continuing emphasis on local control and accountability.

Small, domestic MATV networks of twenty five or fewer head ends do not require formal authorisation (section 3a.(5) of the 1990 Order), while the larger nets must obtain a licence from the Minister for Communications (section 5). Licence awards for master antenna cable networks have been restricted to four distinct categories: local government bodies, the regional telephone companies, owners of apartment blocks and non-profit user groups or antenna societies. In 1989 more than 80% of the MATV systems were owned by the antenna societies and private companies have had to

content themselves with 'operating contracts' to install and run the networks.

The possibility that ownership of MATV networks might be concentrated in a few hands or that there might be direct penetration by private concerns with interests in other media outlets is thus greatly reduced. Private installation companies, despite their capital investment, have to negotiate coverage and programme terms with the antenna societies and find themselves at a disadvantage vis-à-vis the powerful telephone companies. Nevertheless, independent firms have moved into the Danish cable market with Finvik, part of the Swedish group Kinnevik, establishing a strong market presence. It will be apparent that these ownership restrictions serve to prevent foreign companies from owning the cable infrastructure, although they are not precluded from seeking operating contracts on similar terms to Danish companies.

f) Domestic Competition Legislation

Domestic competition legislation was introduced in 1989⁽⁴⁶⁾. This requires that the Competition Board be notified of all 'agreements and decisions, by which a dominant influence is exerted or may be exerted on a certain market' (section 5.(1)). The Competition Board has wide powers of investigation and may, subject to safeguards concerning confidential information, publish reports where this will promote 'transparency' in the market structure. Where practices are thought to be restrictive of competition the Board is empowered to initiate negotiations, terminate agreements and set maximum price or profit thresholds. The Act applies to commercial enterprises and associations of such enterprises and, to a more limited extent, to business activities performed by central or local government administrations. The more draconian powers of the Competition Board to terminate agreements and set maximum price or profit thresholds do

not, however, apply to the latter category of business activities performed by public bodies, nor to business activities which, under special provision, are subject to control or approval by public authorities.

g) The Protection of Pluralism through Content Regulation

Danmarks Radio, as the established public service broadcaster, is required to broadcast news, information, entertainment and cultural programmes⁽⁴⁷⁾. Moreover, in programme planning, paramount emphasis must be placed on freedom of information and expression. It is to strive to offer quality, diversity and pluralism and to attach importance to objectivity and impartiality in its news programmes. Apart from these very general provisions the only other requirement is to broadcast civil defence information at a time of crisis.

The other national television broadcaster, TV2, a public corporation distinct from DR, is set up around eight regional and one central boards. TV2 has even fewer express public service obligations than DR: section 15 k. of the 1990 Order merely requires it to strive to provide quality, diversity and pluralism and ensure that its regional programming has a real link with the region in question. TV2 is required by its statutes to broadcast news and information programmes, entertainment and artistic and cultural programmes. News and information programmes must be objective and impartial. In any event the broadcasting of programmes must be made having regard to diversity and pluralism⁽⁴⁸⁾. The vast bulk of TV2's programmes, with the exception of its news and current affairs programmes, must be

(47) See section 6 which deals specifically with the programme obligations of DR. See also Article 3 of Decree n° 148 of 6th March 1989 concerning the statutes of DR.

(48) Article 3(2) of Decree n° 75 of 5th February 1990 concerning the

commissioned from independent producers, although it is involved in some coproduction activity. TV2 is, however, subject to one specific content provision designed to favour Scandinavian production: It is 'to endeavour' to ensure that at least 50% of its transmitted programmes are of Danish or Nordic origin.

In the private radio and television sector the award of licences is an essentially discretionary affair and very few guidelines are set as to the criteria which should be employed. Some stress is placed, however, on the applicants' awareness of local specificities: those seeking a licence are required to describe their projected programme activity to the local Commission so that it can ensure that there will be an adequate connection with the local area (section 15 b. (2)). In processing applications the Commission is also to endeavour to ensure that the local area is serviced by a 'comprehensive' range of programmes (ibid.). Local broadcast licencees must also transmit emergency messages to the population. The Minister for Communications is empowered to lay down rules for local radio and television broadcasting (section 15 j.).

Cable and master antenna systems may relay foreign sound or television programmes from direct broadcast and communications satellites, provided that the programmes are distributed simultaneously and without alteration⁽⁴⁹⁾. Nevertheless, the Minister for Communications is empowered to regulate not only the licencing of these systems but also the level of consumer influence over the programmes to be offered⁽⁵⁰⁾. Licences have been granted to a limited number of operators so that cable installation companies have had to negotiate installation and operating contracts with these entities, frequently the non-profit antenna

(49) Section 3 of the 1990 Order.

societies. This has placed them at an undoubted contractual disadvantage when negotiating terms. Regulations⁽⁵¹⁾ require that where ownership of the nets is not in the hands of a user group that users be consulted over programme policy and that there should be an attempt to follow their proposals. Consultation is also necessary where an existing programme profile is to be changed. Decisions by the user groups themselves should be followed. In consequence, programme policy for the master antenna networks is in part dictated by the consumers.

h) Transparency

The Danish legislation contains no transparency requirements relating to ownership shares in the media. However, the Press Law of 1986 provides that all Danish publications must have printed within them the publisher's name and that periodicals should also include the name of the editor and the place where published⁽⁵²⁾.

3. GERMANY

A. Constitutional obligations

The freedom of broadcasting guaranteed by Article 5(1), second sentence, of the Basic Law has consistently been regarded by the Federal Constitutional Court as primarily a "functional" freedom which must be exercised in a way

(51) Order no. 651 of 22nd September 1986 as amended by order no. 755 of 12th December 1988, Chapter 5.

that ensures that the information provided is not subject to the influence of the State or of special interest groups.⁽⁵³⁾ In its early judgments, the Court had ruled that this was possible only on the basis of internal pluralism in broadcasting companies, as a consequence of which they would by virtue of their very structure necessarily embrace different opinions and would be bound to offer balanced programmes. It was not until the 1981 FRAG judgment that the Court also referred to the possibility of external pluralism of private broadcasting companies, on the basis of which a wide range of opinions would be guaranteed by a wide range of programmes.⁽⁵⁴⁾ The laws on broadcasting and the media adopted by the Länder during the ensuing period authorized private broadcasting in accordance with various arrangements ranging between internal and external pluralism and on the basis of various regulations aimed at preventing any concentration of the media. As the Lower Saxony law on broadcasting did not provide all the necessary safeguards in this respect, the Federal Constitutional Court was required to specify the conditions which had to be met by rules on mergers. In particular they had to prohibit broadcasting companies from cumulating programmes and prevent double monopolies in broadcasting and the press.⁽⁵⁵⁾ The Court ruled, however, that a publishing company could extend its activities to broadcasting ("cross ownerships") provided that this did not allow a group of companies to acquire a dominant position in

(53) BVerfGE 12, 205; 57, 295; 73, 118; 74, 297, 83, 238.

(54) BVerfGE 57, 295 (325).

(55) BVerfGE 73, 118 (175). For comments see Kull, Auf dem Wege zum dualen Fernsehsystem - Das vierte Fernsehurteil des

the area of public opinion forming.⁽⁵⁶⁾ In general terms, the guarantee of pluralism and in particular the ban on concentration play an important part in the case-law of the Constitutional Court. The Court has stressed on several occasions that "trends towards concentration had to be countered as early and as effectively as possible"; on the grounds that "it is particularly difficult, in this area, to rectify mistakes that have already been made".⁽⁵⁷⁾

As regards the concept of pluralism, according to the case-law of the Constitutional Court, measures in favour of pluralism are necessary to give effect to and protect the basic principle of Article 5(1) of the Basic Law. As regards broadcasting, Article 5 requires laws under which broadcasters are organized in such a way that all interested parties can express their views (1961 judgment); the constitutional freedom of broadcasting is a freedom "serving" the constitutional principle of freedom to form opinions guaranteed by Article 5 (third judgment of 1981 plus sixth judgment of 1991). As regards the press, the objective of press freedom, i.e. to facilitate and safeguard free opinion forming, requires the press to be protected against attempts to do away with competing opinions by means of economic pressure (BVerfGE 25).

B. Monomedia concentration

The Rundfunkstaatsvertrag der Länder (RstV) of 31 August 1991 lays down uniform regulations on concentrations applicable to programmes broadcast throughout the entire Federal area, whereas the 16 Länder laws on media

(56) BVerfGE 73, 118 (175). The Court did not rule on the question of whether the Federal Legislature was required under the constitution to prohibit multimedia interpenetration, 83, 238 (328).

applicable to programmes broadcast at Land, regional or local level sometimes vary. The key provision of Länder regulations on mergers is the ban on the cumulation of programmes. This ban is found, with a few variations, in almost all media laws adopted by the Länder,⁽⁵⁸⁾ as well as in Article 21(1) and (2) of the Rundfunkstaatsvertrag. Article 21(1) and (2) of that Treaty lays down that an operator may broadcast throughout the entire Federal area up to two radio and television programmes. In the case of television, for example, an operator may broadcast two programmes and of those two only one may be a "general programme" or a "special interest programme".

Also taken into account are programmes over which the broadcasting company is able to exercise a controlling influence because of its shareholding or in any other way, including the supply of programmes.⁽⁵⁹⁾

The authorization to broadcast throughout the entire Federal area a

(58) See Article 5(3) Rh-Pf; Article 19(1) LMG Hmb; Article 5(2) LRG Nds.; Article 40(2) LRG Saar.; Article 5(4) LRG Schl.-H.; Article 19(1) and (3) LMG Baden-Württemberg; Article 6(3) LRG NW; Article 15(1) and (2) HPRG; Article 25(5) BayMEG. The Berlin law on the pilot project on cable television contains a similar provision concerning a "bottleneck" in transmission capacity; see in this connection Kreuziger, Probleme bei der Gestaltung von Landesmedien- und Landesrundfunkgesetzen, DVB1.1986, 1095 (1079) and Ricker, Privatrundfunk-Gesetze im Bundesstaat, 1985, p. 100.

"general programme" or "special interest programme" can be granted only to a broadcaster in which none of the interested parties holds 50% or more of the shares and voting rights or exerts a similar dominant influence in any other way. (60)

This type of restriction on ownership is also to be found in the media laws of certain Länder (for example Article 25(5) of the Bavarian Law) which lay down that an operator may broadcast only one radio or TV programme in its local or regional area.

(a) Rules on minority shareholdings

The Rundfunkstaatsvertrag and the majority of Länder laws also attribute to a broadcasting company those programmes over which it is able to exert a controlling influence, either on its own or jointly with third parties, although it does not have a minority holding (in the form of shares or voting rights) in the company which broadcasts these programmes and is not linked to it in any other way. (61) The authorities therefore take into account many other economic possibilities of exerting an influence and de facto situations of dependence in which a broadcasting company may be placed.

However, the Rundfunkstaatsvertrag and the legislation in force in certain Länder have modified this principle through a number of liberal

(60) Article 21(2) of the RuStV.

(61) For example, through cross holdings representing 25% of the capital (Article 19(1) AktG) or through contracts concerning control or the transfer of profits within the meaning of Articles 291 and 292

presumptions whereby the influence exerted is considered "not to be a dominant one" below certain thresholds of holdings.⁽⁶²⁾ Paragraph 3 of Article 21 lays down that any person or company which holds more than 25% but less than 50% of the capital and voting rights of an operator broadcasting a "general programme" or "special interest programme" throughout the entire Federal area which is able to exert a dominant influence over the same in any other way, including those described in the fourth sentence of paragraph 1, may hold interests only in two other broadcasting organizations providing corresponding programmes and may not hold more than 25% of the shares and voting rights in such broadcasters or may not exercise a dominant influence over such broadcasters in any other way, including those referred to in the fourth sentence of paragraph 1.

In the laws of certain Länder the thresholds were fixed as follows:

- 25% of capital or voting rights and of the programme for television channels covering the Federal area and in North Rhine-Westphalia and Mecklenburg-Western Pomerania;⁽⁶³⁾
- 10% of the total voting rights in the Länder of Baden-Württemberg, Hessen and Berlin;⁽⁶⁴⁾

(62) On Article 8(5) of the RStV; see Härtstein, Ring, Krelle, Kommentar zum Rundfunkstaatsvertrag, points 51 et seq.

(63) Article 8(5), fourth sentence, RStV, Article 6(3) fourth sentence LRG NRW.

(64) Article 19(2) 2HS LMG Baden-Württemberg (of programme also); Article 15(1) point 2 HPRG; Article 37(2), fourth sentence, 2HS KPPG. - On problems concerning application in Baden-Württemberg,

- 5% of the shares or voting rights and 10% of the programme in Bremen, (65) and
- 33% of shares and the programme in Saarland. (66)

These often considerable disparities reflect the different degrees of rigour with which the legislatures of the various Länder authorize holdings in several programmes. Moreover, the legislation of certain Länder authorizes a variety of derogations to the ban on the cumulation of programmes where the broadcasting company in question has a "pluralist" internal structure. (67) This situation leaves sufficient room for manoeuvre to circumvent laws aimed at restricting mergers by setting up structures which are completely artificial in some cases.

(b) The "Influence clause"

There are the same differences of interpretation as regards the definition

(65) Article 8(2) 2. HS BremLMG.

(66) Article 40(3), third sentence 2. HS LRG Saarland. The legislation of the other Länder does not provide for any particular threshold of participation for the purpose of assessing this controlling influence.

(67) For example, Article 19(3) LMG Bad.-Württ (see in this respect the LFK report [note 83] page 136 et seq.); Article 5(3) LRG Nieders. Under Article 5(3) LRG Rh.-PF, a broadcasting company may in theory acquire holdings in as many groups of broadcasting companies as it wishes, provided that its holding is below 50%. For an explanation of the provisions in force in Baden-Württemberg, see Bullinger, in: Bullinger/Cödel, LMG Baden-Württemberg, point 19 No 6 et seq. and

of an "other controlling influence". As with the overwhelming majority of Länder laws on the media, the Staatsvertrag considers that it is sufficient for the broadcasting company to be able to exert a controlling influence over another company. Article 21(1), fourth sentence, points 1 and 2 specifies what is meant by dominant influence: this is deemed to exist where a broadcaster or a person who may be treated as such

1. regularly claims a major part of the air time of another broadcaster by broadcasting programme units supplied by the latter or
2. by virtue of contractual agreements, provisions conforming to statute law or any other provision, occupies a position enabling it to make important decisions by another broadcaster concerning programming, and the purchase or production of programmes subject to its authorization.

The question has arisen as to whether the fact that Mr Kirch has a 43% holding in SAT 1 ("general programme") and 25% holding in Première (specialized entertainment channel) is incompatible with Article 21(1) and (3) of the RuStV. Moreover, his son, Thomas Kirch, holds 48% of the shares in Pro 7 (specialized entertainment channel) which itself holds 45% of Kabelkanal (also specializing in entertainment).

Moreover, 10% of the last-named channel is held by Mr Kofler who is the director of Pro 7. The programmes for Pro 7 are supplied by Leo Kirch who holds the rights to a great many films and series. Taken together, these two situations could be incompatible with Article 21(1) of the Rundfunkstaatsvertrag which prohibits any person from having more than two different channels broadcasting throughout the nation.

On the other hand, Article 5(4) of the Schleswig-Holstein law is more specific, because it requires a "legal influence", which considerably reduces the range of possible forms of influence.

This difference in interpretation of the "Influence clause" is currently of great practical significance, since it is crucial especially in assessing the extent of participation in the cases of Pro 7 and Télé 5.

(C) Multimedia concentration

In the Federal Republic, neither laws on the media nor the RuStV restrict multimedia interpenetration. Intermedia or "diagonal" interpenetration between broadcasting companies and the press are restricted by Länder media laws only where they threaten to create a "double monopoly" at local or regional level. If a press enterprise holds a dominant position in the daily press sector in a given area, it may not also exert a controlling influence over a programme broadcast in the same area, since otherwise it could acquire a dominant position in the sphere of public opinion-forming.⁽⁶⁸⁾ However, as regards programmes broadcast throughout the entire Federal area, the Rundfunkstaatsvertrag does not restrict holdings by press enterprises.

(A) Disparities between Länder regulations

(68) Hence the proposal by the Monopolies Commission, see Sondergutachten 11, Wettbewerbsprobleme bei der Einführung von privatem Hörfunk und Fernsehen 1981, Nos. 2 et seq. See also in this connection Schmidt, Rundfunkvielfalt. Möglichkeiten und

The majority of Länder laws on the media⁽⁶⁹⁾ seek to avoid local double monopolies by means of special rules on concentration which restrict the possibility of a press enterprise holding a dominant position on the market acquiring holdings in companies broadcasting in the same area.

- The regulations in Hamburg and Bremen allow press enterprises occupying a dominant position on the market to extend their activities into broadcasting, but only as part of groups of broadcasting companies and on condition that they hold no more than 25% of broadcasting and voting rights.⁽⁷⁰⁾ Bavaria has introduced a similar restriction set at 50% of programmes, but only in regions where it is not possible to operate more than two programmes; in other cases, the share held by the press enterprise in broadcasting programmes may not exceed one third.⁽⁷¹⁾
- By contrast, the law on the media in Baden-Württemberg does not

(69) There is no similar provision in Berlin, in Rheinland-Pfalz or in Saarland, and this situation manifestly conflicts with the perfectly clear provisions in Lower Saxony.

(70) Article 19(3) HmbLMG (in this case, the share of the capital may be up to 35%); Article 8(4) BremLMG. See in this connection Mook, *Privater Rundfunk im Spiegel der Landesrundfunkgesetze*, AfP 1986, 10(14); Kull, *Aktuelle Fragen der Rahmenbedingungen für privaten Rundfunk*, AfP 1985, 265 et seq.; Ricker, (see note 78), page 103 et seq.; Groß, *Medienlandschaft im Umbruch*, 1985, page 102 et seq.; Stammier, *Informationsvielfalt und Wettbewerbsprobleme. Überlegungen zur Wettbewerbsordnung im Bereich privaten Rundfunks, mediaperspektiven 1985*, 601 (605).

stipulate any ceiling for shares or programmes but instead requires broadcasting companies to take the necessary measures to guarantee internal pluralism (e.g., setting up a programming committee). In all cases where a press enterprise occupying a dominant position on the market holds more than 50% of capital or voting rights. (72)

- The situation is quite different in those Länder which have no local or regional broadcasting company (Hessen, Lower Saxony and Schleswig-Holstein); as there are no press enterprises dominating the market at Land level, there is not the same risk of creating a double monopoly as in the Länder of southern Germany which give preference to local broadcasting structures. It has therefore been possible to simply fix corresponding limits for programmes or broadcasts of a local nature. (73)

(b) Difficulties arising in practice

The regulations mentioned are in most cases intended as a means of restricting the number of licences; as a result, subsequent changes in holding patterns can only be dealt with indirectly on the basis of general

(72) See Article 22 paragraph 3 in conjunction with paragraph 2 of LMG Baden-Württemberg: through its organization, and more specifically through the setting up of a programming committee made up of representatives of the main tendencies in the broadcasting area and through its range of programmes and the broad lines of its programming, every broadcasting company must provide legal guarantees that its broadcasts respect the principle of pluralism.

(73) See Article 23 LRG Nieders; Article 16 HPRG; In Schleswig-Holstein, no corresponding provision has been adopted as

grounds for the revocation of such licences, which leaves a great deal of room for manoeuvre. For example, in Hamburg, express rules do exist (any exceeding of the limit must be corrected within one year, Article 19(4) HmbLMG), but they themselves offer scope for circumventing the law and contain no provision on how to return to the legal ceiling, nor on possible penalties for failing to do so.

Generally speaking, the provisions that the Land legislatures have adopted to combat double monopolies only partly tackle the phenomenon of media interpenetration. In their local or regional circulation area (there is no dominant enterprise within the meaning of Article 22 GWB at Land or Federal level), press enterprises holding a dominant position on the market can acquire holdings in a broadcasting company operating in the same area only within the specified limits. By contrast, they are not subject to this limit if they acquire a holding in a broadcasting company operating in another area, or in one operating at Land or Federal level. They may also take holdings in several broadcasting companies provided that these broadcast in different areas.

(D) Competition rules concerning mergers

In the Federal Republic, private broadcasting companies are subject not only to Länder legislation on the media, but also to merger rules

adopted in the framework of general legislation on restrictive agreements, and in particular to the merger control provisions in Articles 23 and 24 of the law against restraints of competition (GWB).⁽⁷⁴⁾ Under these provisions, a merger is deemed to occur where an enterprise acquires the assets or more than 25% of the shares of another enterprise or where it increases its holding to more than 50% (Article 23(2) of the GWB). Moreover the merger has to be of a certain size, i.e. the enterprises involved must together have at least 20% of the market at Federal level, have a joint turnover of at least DM 500 million or employ at least 10 000 people.

This set of provisions has little effect in controlling mergers of private broadcasting companies, given that they do not capture the "internal growth of the enterprise" (i.e. its extension on local markets) and given that even holdings below the threshold for application of the law may be significant from the point of view of their influence on public opinion, for example where holdings in press enterprises are involved. None the less, the main factor is that it is very rare for private broadcasting companies to reach the specified thresholds,⁽⁷⁵⁾ which explains why it is also extremely rare for the Federal Cartel Office to have to deal with cases of mergers.

(74) This is not prejudiced by Länder powers in the sphere of broadcasting, BVerfGE 73, 118 (174). See also Kübler, Medienverflechtung, page 57 et seq.; Mestmäcker, Die Anwendbarkeit des GWB auf Zusammenschlüsse zu Rundfunkunternehmen, GRUR Int. 1983, 553 et seq.

(75) Spieler, Fusionskontrollen im Medienbereich, 1988, page 203; on the subject of the Bertelsmann-RTL Plus merger, see BKartA TB 1983/84,

For press enterprises which edit, print or distribute newspapers or periodicals⁽⁷⁶⁾ the limit is however reduced to DM 25 million⁽⁷⁷⁾ and as a result, mergers in the field of the press may already be prohibited from a much lower turnover figure.⁽⁷⁸⁾ Where press companies enter into mergers with broadcasting companies, the merger is controlled on the basis of the more stringent rules applicable to the press and is generally subject to scrutiny by the Federal Cartel Office.

Even in such a case, however, the merger cannot be prohibited unless it has the effect of creating or reinforcing a dominant position (Article 24(1) of the GWB). Up to now, it has always been considered that this was not the

(76) See in this connection Mestmäcker, in Immenga/Mestmäcker, GWB, paragraph 23 point 40; Möschel, Pressekonzentration und Wettbewerbsgesetz, 1978, page 167 et seq.

(77) Under Article 23(1), seventh sentence, of the GWB, the reference figure is twenty times the turnover. However, under the sixth sentence of this provision, only three quarters of the turnover are taken into consideration for commercial enterprises, the threshold applicable to press distribution companies being raised to DM 33.3 million.

(78) The constitutionality of merger control in the press sector, which has been the subject of a wide-ranging debate, has never been called into question by the Bundesverfassungsgericht (Federal Constitutional Court). BVerfG, NJW 1986, 1743. See also BGHZ 76, 55 (page 64 et seq.); Kübler, Medienverpflichtung, page 55, with

case when there was a merger between a press enterprise and a broadcasting company, since these have generally been taken to be different markets.⁽⁷⁹⁾ Moreover, the technical possibilities of transmission are limited; combined with the special characteristics of the broadcasting market where powerful public enterprises operate, this creates from the outset a situation which is not very satisfactory from the point of view of competition. There is therefore scarcely any opportunity to apply merger control law to maintain existing competition. In any event, merger control instruments are not an effective means of dealing with dominant influences and positions in public opinion forming.

(E) Provisions on the internal structure of broadcasting companies

As mentioned above, Article 21(2) lays down that a licence can be granted only to a broadcaster in which no interested party holds 50% or more of the capital or voting rights or exerts a similar dominant influence in another way.

In practice, when the few available channels are allocated, there is however a tendency to give preference to "broadcasting groups" or to enterprises grouping partners from different fields, in the hope that this pluralistic internal structure will ensure a broader spectrum of opinions. This is why terrestrial frequencies have generally been awarded to broadcasting groups numbering several members.

(79) WuW/EB BKartA, 1921, 1924 et seq.; KGWuW/E OLG 2228, 2232; Monopolkommission; Fünftes Hauptgutachten Tz. 575, Spieler (see note 94), page 177 et seq., 183 et seq., and Kübler, Monopolkommission, page 21.

(F) Measures requiring pluralism in programmes

As regards programme content, only the Länder of Hamburg, Bremen and North Rhine-Westphalia lay down conditions regarding balance and the covering of all ideological tendencies in order to safeguard internal pluralism. The other Länder and the Rundfunkstaatsvertrag impose such a requirement of balance only in cases where a specified minimum number of broadcasting enterprises (two or three) is not reached, i.e. where there is no "external pluralism". So far, however, the supervisory bodies have not contested any programme on this basis and in practice there appear to be scarcely any differences between the supervision exercised by those Länder requiring external pluralism on the one hand and those requiring internal pluralism on the other. Quotas for categories of programmes (culture, education and training, etc.) are either not specified by the Länder laws or are indicated only as guidelines.⁽⁸⁰⁾

(G) Disclosure and concentration

Article 21(4) of the Rundfunkstaatsvertrag lays down that any planned changes in holdings and other forms of influence within the meaning of paragraphs 1 to 3 must be notified to the competent regional institution for the media before they are carried out. This requirement concerns the broadcaster and persons connected directly or indirectly with the broadcaster. The validity of the changes can be certified by the regional body only if the new circumstances meet the criteria laid down for the grant of a licence. If changes whose validity cannot be certified under the third sentence are carried out, the licence is withdrawn in accordance with Land law.

(80) For example see Article 8(2) of the Rundfunkstaatsvertrag for

The Länder laws on the media all require broadcasting companies to declare any change in the composition of their capital or to have such changes authorized by the supervisory bodies. In some Länder, failure to comply with this obligation may result in fines, or even withdrawal of the licence in serious cases. However, these provisions do not always guarantee sufficient transparency with regard to the influence that can be exerted over broadcasting companies. In particular, the authorities overseeing the media in the Länder have not hitherto had sufficient powers and resources to be able to unravel the complex interrelationships that can exist, in which "front companies" may be involved. They do not have the extensive powers of verification enjoyed for example by the anti-trust authorities (Article 46 of the GWB), which means that they cannot check on the spot the information provided by enterprises. This has posed problems, particularly in the case of PRO7 and SAT1. Moreover, the Federal supervisory structure, with 16 authorities whose powers end at the Land borders, has proved to be unsuited to the task of throwing light on holdings and interpenetration between broadcasters operating beyond the borders of the individual Länder.

(H) Experience and prospects regarding mergers

Since the establishment of private radio stations is a relatively recent phenomenon, there has so far been little reliable experience of merger control in the German Länder. The lively debate provoked by the holding acquired by Thomas Kirch in the national television programme PRO7 and by the holding acquired by the Compagnie Luxembourgeoise de Télédiffusion (CLT) in Télé 5 has however revealed the existence of shortcomings in the

control arrangements which are due both to the inadequacy of control instruments and to problems of coordination between the authorities supervising the media in the various Länder.⁽⁸¹⁾ It was very difficult to reach a compromise at the conference of directors of media supervisory authorities in the various Länder, among other reasons because the authorities in each Land did not want to take action against the broadcasting companies established on their territory.⁽⁸²⁾

In the field of radio as well, particularly in the southern Länder which tend towards a local broadcasting structure, there have been instances of

(81) See in this connection epd/KuR of 19.8.1989 and the particularly instructive comments of Röper, *Formationen deutscher Medienmultis* 1988, *Media Perspektiven* 1988, p. 749 et seq.; for a few general thoughts on these questions see Jens, *Privater Hörfunk - eine Verlegerdomäne?* *Media Perspektiven* 1989, p. 23 et seq.; Klingler/Schröter, *Privatrechtlicher Hörfunk in Baden-Württemberg*. Are we on the way to provincial channels each covering one Land? *Media Perspektiven* 1989, p. 419 et seq.

(82) Thus, Röper, *Stand der Verflechtung von privatem Rundfunk und Presse* 1989, *Media Perspektiven* 1989, p. 533 (535) accuses the media supervisory authorities of the various Länder of having rendered totally meaningless those rules of law aimed at preventing hasty mergers and of having used and abused derogations in this connection. See also critical comments by Lange, *Landesmedienanstalten und "Aussenpluralismus" auf dem Prüfstand*, *Media Perspektiven* 1989, p. 268 et seq. which refers to the conclusions of a three volume study published under the title "Rundfunkaufsicht", carried out by Hellstern, Hoffmann-Riem and Reese, as part of the survey commissioned by North Rhine-Westphalia in conjunction with the pilot project on cable TV for the city of

concentration to which the supervisory authorities have in most cases not responded. As a result of a wave of takeovers, of changes in holdings in broadcasting companies, of the acquisition of holdings in various broadcasting companies by enterprises in the media sector, the purchase of framework programmes or the conclusion of wide-ranging contracts for the supply of programmes, to mention only a few of the conceivable forms of concentration, many broadcasting companies which were formerly autonomous have lost their independence, thus handing an even greater power of influence to a small number of firms. This trend towards interdependence with the large press groups is accompanied by tendencies towards concentration at regional level, when local broadcasting companies group together in pools for disseminating advertising or in chains and thus lose the very independence that the authors of legislation wanted local broadcasting companies to keep. (83)

4. GREECE

A) Background Note

The Greek audiovisual sector has historically been dominated by the public service broadcaster, 'Greek Radio and Television', referred to by the

(83) See epd/KuR No 64 of 16.8.1989, Wöste, Networkbildung durch die Hintertür? Programmzulleferer für privaten Hörfunk in der Bundesrepublik - Eine Bestandsaufnahme, Media Perspektiven 1989, p. 9 et seq. and Klünger/Schröter see note 102, p. 425 et seq. Also the report of the Baden-Württemberg Landesanstalt für Kommunikation to the Land government, Stuttgart 1989, pp. 79 et seq. and 92 et seq. which acknowledges the existence of these

acronym ERT, which since legal changes in 1987 has taken the form of a limited liability company under public ownership. Although radio broadcasting was in private hands until 1935, strict government control has characterised Greek broadcasting ever since: until recently the only significant derogation to the state monopoly was the broadcast service developed by the armed forces, YENED, which in 1982 was converted into what was then the second broadcast service, ERT-2.

ERT currently broadcasts three television channels. ET 1 and ET 2 are national channels, while the struggling and highly commercial ET 3, launched in 1989, is restricted to Athens and Thessalonika. ERT is financed by a mixture of advertising revenue and a tax imposed on all those connected to the main electricity grid, the tax is levied regardless of whether the individual owns or uses a television set. Apart from its three television channels ERT also provides a number of national and regional radio services.

The ERT broadcast monopoly was finally broken at the local level for radio, in 1987 and for television in 1989. Dissatisfaction of the public and limited programme range led from the mid eighties onwards to the establishment of pirate radio stations by political groups and entrepreneurs offering popular music interspersed with advertising. Consequently, when the liberalisation of local radio finally took place it was little more than legal recognition of existing broadcast reality. But the liberalisation of local radio was to prove but the first step in a confused and largely unregulated move to a mixed public/private television system: the attraction of foreign satellite channels for retransmission over-air, without payment of copyright royalties, has proved too attractive a commercial proposition to let pass and new television channels have sprung up to meet popular demand. Despite the enactment of Law no. 1866 in 1989, which provided for the award of local television licences, no grants have to date been made and the cut-throat, fiercely competitive nature of Greek television broadcasting is reminiscent of Italy in the early 1980's.

B) Principles of Constitutional Law

The 1975 Greek Constitution, written in the immediate aftermath of dictatorship, with a heightened awareness of the dangers of monolithic state control over public information sources, makes specific reference to both the print and audiovisual media. Article 14 sets up a general guarantee of free expression: '(e)very person may express and diffuse his thoughts orally, in writing and through the press in compliance with the laws of the State'. There then follow specific provisions for the press sector, with a prohibition on prior censorship and the expedition of legal prosecutions for press offences.

By contrast Article 15 applies to the electronic media and states that the protections offered the press in Article 14 do not apply to 'films, sound recordings, radio, television, or any other similar medium for the transmission of speech or images'. Instead clause two stipulates that '(r)adio and television shall be under the immediate control of the State and shall aim at the objective transmission, on equal terms, of information and news reports as well as works of literature and art'. The quality level of programmes is guaranteed in recognition of their social mission and contribution to the cultural development of the country.

The ambit and meaning of Article 15 has caused considerable legal and political controversy. Does 'immediate control of the State' necessitate State ownership, that is, a State broadcasting monopoly, or does it merely require that the State determine and oversee the regulatory framework of the audiovisual sector? Moreover, can the State justifiably use its power of 'control' to determine the content of news or other politically sensitive programmes, long a fact of life in Greek public broadcasting; or is it rather required to ensure a degree of pluralism - as the reference to 'equal terms' in Article 15.2. might lead one to conclude? Despite, or perhaps because of, the restrictive history of state monopoly in the Greek broadcast field, pirate radio and television stations have displayed a

particular virulence. It was government attempts to close these stations down which ultimately brought the scope of Article 15 directly into question.

The Council of State, in its important judgment 1144 of 1988, concluded that the constitution did not require the institution of a state monopoly, so as to legally preclude all private broadcast activity. Instead it held that it was left to the discretion of the legislator, in the exercise of its power of control, to decide whether or not to institute a public monopoly, a mixed or even entirely private broadcast system⁽⁸⁴⁾. Over a decade earlier, the Council of State had held in its judgment 2209 of 1977 that the freedom of expression recognised in the first paragraph of Article 14 also included the freedom to obtain information or ideas from whatever available source. Consequently, individual reception of readily available broadcast signals, whether directly from foreign satellites or even from operators acting illegally on the national territory, cannot be prohibited under Greek law.

C) The Regulation of monomédia Concentration

a) Radio

Law no. 1730 of 1987 and Presidential Decree no. 25 of 1988 set up the legal conditions for the award of private radio licences⁽⁸⁵⁾. The monopoly of the public broadcaster ERT was retained at the national level,

(84) Two judges gave dissenting judgments, holding that the Constitution actually prohibited the establishment of a public monopoly.

(85) These provisions have been further modified by Law number 1866 of 1989, notably in the abolition of the Commission for Local Radio (Article 3.7).

private licences being solely local in ambit. Moreover, ERT has retained monopoly rights over the use of the medium and short wave bands: private broadcasters being restricted to frequencies between 87.5 and 107.7 mega hertz.

Licences, of a renewable two year duration, are awarded by the Minister to the President of the Government, on the advice of the National Council for Radio and Television, the new regulatory body introduced by Law no. 1866 of 1989. Licences are inalienable and granted to two distinct categories of users: to individuals, companies or municipal authorities which seek to provide a varied and wide-ranging, essentially professional, service and to individuals with some knowledge of radio technology who wish to set up an amateur service, connecting individuals within a given quarter or establishment or who share a particular interest.

The 1988 Decree institutes strict ownership limits for local radio. Article 4 provides that individuals or companies can own only one local radio licence and those which do not own, either wholly or partially, a radio licence are entitled to own shares in, or act as manager, president or member of the administration of, only one company which holds, or has applied to hold, a radio licence. This ensures diversity in the share structures of the various licence holders and prevents evasion of the 'one licence per entity' rule through the use of company structures to hide real ownership interests. Article 6 of the 1988 Decree prohibits the creation of networks by linking stations through shared programming.

b) Hertzian Television

It was to take another two years for the public television monopoly to be broken, and here, just as for radio, private broadcasting was to be permitted solely at the local level, ERT retaining its monopoly over national broadcasting. The national television and radio monopoly of ERT is confirmed by paragraph 2 of article 18 of Law no. 1866 of 1989. Local television licences, of seven years duration and renewable, are granted by

Joint decision of the Minister of the President of the Government, of the Interior, of Finance, of Transport and Communication. The prior advice of the National Council for Radio and Television must be sought before allocation. The licences awarded local television broadcasting stations may cover the use of cable or satellite relay facilities.

Just as for radio, tight restrictions on concentration of ownership in the private television sector have been instituted: Article 4.g. of Law no. 1866 provides that an individual or company cannot have interests in two television stations, whether as proprietor or in any other capacity - as shareholder, manager or member of the council of administration of a second television station. It is forbidden to cede the use or exploitation of a television station to any other company or individual except to a communal or inter-communal organisation.

As at the time of writing no formal licences have been granted, although there are indications that allocations may at last take place in the course of the next few months. In the absence of a functioning legal framework, private television stations have multiplied, with anything between twenty to forty stations broadcasting at any given time. Mega Channel and New Channel have established a quasi-official status but others such as Antenna TV and Kanal 29 are currently jostling for position in the battle to become dominant actors in the private television market. Competition has been fierce with stations retransmitting satellite channels on terrestrial networks or programming 'pirated' video cassette tapes: only four of the stations make regular copyright payments⁽⁸⁶⁾. The ability to

(86) Terrestrial retransmission of satellite broadcasts began in the summer of 1988 when the mayor of Thessalonika set up his own relay station. This was challenged in court as contrary to the states' then monopoly over television broadcasts and led to a long running legal battle centering on whether satellite relay should be seen not as an original broadcast but merely as facilitating the individual's constitutional right to reception.

garner advertising revenues through the insertion of publicity in what amounts to de facto, if not de jure, 'free programming' has proved too great a commercial enticement to ignore. The government has been reluctant to intervene to close down the illegal stations because of extensive penetration by powerful press groups, capable and willing to use their papers for political advantage.

c) Satellite

The relay of satellite channels by terrestrial broadcasters has retarded the development of direct satellite to home reception. It is not, however, only the private television channels which make use of satellite programming: the national broadcaster, ERT, has reached agreement with a number of broadcast satellite stations, among them MTV Europe and CNN, for relay of their programmes in Greece. Linguistic and financial restraints undoubtedly limit the scope to develop domestic satellite channels, although ET1 is currently broadcast by the Eutelsat satellite for reception in Cyprus.

d) Cable

Here, too, development has been retarded by the growth of terrestrial private television channels and cable is not yet a significant aspect of Greek broadcasting. Article 4 of Law no. 1866 of 1989 envisages that local television stations in receipt of a broadcast licence may employ cable transmission technology. With the passage of law no. 1866 of 1989 ERT lost its monopoly over the installation of the technical infrastructure necessary for sound and television broadcasting, a monopoly which had covered installation both of satellite emitters and retransmitters and cable networks (article 2.2(b) of 1730) - the ability to install such equipment falls henceforth merely within 'its capacity' to provide national sound and television licences. Cable retransmission is governed by the Presidential Decree of May 1988, which establishes the technical and economic prerequisites for obtaining the mandatory licence to relay

satellite signals from any station outside Greece over a cable network.

D) The Regulation of multimedia Concentration

At present Greek law contains no inter or cross media ownership restrictions. In the radio and television sectors this is mitigated to some extent by the adoption, considered above, of a strict 'one licence only' principle: cross ownership could thus never extend beyond one licence in each domain. Nevertheless, there has been considerable concern at the scale of involvement by Greece's newspaper establishment in the private television and radio industry. Many Greek newspapers are now owned by sizeable business enterprises with interests which range beyond the publishing field to such politically sensitive sectors as banking and the petrol industry and although undoubtedly motivated by financial gain, there are fears that publishers may be tempted to use the audiovisual media for political advantage. Most of the major private TV ventures have close links with the printed press: Mega Channel, for example, is owned by a powerful consortium of press groups, including that of Lambrakis, the proprietor of the leading daily paper Ta Nea; Kanali 29 was backed by Kourlis Bros also with press interests, while New Channel belongs to the publisher Voudouris together with two other publishing companies⁽⁸⁷⁾.

E) Capital Participation Limits

a) Radio

(87) See, inter alia, the Jeandon report for the European Community on the 'Impact des nouvelles technologies sur la concurrence dans l'industrie de la télévision en Europe' Office of Official

Greek legislation contains no capital participation limits as such for local radio, a provision which might have seemed slightly incongruous given that licences may be granted to single individuals, with the absolute ownership this entails. Capital participation limits would have fragmented ownership solely in the company field. Nevertheless, there do exist provisions which seek to limit the ability of individuals or companies to influence radio companies through their financial muscle. The Presidential Decree no. 25 of 1988 provides that an individual or company can cover more than 5% of the functioning costs of only one local radio station, although certain exceptions are made for various Greek savings banks and credit institutions, as well as for local authorities or entities funded by them. Revenues from gifts or advertising from one or more related individuals, or from individuals linked economically or through work, must similarly not exceed 5% of the stations' functioning costs.

b) Television

In the private television sector article 4 of Law no. 1866 provides that no shareholder can control more than 25% of the social capital of a local television station. To restrict the more obvious forms of circumvention, individuals related to the fourth degree are prohibited from together owning shares in excess of the 25% threshold. In the public sector ERT has been heavily criticised, even after the structural changes introduced by Law no. 1730 of 1987, as unrepresentative and government controlled. The Minister of the President of the Government is empowered to select the president, vice president and members of the powerful council of administration of ERT from among the names forwarded by the National Council for Radio and Television (Art. 3.4 of law no. 1866); while the potentially more representative watchdog body, the Representative Assembly of Viewers and Listeners, drawing widely on individuals from the fields of science, culture and the arts, is structurally hampered by its extraordinary size of 50 members: some indication of its potential may be gleaned from the fact that no meeting had been held over a year from the passage of the 1987 law.

F) Foreign Nationality and other Ownership Restrictions

Greek law significantly curtails foreign ownership and investment in radio and television. Article 2 of Law no. 1730 of 1987 provides that local radio licences, apart from those granted to local administrations, can only be awarded to individuals of Greek nationality or to legal entities under Greek control. There are, however, no specific limits to foreign capital participation. Awards may be made to individuals, companies and to local municipalities.

In the television sector, Article 4 of Law no. 1866 of 1989 stipulates, as noted in the previous section, that no shareholder can hold more than 25% of the social capital of a local television company and that foreign capital must not exceed 25% of its total. Television licences can be awarded either to companies or to local authorities, there is no mention in article 4 of grants to individuals. Shares in local television companies cannot be held by individuals or companies found guilty of various press offences.

Infringements proceedings pursuant to article 169 of the Treaty have been started against Greece.

G) The Control of Concentration in the Press

There are no sector specific regulations controlling press concentrations, whether at the mono or multi media levels.

H) Domestic Competition Rules

Domestic competition legislation (Law no. 703 of 1977) is very general and

prohibits a wide range of anti-competitive and abusive market practices: its terms mirror closely the wording of Articles 85 and 86 of the Treaty of Rome. The Competition Commission is charged with overseeing compliance with the legislation which is applicable to both public and private media organisations.

1.) The Protection of Pluralism through Content Regulation

ERT is required by Article 2 of Law no. 1730 to fulfill the traditional public service obligation of contributing to the education, entertainment and information of the Greek people. Article 3 of the 1987 law provides that broadcasts are to be inspired by such ideals as liberty, democracy, national independence and peace and friendship among peoples. More specifically ERT is required to ensure the objectivity and completeness of broadcast information, the good quality of broadcasts, the protection of the Greek language and the protection, advancement and dissemination of Greek culture and traditions. The public television channel ET 1, previously ERT 1, is the central public service channel, and has traditionally sought to broadcast the maximum number possible of Greek productions. A significant proportion of these programmes have been commissioned from external producers, rather than produced in-house. The second public channel pursues a more commercial logic, while ET 3, relying heavily on repeat programming, is in serious financial difficulties. All three channels face stiff competition from the new private television stations and ERT has responded by increasing its entertainment programming and extending its broadcast day to cover the morning and late night slots. The National Council for Radio and Television which oversees the whole range of radio and television services, both public and private, has the general mission to guarantee the objectivity, equality of terms and quality of programmes in conformity with article 15.2 of the Greek Constitution. It is empowered to establish codes of conduct for programmes and advertisements.

Article 6.2 of the 1989 Act places local private television stations under the same obligations as those imposed on the public stations, considered above. In granting licences the quality of the proposed programmes and any improvements to the competitiveness of the public service must be taken into account.

In the private radio sector Law no. 1730 of 1987 requires consideration to be given, when granting local radio licences, to the programme policy of applicants, to whether any cultural or social bodies are to contribute to the programming and to the stations' openness to intellectual, cultural and social movements within the local community as well as to young people in the area. Control over radio programmes is exercised at both the internal and external level. At the internal level, every private local radio station is required to have its own professional standards committee of three to five members, chosen from individuals residing in the reception area of the station and who are distinguished in the fields of science, journalism or the arts. The members of the committee are named by the owner of the station or the municipal council where this provides a local radio service. The committee is required to monitor compliance with the various rules and regulations which govern radio programmes and publicity. Its decisions are binding on the management of the station and failure to comply with committee recommendations may be considered when a decision is taken whether or not to renew the broadcast licence. External control is exercised by the National Council for Radio and Television, established by the 1989 legislation.

In both the public and private radio and television sectors there is a recognised right of reply, with the National Council for Radio and Television now having competence in this field (Article 6.8 of Law 1866). The unregulated growth of private commercial television stations has badly hit radio revenues and cinema box office takings.

J) Transparency Requirements

There are extensive transparency requirements set up by Greek law for the press, radio and television sectors, primarily concerned to reveal the origins of their financial resources. To this end, all shares in companies owning daily papers or private radio and television stations are required to be named⁽⁸⁸⁾. The Bank of Greece and the Deputy to the Procureur of the Appeal Court are empowered to examine the finances of the daily and periodical press, radio and television companies. The principle of banking confidentiality cannot be called in aid by an extensive category of individuals and companies in order to block such an examination. These include certain key administrative figures, editors and directors of the daily or periodical press, of radio and television stations, as well as companies or individuals which have as their object the editing of daily or periodical papers or the running of radio or television stations. These provisions are also applied to companies in which the above mentioned individuals or companies hold at least twenty percent of the social capital. All such entities are required, by article 40.5 of Law no. 1806 of 1988, to declare annually the origin of the finances they have invested in press, radio and television enterprises.

Private radio stations are required to publish their annual accounts in two daily papers, one of which is published in the region covered by the station. A special investigation into concentration of ownership in the radio sector by the Commissioner for Accounts can be ordered by the National Radio and Television Council, substituted under the 1989 legislation for the Commission for Local Radio (Article 13.5 of the 1988 Presidential Decree no. 25).

The National Council for Radio and Television has wide powers to

(88) See Article 24 of Law no. 1746 of 1988 (press), Article 4.a) of Law no. 1866 of 1989 (television), and Article 2.8 of Law no. 1730 of 1987.

Investigate breaches of the laws governing the audiovisual media and to establish whether the restrictions on media concentrations and the formation of networks have been complied with⁽⁸⁹⁾.

5. SPAIN

(A) Constitutional requirements

Although the Spanish Constitution is the Community's youngest (1978), it does not contain any specific provisions on the organization and legal structure of broadcasting. It guarantees freedom of expression and information in the broadcasting field, among others (Article 20), but it confers on the State the right to organize and regulate "essential public services" itself (Articles 128 and 149). The organization and regulation of broadcasting are accordingly a matter for the legislator and, ultimately, the Constitutional Court. The latter has sanctioned the legislator's view that broadcasting is an essential public service, so a state monopoly, or at least a set of stringent legislative provisions, is therefore compatible with the Constitution.⁽⁹⁰⁾ There is no obligation under the Constitution to introduce private broadcasting, this being left to the discretion of the legislator.⁽⁹¹⁾ In the event of a private broadcasting company being set up, legislation must be enacted to prevent

(89) Article 3.5 of Law no. 1866 of 1989.

(90) Judgment No 12/1982 of 31 March 1982, reported in the Boletín Oficial del Estado of 21 April 1982, point 4 of the statement of grounds.

(91) Judgment No 12/1982 of 31 March 1982, point 4 of the statement of grounds.

concentrations of ownership and the formation of oligopolies in broadcasting.(92)

The current legislative framework for the Spanish broadcasting system consists of the Broadcasting Act of 4 January 1980,(93) the Telecommunications Act of 18 December 1987(94) and the Act of 3 May 1988 on the authorization of private television channels.(95) These Acts impose on private broadcasters, and in particular private television broadcasters, tight restrictions as regards programming and programme content. The number of licences that may be granted to national terrestrial television channels has been limited to a total of three. Cable and satellite television channels and local terrestrial television channels do not qualify for licences.

(B) Monomedia concentration and plurality in broadcasting

Under the Act on the authorization of private television channels, a company may not be granted more than one of the three available television licences (Article 10e). A company may not hold an interest in more than one licensee (Article 19(2)).

As for radio, a company may hold only one licence to provide medium wave

(92) Judgment No 12/1982, point 3 of the statement of grounds.

(93) Act No 4/80 of 10 January 1980, in: Boletín Oficial del Estado No 11 of 12 January 1980.

(94) Act No 31/87 of 18 December 1987, in: Boletín Oficial del Estado No 303 of 19 December 1987.

(95) Act No 10/1988, Boletín Oficial del Estado No 10 of 5 May 1988,

sound broadcasting services and no more than two licences to provide frequency modulation sound broadcasting services where there is a substantial overlap in the zones served. In the latter case, a company may hold two licences with overlapping zones only where there is a lack of plurality in the provision of sound broadcasting services to that area. It is also stipulated that a natural or legal person may not hold a majority of the shares in more than one licensee where they provide sound broadcasting services which overlap substantially in terms of the zones served. (96)

(C) Multimedia concentration

According to Article 19 of the draft version⁽⁹⁷⁾ of the current Act on private television broadcasting, a company was not to hold more than a 15% interest in a television station where it already held more than a 15% interest in the publisher of a daily or weekly newspaper or in a press agency. The same applied where a company already held more than a 15% interest in a radio station. This restriction on holdings by newspaper proprietors in broadcasting companies and the restriction on holding both radio and television licences were rejected by the legislator and are therefore not included in the Act as it now stands. Consequently, there are at present no specific restrictions in Spain on multimedia concentrations.

(96) Act No 31/87, Chapter IV, Article 26 and Supplementary Provisions, Sixth: 1.(d) and (e).

(97) Published in Boletín Oficial de las Cortes Generales No 30 of

(D) Requirements as to the internal structure of broadcasting companies

Article 18 of the Act on private television broadcasting provides that only limited companies whose sole business activity is the broadcasting of television programmes qualify for a television licence. It also provides that, without prejudice to Community law, licensees must be registered and domiciled in Spain. Companies which are not registered in a Member State are therefore barred from entering the Spanish television market as a licensee. Only public limited liability companies may hold shares in licensees and provision is made, as in France, for a limit on the size of holdings of 25% of the capital or voting rights (Article 19(3)). If this limit is exceeded, the licence is automatically void unless the company reduces its holding to the authorized level within one month from the date on which the supervisory authority issues a warning (Article 17(2)). Holdings by companies from outside the Community⁽⁹⁸⁾ may not exceed a total of 25% of the shares in a licensee (Article 19(4)).

(E) Measures requiring pluralism in programmes

Since they are defined by law as a public service, the various channels are under a duty of objectivity and neutrality and must respect pluralism of expression at the political, religious, social, cultural and linguistic levels.⁽⁹⁹⁾

(98) The Finance Act of 28 December 1990 (BOE 311) provides that the restrictions previously imposed on foreign investment in the radio and television sectors no longer apply to Community nationals.

(F) Disclosure and concentration

In order to ensure the transparency from the public's point of view of the internal structure of licensees, the Act on private television broadcasting has set up a special public register in which must be entered details of the structure of holdings in licensees, their status and any changes thereto (Article 20). Limited companies may issue only registered shares. All transactions involving shares in licensees, such as their purchase, sale or acceptance as security, must be authorized in advance by the supervisory authority (Article 21). The licence as such is expressly declared to be non-transferable. (100)

(G) Rules and regulations applicable to the press

Under Act No 29/1984 of 2 August 1984 there are no discriminatory restrictions on press ownership. However, for a newspaper to qualify for the various forms of government assistance, its entire share capital must be held by Spanish companies or nationals. As regards transparency, newspapers must publish their accounts annually, indicate the structure of their capital to the second degree, identify those who hold more than a 10% interest and ensure that they are entered in the national press register in order that they might receive government support. Aid is given to newspapers which have no interests in the advertising sector.

6. FRANCE

(A) Principles of constitutional law

The French Conseil constitutionnel (Constitutional Council) considers that the need to guarantee the right to freedom of information and expression enshrined in the Constitution justifies the adoption of specific measures to defend pluralism in the audiovisual field - as opposed to the press.(101) It reaffirmed this view in a decision of 18 September 1986 in which it held that the rules on pluralism contained in the Freedom of Communication Act, which had just entered into force, were inadequate.(102) This decision attaches to pluralism in the media no small importance in that it regards it as a constitutional objective in itself and places it under the special protection of the Constitution. The points in question were the permissible scale of a company's involvement in the broadcasting field, in other words the limits on the size of interests and on cross shareholdings, and the powers of the Commission nationale de la communication et des libertés (National Commission for Communication and Freedoms - CNCL), which the Conseil constitutionnel deemed insufficient to ensure properly the pluralistic expression of currents of thought and opinion in programmes. An Act of 27 November 1986(103) tightened up the provisions at issue and laid down precise limits with a view to guaranteeing pluralism.

The Conseil constitutionnel considers pluralism to be necessary to ensure

(101) Decisions of 27 July 1982 and No 84-181 of 10 and 11 October 1984, Journal officiel of 13 October 1984.

(102) Decision No 86, 217 DC; Journal officiel of 19 September 1986, p. 11294.

(103) Journal officiel of 28 November 1986, p. 14297.

the effective application of the principle of freedom of expression. The stand taken by the Conseil constitutionnel is not one of justified incompatibility, its view being that pluralism is a constitutional objective that is necessary to ensure the effectiveness of the free communication of thoughts and opinions referred to in Article 11 of the Declaration of Rights. Effectiveness presupposes a sufficient number of publications of different tendencies (decision of 29 July 1986 on the Press Act). The effectiveness principle enshrined in Article 11 of the Declaration of Rights is reproduced in the decision of 18 September 1986 on the Audiovisual Act, the Conseil adding that pluralism is a precondition for democracy which involves making available to the public "programmes which guarantee the expression of different tendencies while respecting the need for honesty in the provision of information" and which guarantees listeners and viewers freedom of choice "for which neither private interests nor the public authorities may substitute their own decisions, and which cannot be bargained away". The Conseil considered in this decision that the anti-concentration provisions were unconstitutional in that they did not satisfy "the constitutional requirement of preservation of pluralism" (the provisions were subsequently strengthened).

(B) Monomedia concentration

The Freedom of Communication Act of 30 September 1986, as amended on 27 November 1986, contains a set of rules on broadcasting bodies which has been maintained in subsequent amendments. Article 41 thus draws distinctions based on telecommunications media (over the air waves, cable, satellite) and on the audience of each broadcaster in particular.

(a) Television

- No person may hold two authorizations for national television services broadcast over the air waves.
- No person may hold both an authorization for a national television service broadcast over the air waves and an authorization for a non-national service of the same type.
- No person may hold more than two authorizations for television services broadcast exclusively on frequencies reserved for sound broadcasting and satellite television.
- A person holding one or more authorizations for a non-national television service broadcast over the air waves may not be granted a further authorization for a non-national service of the same type if that authorization would have the effect of increasing to more than six million the potential audience in the areas served by all the services of the same type for which that person would hold authorizations.
- A person holding an authorization to operate a television service broadcast over the air waves in a given area may not be granted a further authorization for a service of the same type broadcast wholly or partly in the same area.
- A person holding one or more authorizations to operate a network distributing sound and television broadcasting services by cable may not be granted a further authorization for a service of the same type if that authorization would have the effect of increasing to more than

eight million the potential audience in the areas served by all the networks that person would be authorized to operate. It should be noted that the same service broadcast simultaneously by direct broadcast satellite and over the air waves is considered to be a single service broadcast over the air waves.

The safeguarding of the plurality of audiovisual communication services is also ensured by provisions limiting cross shareholdings in companies holding a television broadcasting authorization. A person who already holds between 15% and 25% (or, in the case of satellite television, between 33.3% and 50%) of the capital or of the voting rights of a broadcasting body may not hold more than 15% of the capital (33.3% in the case of satellite broadcasting) of a second broadcasting body. A person who already holds two interests of between 5 and 15% in a terrestrial television service (between 5 and 33.3% in the case of satellite television) may not acquire a third unless it is no bigger than 5%. In the case of regional terrestrial television services, there are no restrictions on the number of interests.

(b) Radio

- A person operating a national network for the broadcasting of radio services over the air waves may acquire one or more authorizations to use frequencies for the broadcasting of radio services over the air waves only if the potential audience in the areas he would serve on the basis of the further authorizations is less than 15 million.
- In the field of cable distribution, a company may hold more than one authorization if the combined audience does not exceed eight million people.

(c) The press

The Act of 27 November 1986 declares void the purchase, take-over or hire-management (location-gérance) of a printed daily publication containing political and general information where it has the effect of permitting a natural or legal person or group of natural or legal persons to possess, control directly or indirectly or publish as a hire-manager printed daily publications containing political and general information whose total circulation is more than 30% of the circulation in France of all printed daily publications of the same type.

(C) Multimedia concentration

Under Article 41(1) and (2) of the Freedom of Communication Act the scale of newspaper involvement in broadcasting depends on a paper's resources and market shares in each branch of the audiovisual sector. A rule known as the "two out of four" rule, which takes into consideration aspects of multimedia concentration, draws a distinction between radio and television and between national and local/regional circulation.

(a) National broadcasting

No authorization for radio or terrestrial television broadcasting or for the operation of a network distributing radio and television services by cable may be granted to a person who is in more than two of the following situations:

- holder of one or more television authorizations making it possible to

serve 4 million people;

- holder of a radio authorization making it possible to serve more than 30 million people;
- holder of one or more authorizations to operate networks distributing radio or television services by cable making it possible to serve more than 6 million people;
- publisher or controller of one or more printed daily publications containing political and general information accounting for more than 20% of total circulation in France.

(b) Regional/local broadcasting.

No non-national authorization for radio or terrestrial television broadcasting or for the operation of a network distributing radio and television services by cable may be granted to a person who is in more than two of the following situations:

- operator of a television service, whether national or not, broadcast by terrestrial means to the relevant area;
- operator of one or more radio services whose combined potential audience in the relevant area is more than 10% of the total potential audience in the same area;
- operator of a cable network distributing radio or television services in that area;
- producer of one or more national or regional daily publications containing political and general information circulated in the relevant area.

These rules do not impose an absolute ban on cross shareholdings in the sector of printed or audiovisual means of communication. In the first place, they are directed only at daily publications containing political and general information and do not therefore cover other periodicals. Audiovisual communication companies or publishing houses operating principally in the latter market are accordingly subject to no conditions governing access to broadcasting. As far as daily publications are concerned, the rules permit them to hold a not insubstantial share of the market, subject to a limit of 20%. Moreover, the rules do not oblige the publishers of daily publications occupying a leading or dominant position on the market to give up broadcasting, but simply require them to choose between radio, television and cable. A newspaper holding a large share of the national dailies market may thus also hold an interest in a national broadcaster (like any other company, i.e. subject to a 25% limit).

The rules are, on the other hand, more restrictive at the local and regional level. The 20% limit does not apply here, so that merely running a daily newspaper in the area served is caught by the law. A holding is not entirely ruled out, but it is limited to a single branch of audiovisual communication.

To conclude, the "two out of four" rule has the advantage of being flexible as it allows a company to choose the structure of its multimedia participations itself.

(D) Concentrations Incompatible with competition law

The law on the subject, as embodied in the new Article 41(4) of the Act of 17 January 1989,⁽¹⁰⁴⁾ refers to general competition law and in particular the Ordinance of 1 December 1986.⁽¹⁰⁵⁾ The new article nevertheless expressly excludes the application of the rules on merger control (Title V of the Ordinance), which are particularly important as far as concentrations are concerned.

With regard to abuses of dominant positions and practices impeding free competition, broadcasting companies are governed by general competition law and are therefore subject to monitoring by the Conseil de la concurrence (Competition Council).

Since 17 January 1989 it has no longer been for the CNCL and the Commission de la concurrence (Competition Commission) to ensure jointly that the rules are complied with inasmuch as this task is now entrusted exclusively to the Conseil de la concurrence, which was set up in 1986. The Conseil supérieur de l'audiovisuel (Higher Audiovisual Council - CSA) may nevertheless address observations to the Conseil de la concurrence and refer to it any cases involving breaches of the rules.

(E) Internal structure requirements for broadcasting organizations

In addition to the rules on concentrations which have just been described, the Freedom of Communication Act contains detailed provisions on the

(104) Journal officiel of 18 January 1989, p. 728.

(105) Act No 77-806 of 19 July 1977, as amended by Ordinance No 86-1243 of 1 December 1986. Journal officiel of 9 December 1986, p. 14773. In its 1989 version, Article 41(4) excludes Title V of the Ordinance.

capital structure of the various broadcasting companies..

An authorization to operate a national television service broadcast over the air waves may be granted only to a company in which no natural or legal person holds more than 25% of the capital or voting rights (50% in the case of satellite broadcasting). In the case of regional bodies with an audience of between 200 000 and 6 million people, the corresponding limit is 50%. There is no restriction where the audience is less than 200 000.

By subjecting to strict limits the capital structure of a broadcaster, the Act seeks to spread decision-making power over a television channel among several companies in order to encourage the expression of a broad range of currents of thought and opinion in programmes.

The provisions' lack of flexibility has given rise to difficulties in practice, and the CSA advocates a relaxation of the rules.(106). From the point of view of the limitation of concentrations, the rules may also have the effect of obliging the companies concerned to form artificial groupings which often do not reflect market conditions, and they may be conducive to the development of concentrations in other fields. The question remains whether they help attain the desired objective of pluralism.

(F) Measures requiring pluralism in programmes

A rule known as the two-thirds rule seeks to ensure balanced television programming. All television bodies are required to give the same air time ✓ to the political broadcasts of the Government, the parliamentary majority

and the opposition. The CSA monitors compliance with the rule in private programmes just as closely and publishes a quarterly report. In the event of a breach, it has the power to impose penalties which in extreme cases may consist of the suspension or withdrawal of an authorization. It is reluctant to exercise this power - at least in relation to private broadcasters - because it is not expressly provided for in the Freedom of Communication Act, being based instead on a principle of customary law dating from the time when broadcasting was entirely in public hands.

The strict allocation of air time has been criticized on the ground that the way in which the tendency of a programme is included in the "equation" takes no account of the time at which it is shown and hence of the number of viewers. The CSA agrees that the arrangements are inappropriate and is considering various alternatives.(107)

(G) Disclosure and concentration

The trouble caused in the early years of private broadcasting by the use of front companies and the disguised acquisition of shareholdings in private broadcasters induced the French legislator to adopt a whole series of measures aimed at ensuring the verifiability and transparency of the structure of ownership in the companies holding authorizations and at preventing the rules from being circumvented.(108) Companies holding authorizations are accordingly required to disclose to anyone who so requests the names of the owners or three largest shareholders, the titles

(107) Page 4 of the CSA's letter of April 1990.

(108) The High Authority and the CNCL seem to have experienced difficulties in proving the existence of a hidden ownership structure.

of their publications and the nature of any other communications services they provide. Limited companies may issue only registered shares. Moreover, any company which acquires a fraction in excess of 20% of the capital or of the voting rights in a company which holds an authorization must inform the CSA within one month of its exceeding the threshold (Articles 36 to 38).

These requirements are supplemented and underpinned by various prohibitions and by severe penalties. Front-company transactions and disguised acquisitions of shareholdings are expressly prohibited and are punishable by a term of imprisonment of up to 12 months or a fine of up to FF 200 000 (or 1 million in the event of a breach of the rules on cross shareholdings), applicable to any person benefiting from the operation. Any breach of the transparency obligations imposed on broadcasters is punishable by a fine of up to FF 120 000.

It is also an offence to circumvent the rules by purchasing an authorization from another broadcaster. Broadcasting authorizations are not transferable. In other words, in the event of a company ceasing its business activities, the authorization thus becoming available must be reallocated by the CSA. The CSA may, without prior notice, withdraw an authorization in the event of a substantial alteration of a company's capital or voting rights or of a change in the board structure.

7. IRELAND

A) General Observations

Irish radio broadcasting dates back to the early twenties and, as in many countries at that time, it was ultimately decided to keep popular

broadcasting in the public sector, rather than open it up to private competition along American lines.

Dissatisfaction with the highly circumscribed national radio service, funded by a mixture of licence fees and advertising revenue, led to the establishment of a new authority in 1960 (which became 'Radio Telefís Éireann', RTE, in 1966) with a mandate to provide both radio and television services. The first national television service started operation at the end of 1961 and the State sector now comprises two national television channels, RTE 1 and RTE 2, and three national radio channels, Radios 1 and 2 and the Irish language service Raidió na Gaeltachta. This public service approach dominated State regulatory policy until the late 1980's when a new determination to open radio and television to private actors received concrete recognition in the Radio and Television Act 1988.

The 1988 legislation envisaged the introduction of a new private sector: one additional television channel and a number of radio services to include one channel of national ambit. An Independent Radio and Television Commission was instituted to authorise these new ventures on the basis of licences previously issued to it by the Minister for Communications. Questions of concentration are only now, therefore, receiving concrete legal and regulatory examination as Ireland moves away from a history of public monopoly, dominated by RTE.

Since the early seventies pirate radio stations offering alternative popular music successfully took root and many households in the areas bordering Northern Ireland and on the east coast of the country have tuned into the British television stations available 'off the air'. Those who could not receive these channels considered themselves to be 'second-class' media citizens and pressed for universal coverage. This demand for foreign stations led to an extensive cabling programme which has enabled the Irish government to plan the introduction of the new television channel, TV3, solely on the basis of cable and microwave technology. Prior, therefore, to the recent liberalisation it was felt necessary to 'purge' the airwaves

of illegal broadcasters, thus instituting a clean slate for the award of contracts without the domination of powerful private groups who have established themselves over time. This was effected through the Broadcasting and Wireless Telegraphy Act 1988, section 3(1) of which provides that a 'broadcast shall not be made from any premises or vehicle in the state unless it is made pursuant to and in accordance with a licence issued by the Minister', complementing the licensing requirements set out for the cable sector in S.I. No. 67 of 1974 and ensuring State control over the whole field of audiovisual activities.

B) Principles of Constitutional Law

Article 40.6.1.1. of the 1937 Irish Constitution provides that the state guarantees the right of the citizens to express freely their convictions and opinions. The ambit of this guarantee has to date received very little judicial examination and a number of questions, particularly relevant for the audiovisual media remain open. It has not yet, for example, been conclusively settled whether the expression of 'convictions and opinions' covers also the communication of what might be referred to as 'straight' information. In *Attorney General v. Paperlink Ltd.*⁽¹⁰⁹⁾ it was held that letter post, since this might involve the communication of information, did not fall within the protection afforded by Article 40.6.1.1. Similar reasoning was adopted in the later case of *Kearney v. Minister for Justice*⁽¹¹⁰⁾ where it was held that freedom of expression in Article 40.6.1.1. did not extend to the transmission of mere information. In *Attorney General for England and Wales v. Brandon Books Publishers Ltd.*⁽¹¹¹⁾, however, it was held that there was a constitutional right under Article 40.6.1.1. to publish information so long as this does not constitute a breach of copyright or confidentiality or is otherwise

(109) Unreported, High Court, 15th July, 1983.

(110) 19 IR 116, 1987 ILRM 52.

(111) 1987 ILRM 135.

contrary to the public interest.

Whatever the scope of the protection offered by the first sentence of Article 40.6.1.1., further phrases set out specific limits to the enjoyment of this freedom by the 'organs of public opinion'. These 'organs' are expressly held to embrace 'radio', 'press' and 'cinema'; while in *The State (Lynch) v. Cooney*⁽¹¹²⁾ 'radio' was held to cover also television. These organs shall not, in the terms of Article 40.6.1.1., 'be used to undermine public order or morality or the authority of the State', while the 'publication or utterance of blasphemous, seditious, or indecent matter' is held to be 'an offence which shall be punishable in accordance with the law'.

C) Mono- and multimedia concentration in the audiovisual sector

- a) The regulation of new national Television and Radio services under the Radio and Television Act 1988

The Irish audiovisual scene is characterised by the absence of express restrictions on mono- and multimedia concentrations. There are, for example, no fixed capital participation limits or ownership restrictions based on nationality. Such issues, where they are to be considered, fall within the general discretion of the Commission or Minister in awarding broadcast contracts or licences.

(1) Monomedia concentration

Provision was made in the Radio and Television Act 1988 for the authorisation by the Independent Radio and Television Commission ('the Commission') of one further television service in addition to RTE, to be distributed using cable and microwave networks (section 17), and an

(112) 1983 ILRM 89.

unspecified number of sound broadcasting services, to include a national channel. Since many of the provisions in the 1988 Act apply equally to the new radio and television services the two media will be considered together.

Section 6(2)(g) of the Radio and Television Act 1988 requires the Commission to have regard, in awarding the new radio contracts, to the desirability of allowing any person or group to have control of, or substantial interests in, an undue number of sound broadcasting services authorised under that Act. Section 6(2)(g) may thus be used to brake undue concentration although it is left to the discretion of the Commission to determine how many radio contracts would be numerically 'undue'. This provision is extended by section 18 to the new television service but it is difficult to ascertain its relevance where only one contract is to be awarded. The television contract has now been granted to the Windmill Lane consortium. In addition 25 local independent radio services have been authorised, with the national radio contract awarded to Century Radio currently providing competition for the established RTE stations.

(II) Multimedia concentration

Section 6(2)(h) of the 1988 Act requires the Commission to have regard in awarding sound contracts and, by virtue of section 18, television contracts to the desirability of allowing any person, or group of persons, to have control of, or substantial interests in, an undue amount of the communications media in the area covered by the contract. Once again this provision merely requires the Commission to consider the issue of concentration, but leaves it to its discretion to determine the concrete implications of its findings. There is thus no specific prohibition on newspaper interests in the audiovisual sector.

b) Satellite

The Irish government, given the high-risk, high-finance nature of satellite broadcasting, has chosen not to adopt specific concentration restrictions in this field. All five Irish direct broadcast satellite channels were awarded in 1986 to one company, Atlantic Satellites, owned by the US company Hughes Communications Inc. and the Irish businessman James Stafford. To date Atlantic has not exploited its franchise, although the Irish satellite footprint covers the potentially attractive UK market. It has more recently, however, considered launching two twenty-four transponder satellites, the earliest launch date being 1993, but wishes to have up-front finance from satellite tenants before commencing the project.

c) Cable

Cable developed in Ireland relatively early, encouraged by the ability to relay (without copyright payments to the British programme companies) British television channels to areas beyond their natural off-air reach. About 35 per cent of the Irish household population now subscribes to cable, enjoying access to from eight to twenty-six television channels. Since the objectives of the cable companies were initially limited the technical capacity of early networks was restricted, sufficient for the most part merely to relay the four British channels and the RTE television and radio services.

By 1974 the growth of cable was seen as an inevitable development and the Wireless Telegraphy (Wired Broadcast Relay Licence) Regulations, 1974 (S.I. No. 67 of 1974) introduced a new regime to regulate the award of cable licences. The 1974 regulations give the Minister for Posts and Telegraphs (now Communications) absolute discretion in deciding whether or not to grant a cable licence: no guidelines for this assessment are set out in the instrument itself and there is no reference to the issue of media pluralism.

Closely circumscribed in their programming, the post '74 cable nets nevertheless enjoyed a degree of protection from competition. At the mono-media level it has been government policy to grant one licence only in a given area, thus protecting those cable companies providing the initial finance for the technical infrastructure from damaging competition. In addition, licences for the more limited SMATV networks have not been granted in areas already covered by a cable franchise. Finally, considerable concentration in cable ownership has been tolerated, with operators able to accumulate licences for more than one area. In particular, the Cablelink company, owned eighty percent until recently by RTE, has obtained licences in the Dublin, Waterford and Galway areas. At the multimedia level this incursion of RTE into the cable world indicated a government willingness to tolerate a substantial degree of broadcast/cable cross ownership.

d) Multi-Point Microwave Distribution Systems

Microwave relay is covered by the Wireless Telegraphy (Television Programme Retransmission) Regulations, 1989 and over thirty microwave licences have now been granted by the Minister for Communications. These new licences are intended, primarily, to relay the British channels and a selection of satellite channels to rural areas which for economic reasons are not covered by cable. They are also to relay, under their sole 'must carry' obligation, the service of the new national broadcaster TV3.

In contrast to the absence of all reference to the problem of media concentrations in the cable regulations, the 1989 Wireless Telegraphy Regulations require the Minister when awarding licences to have regard to 'the desirability of allowing one person, or group of persons, to have control of, or substantial interests in, an undue number of programme retransmission systems' (Section 4 (1)(c)). Nevertheless multiple licences have been granted to individual companies such as Cablelink in the hope

that higher distribution costs in difficult areas will be offset by income recouped from the more profitable networks. Despite the reference in the 1989 regulations to the issue of monomedia concentration, there is no reference to multimedia concentration, along the lines set out in section 6(2)(h) of the 1988 Radio and Television Act for radio and television. Consequently press and cable consortiums have been allowed to establish sizeable cross interests in microwave. The Independent Newspaper Group, for example, had by late 1990 built up direct or indirect interests in nineteen of the thirty three franchises, while Westward Cable was awarded seven microwave licences in 1989.

D) Foreign and Other Ownership Restrictions

There are no express restrictions in the governing legislation. For both radio and television under the 1988 Act and microwave under the 1989 Regulations the Commission and Minister respectively are called to have regard to 'the character of the applicant' or, if a company, the 'character of the body and its directors, manager, secretary or other similar offices and its members and the persons entitled to the beneficial ownership of its shares'. No guidance is given, however, as to the weight which the Commission or Minister should give to any given ownership characteristic, such as foreign nationality. Despite this lack of formal requirements, it is probable that in order to meet the guidelines set out in the 1988 Act and to convince the Commission of an acceptable sensitivity to local interests a strong Irish connection, whether at the management or equity level, will be essential for success.

Radio and television contracts under the 1988 Act may contain a condition prohibiting assignment, or material changes in ownership where a company is involved, and, where there is no such provision then the Commission's prior written consent must be obtained before any such changes take place. The Commission is thus able to keep control of subsequent alterations in the ownership structure of contractors, applying the same considerations as

those relevant on the initial grant. In the cable field the Minister's written consent is required before any assignment but no such provision is included in the 1989 regulations relating to microwave licences.

E) Domestic Competition Rules

The Mergers, Take-overs and Monopolies (Control) Act, 1978, as amended by the Restrictive Practices (Amendment) Act 1987, requires that the Minister for Industry and Commerce be notified of company mergers involving companies whose turnover exceeds a given threshold⁽¹¹³⁾. The Minister can either make no order with regard to the proposed merger, which may then proceed, or refer the notification to the Fair Trade Commission. The Fair Trade Commission will then prepare a report on the proposed merger or take-over, stating whether it considers that this would operate against the 'common good'. After considering this report the Minister may then prohibit the merger absolutely or on terms.

Statutory Instrument number 17 of 1979 makes specific provision for the application of these controls in the newspaper sector. All mergers and take-overs involving companies, at least one of which is engaged in the printing or publication of one or more newspapers, are subject to the notification and scrutiny provisions, whether or not the threshold turnover limits are met.

The 1978 Act also enables the Minister to call on the Director of Consumer Affairs and Fair Trade to investigate apparent monopolies and to report on whether any such monopoly restricts competition, or is in restraint of trade, or operates against the 'common good'. The Minister, having considered this report, may then rule that the monopoly should only be allowed to continue on compliance with certain specified conditions or require that it be broken up through asset sales or by other mechanisms.

These powers were used in 1986 to investigate the monopoly acquired by Dublin Cablesystems Ltd in the Dublin cable industry. Section 8 of the 1987 Act also affords the Minister additional powers to prohibit restrictive or unfair practices or unfair methods of competition 'in the interests of the orderly and proper regulation of competition'.

F) The protection of pluralism through content regulation

The public broadcaster RTE has, not unlike many of its European counterparts, been expected to fulfil a number of cultural and social obligations in exchange for its protected monopoly status. RTE is legally required to have regard to the defence of the Irish language and culture, the furtherance of democratic values enshrined in the Constitution, the promotion of an understanding of other countries' cultures and traditions (particularly those of other EC Member States) and the need to work for peace and understanding.

Under the 1976 Broadcasting Authority (Amendment) Act RTE is required to ensure the objectivity and impartiality of all news and current affairs broadcasts. In the past there has been considerable friction between RTE and the government over the coverage of the conflict in Northern Ireland, with ministerial powers under the broadcasting acts being used to ban the transmission of interviews, or even reports of interviews, with spokesmen of proscribed groups, a category which includes members of the political Sinn Féin party. These provisions were unsuccessfully challenged before the Irish courts as contrary to the constitutional protection of free speech⁽¹¹⁴⁾ in Article 40.6.1.1. and the matter has now been referred to the Commission of the Court of Human Rights in Strasbourg by interested journalists and producers.

⁽¹¹⁴⁾ The State (Lynch) v. Donohue, 1982 ILRM 80.

Both the public and the private broadcast sectors are, of course, subject to important programme restrictions set out in Irish law. These restrictions, recognised in the 1937 Constitution, derive from the laws on confidentiality, on defamation, privacy, contempt of court and the protection of official secrets.

In the private sector the Commission, in awarding the new radio and television contracts, is required to have regard to a number of programming issues, among them the quality, range and type of the proposed programmes (particularly of the Irish language programmes), the opportunities which will be provided to Irish talent, the coverage of minority interests and the extent to which any proposed service will meet the needs of local communities or communities of interest. The television contractor is to show the same sensitivities to cultural and democratic values as those, set out above, which underpin the public broadcast service. This requirement is not, however, placed on the new radio contractors. Radio contractors, under section 9(1)(c), are required to offer a minimum percentage of news and current affairs coverage.

In both the radio and television sectors news and current affairs programmes are to be presented in an objective, fair and impartial manner, without expression of the broadcaster's views. Broadcasters are to ensure⁽¹¹⁵⁾ that they do not broadcast anything offending against good taste or decency, that might promote crime or tend to undermine the authority of the State. Existing or future Ministerial directions on the coverage of prescribed organisations are to be complied with by the new services⁽¹¹⁶⁾.

Not unsurprisingly, the Irish cable and microwave nets, essentially carriers of existing programme packages, have not been subjected to equivalent programming requirements. Control is exercised through the

(115) Sections 9(1)(d) and 18 of the 1988 Act.

government's power to direct the carriage of certain favoured channels. In the cable sector this has led to must-carry requirements for RTE television and radio services although the new microwave nets have not been placed under a similar obligation.

G) Transparency Requirements

Transparency requirements in the audiovisual media have received little express legislative consideration. Licences issued to the Commission by the Minister for Communications are to be open for public inspection at the Commission's registered offices. The Commission has wide powers to investigate the 'financial...or other affairs' of a sound or television contractor (section 13). In the cable and microwave field the Minister, and through him authorised officers, are given a number of investigative powers but these powers seem to be primarily concerned with the ascertainment of the fees to be paid by cable licensees or the charges to be levied and frequencies used by microwave operators, rather than with the ownership of the franchise holders as such.

8. ITALY

A) Constitutional basis

The constitutional basis of Italian broadcasting is provided by Article 21 of the Italian Constitution, which guarantees everybody the right of free

expression in speech, in writing or by any other means of dissemination. On this basis, the Constitutional Court has delivered a series of judgments defining an approach to broadcasting whose central values are the pluralism of opinions and the freedom of information for individuals.⁽¹¹⁷⁾ In so doing, it has always exhorted the legislator to adopt measures making it possible to combat the creation of monopolies and oligopolies effectively. The Court's position is made particularly clear in its judgment of 1988, which describes the situation then existing as "abnormal and unbalanced", and which calls for the establishment of a definitive, effective system making it possible to defend pluralism of information effectively at all levels against the development of dominant positions.⁽¹¹⁸⁾

B) Absence in the past of merger-control legislation

(117) Judgment of 13 July 1960 No 59/1960, *Giurisprudenza costituzionale* 1960, p. 759 et seq.; judgment of 10 July 1974 No 226/1974, *Giur. cost.* 1974, p. 1791 et seq.; judgment of 28 July 1976 No 202/1976, *Giur. cost.* 1976, p. 1267 et seq.; judgment of 21 July 1981 No 148/1981, *Giur. cost.* 1981, p. 1379 et seq.; judgment of 17 October 1985 No 23/1985, *Foro Italiano* 1985, Part I, p. 2829 et seq.; Decision of 14 July 1988 No 826/1988, *Gazzetta Ufficiale*, No 29 of 20 July 1988; judgment of 21 February 1990, No 102/1990, *Gazzetta Ufficiale* No 10 of 7 March 1990.

(118) Judgment of 14 July 1988 No 826/1988, *Gazzetta Ufficiale* No 29 of

Despite this adoption of a particularly clear position by the Constitutional Court and despite the fact that private radio stations have been in existence now for 15 years, there was no law on private broadcasting in Italy prior to the passage of the "Mammì" Law⁽¹¹⁹⁾ in August 1990, nor, until October 1990, were there any general rules limiting mergers.⁽¹²⁰⁾ The Italian broadcasting companies were able to act in accordance with market forces without being subject to the most elementary rules on mergers.

In the case of the press, there are anti-trust laws, it is true, which lay down that a company cannot control publishers whose papers attain in excess of 20% of the total turnover of all daily papers published in Italy.⁽¹²¹⁾ However, these rules can be circumvented since they do not apply to companies with "cross-holdings". In addition, they apply in practice only to mergers arising after their entry into force, leaving prior acquisitions untouched. They do not cover mergers in the important periodical sector and it has never been clearly specified which

(119) Law No 223 of 6 August 1990.

(120) Law No 287 of 10 October 1990 and for more details concerning the legal situation of private broadcasting see Wagner, *Duale Rundfunkordnung und Rundfunkwirklichkeit in Italien - Gegenwärtiges Erscheinungsbild und Perspektiven*, ZUM 1989, p. 221 (223).

Rauen, *Italien: Kartellbildung von Medien und Industrie*, Media Perspektiven 1990, p. 156 (164).

Lanzillo R, *Le comunicazioni di Massa*, vol I, A. Giampicelli Editore, Torino, 1990.

Rauen, *Platz für zwei Networks: Medienkonzentration in Italien*, Media Perspektiven 1984, p. 161 (164).

Rauen, *Italien, Kartellbildung von Medien und Industrie*, Media Perspektiven 1990, p. 156 et seq., 164 et seq.

publications are to be regarded as opinion-forming ones, if sporting, etc. publications can be disregarded. Thus, in practice, no merger of firms has yet been prohibited under the Law on restrictive agreements in the press.

The absence of any limits on mergers in the field of private broadcasting has been fully exploited: the early independent local stations combined to form small networks of broadcasters, which rapidly transformed themselves into national channels backed by large financial resources. The early 1980s saw ruthless competition between these channels, with the Fininvest holding company (owned by Silvio Berlusconi) finally emerging as the strongest player.

C) Law No 223 of 1990: a new framework for the Italian broadcasting media

In August 1990, the Bill brought in in 1987 by the Minister for Posts and Telecommunications, Mr Mammi, became the new Law, No 223, after many amendments had been made and the political negotiations completed.

(1) Monomedia mergers

The new Law states that national licences for radio and television broadcasting, issued to the same person or to persons controlled by or linked with persons who in turn control other licence-holders, may not exceed 25% of the number of national networks provided for in the allocation plan and in any case may not be greater than three.⁽¹²²⁾ It seems that Fininvest has chosen to keep control of its three television channels in exchange for relaxing its influence on the daily press.

Another point to note is that it is not possible to hold radio or television broadcasting licences or authorizations at both national and local levels at the same time.⁽¹²³⁾ A company will therefore have to make a strategic investment choice as to the level at which it wishes to enter the market.

There are also provisions restricting the control of broadcasting media in a given local area. As regards local television broadcasting, the same person may hold one licence only per reception area and at most three licences for different reception areas.⁽¹²⁴⁾ In such areas, which may be contiguous, provided that their total population does not exceed 10 million, only one set of programmes per complete day is authorized. Subject to this population limit, the number of contiguous areas may be extended to four in the southern part of the country.⁽¹²⁵⁾

As regards local sound broadcasting, the law specifies that the same person may hold one licence per reception area and seven licences altogether for contiguous areas provided that the total population does not exceed 10 million. A single set of programmes per complete day is authorized.⁽¹²⁶⁾

Deeds of sale, contracts for the hire or management of companies operating in the mass communications sector, and the transfer inter vivos of shares in companies operating in the said sector are

(123) Article 19(4) of Law No 223 of 6 August 1990.

(124) Article 19(1) of Law No 223 of 6 August 1990.

(125) Ibid.

(126) Article 19(2) of Law No 223 of 6 August 1990.

null and void if they result in the same person, even through the intermediary of controlled or associated persons, earning more than 20% of the total receipts from the mass communications sector. The limit is 25% where the same person earns at least two thirds of his total own receipts in the mass communications sector.(127)

(II) Multimedia mergers

As regards mergers between press and television broadcasting companies, the new Law states that it is not possible to hold:

- a television broadcasting licence at national level if one controls companies publishing daily newspapers with an annual circulation exceeding in the previous calendar year 16% of the total circulation of daily newspapers in Italy;(128)
- more than one television broadcasting licence at national level, if one controls companies publishing daily newspapers with a circulation exceeding 8% of the total circulation of daily newspapers in Italy;(129)
- more than two television broadcasting licences at national level, if one controls companies publishing daily newspapers with a combined circulation not exceeding 8% of the total circulation of daily newspapers in Italy.(130)

(127) Article 15(2) of Law No 223 of 6 August 1990.

(128) Article 15(1)(a) of Law No 223 of 6 August 1990.

(129) Article 15(1)(b) of Law No 223 of 6 August 1990.

The same rules as those described above concerning deeds of sale etc. which give a company a share of more than 20% of the total receipts of the mass communications sector apply to multimedia mergers.

As regards local broadcasting, the Law states that the holder of a television broadcasting licence may obtain a radio broadcasting licence at local level provided that, in the same reception area, the number of applications for the radio sector does not exceed the number of frequencies to be allocated. By the same token, a person who has already obtained a local sound broadcasting licence may obtain a second one within the same territorial framework.(131)

D) Discriminatory restrictions and other restrictions on media ownership

In the press sector, "foreign" firms and financial institutions may not hold a majority interest or control companies which publish daily newspapers. There is a similar prohibition on holdings in companies which control such publishing houses.(132) The new Law specifies that radio broadcasting of a community nature must be provided by foundations, recognized and non-recognized associations which reflect special interests of a cultural, ethnic, political or religious nature, and in certain circumstances by cooperatives whose purpose is to provide a cultural, ethnic, political or religious radio broadcasting service.(133) It should also be noted that it is not possible to transform a community radio

(131) Article 19(3).

(132) Article 1 of Law No 416 of 5 August 1981, as amended.

(133) Article 16(5) of Law No 223 of 6 August 1990.

broadcasting licence into a commercial one.(134)

As regards commercial radio broadcasting at national level and television broadcasting at national level, the Law states that a licence may be granted only to companies or cooperatives set up in Italy or in other Member States of the Community which have a capital of not less than LIT 3 billion in the case of television broadcasting or less than LIT 500 million in the case of radio broadcasting.(135)

At local level, a television broadcasting licence may be granted only to: (i) natural persons of Italian nationality or the nationality of one of the Member States of the Community who provide security of at least LIT 300 million; (ii) certain bodies recognized by the Italian Government or by other Member States, which provide security of at least LIT 300 million, or (iii) companies formed in Italy or another Member State, with the exception of partnerships ("società semplici"), which have a capital of at least LIT 300 million.(136) As regards commercial radio broadcasting at local level, a licence may be granted only to the same categories of person, but the security obligations are reduced to one third.(137)

There is also a category of person which is disqualified from obtaining a

(134) Article 16(6) of Law No 223 of 6 August 1990.

(135) Article 16(7).

(136) Article 16(8).

private radio or television licence. These are companies whose object is neither radio/TV broadcasting, publishing of information nor an activity relating to information or the visual arts.⁽¹³⁸⁾ A licence may not be granted to public bodies (even those with an economic purpose), to companies in which public authorities hold a majority interest or to credit institutions.⁽¹³⁹⁾ It may not be granted either to persons who have been sentenced to prison for an intentional offence or breach of statutory duty, or to persons from whom another licence has been withdrawn, even in respect of a different local level.⁽¹⁴⁰⁾

The Law also restricts share ownership. The majority of shares in private licence-holding companies and the number of shares which makes it possible to control such companies or create links between them must not be held by natural or legal persons or companies, with or without legal personality, of foreign nationality, nor by trust companies. This prohibition also applies to shares in companies which directly or indirectly control the private licence-holding companies. It should be noted, however, that the prohibitions on foreign companies do not apply to companies set up in one of the Member States of the Community or in states which offer Italy reciprocal rights.⁽¹⁴¹⁾

Finally, it should be noted that the 1990 Act attempts to address the powerful position acquired by the advertising agencies in Italy, linked variously to the public (RAI) and private (Fininvest) sectors. Article 15(7) of the 1990 Act states that where a public or private licence holder finds itself in control of or connected with an advertising agency,

(138) Article 16(11).

(139) Article 16(12).

(140) Article 16(13).

(141) Article 17(1) of Law No. 992 of 9 August 1990.

this latter cannot collect advertising for more than three national television channels, or two national and three local or one national and six local channels. The same provision applies in reverse to advertising agencies which own or control radio or television licences. Contracts which contravene these provisions are to be null and void. Section 24(3) further stipulates that where a company controls an advertising agency which collects more than 50 % of the advertising income for a national radio or television broadcaster that company will itself be treated as though it holds the operating licence for that station.

E) Domestic Competition Legislation

General competition legislation was finally introduced in October 1990 with Law n° 287. This seeks to outlaw restrictive practices, abuses of dominant positions, and market concentrations which substantially restrict or eliminate competition. A new authority, the *Autorità garante della concorrenza e del mercato*, with extensive powers of investigation and able to impose fines, or, in certain instances, suspend agreements, has been established to oversee the competition regulations. In the broadcast and press sectors, however, it is the *Garante per la radiodiffusione e l'editoria*, set up under the 1990 audiovisual legislation, who is empowered to enforce the competition provisions, having previously sought the opinion of the *Autorità garante della concorrenza e del mercato*.

F) Measures requiring pluralism in programmes

In order to be awarded a private local sound and television broadcasting licence, a company must devote at least 20% of its weekly programming to

local information (news and services) and to programmes connected with local non-commercial events.(142)

Holders of a national radio or television broadcasting licence are required to broadcast daily television news or radio news programmes.(143)

G) Transparency Requirements

The transparency requirements in the press field go beyond the daily paper sector to cover all periodicals and reviews (excepting those published in a foreign language, monthlies or papers with less than 12 issues a year). Also covered are national press agencies. Details of the names of shareholders, the size of their holdings, together with details of changes in control or transfers relating to more than 10 % of the share capital (reduced to 2 % for quoted companies) must be notified to the Servizio dell' editoria. Transfers falling within the latter category must also be published in all papers edited by the company in question.

All press bodies covered by the legislation must be inscribed in the National Press Register which details such matters as the firms' social objects, its legal representative, the titles it prints and their place of publication(144).

A national register is also kept for radio and television companies. This covers public and private licensees, programme production and distribution

(142) Article 16(8) of Law no 223 of 6 August 1990.

(143) Article 20(6) of Law No 223 of 6 August 1990.

(144) Articles 1, 2, 3, 7, 10 and 11 of Law n° 416/1981 as amended.

companies and audiovisual advertising agencies. Contracts between the public licensee, private licensees and Italian programme production and distribution companies or advertising licensees are void where one of the parties to the contract is not entered on the national register.⁽¹⁴⁵⁾ The companies subject to the registration requirement are required to ask for their own associates, including companies, associates of companies owning shares in the operating company, and associates of companies which in any way control it directly or indirectly, to be entered on the national register of radio and television companies, indicating the number of shares they own or the size of their holding. The registration requirement also applies to associates who are natural persons where they own at least 2% of the shares of the company operating the television company, companies owning shares in the operating company or companies which in any way control it directly or indirectly.⁽¹⁴⁶⁾

Notification is also necessary of any transfer for whatever reason of over 10% of the capital of sole proprietorships or enterprises constituted in the form of public limited companies which are subject to the registration requirement, and successive transfers of shares in such companies which individually represent under 10% but cumulatively exceed this limit. The limit is reduced to 2% for public limited companies quoted on the stock exchange.⁽¹⁴⁷⁾

9. LUXEMBOURG

Luxembourg is in a special situation in that it has no rules on mergers which can be compared with those of the countries already examined.

(145) Article 12(4) of Law no 223 of 6 August 1990.

(146) Article 12(5) of Law no 223 of 6 August 1990.

Because of Luxembourg's small population (barely 400 000), commercial television cannot be profitable, and competition between several broadcasters is even less conceivable. A commercial broadcaster can only survive in Luxembourg if he can profitably extend his transmitting range beyond national frontiers or cooperate closely with broadcasters in neighbouring countries. It is only this kind of internationalization which has enabled CLT (Compagnie Luxembourgeoise de Télédiffusion) to become a large European commercial broadcaster. This is also the basis on which SES (Société Européenne des Satellites) works; this company is also established in Luxembourg and operates Europe's main broadcasting satellite (ASTRA), whose 16 channels can be received in almost all the countries of western Europe. The success of these two companies is due not only to Luxembourg's favourable central position, but also to the perspicacity of the Luxembourg government, which has always strongly supported the activities of the CLT (the largest taxpayer in the Grand Duchy) and SES.⁽¹⁴⁸⁾ In these circumstances, it is not surprising that the law in Luxembourg contains no provisions limiting concentration.

(a) The current situation - CLT's monopoly

Under the terms of the Law of 29 December 1929 on broadcasting and of several licence contracts, CLT has the exclusive right to use Luxembourg frequencies and ever since that date has been the country's only broadcasting authority. It is a public limited company and is financed entirely by advertising revenue. In order to broadcast its television and radio programmes, which usually carry the name of RTL, it has three terrestrial television frequencies and eight terrestrial radio frequencies, on which, in addition to one radio programme and a few television programmes

(148) Cf Santer: Stahl - Banken - Medien, Luxembourg im wirtschaftlichen Wandel. Speech by the Luxembourg prime minister in Düsseldorf.

In the Luxembourg language, it broadcasts programmes in French, German and English. These are in part the same as the programmes broadcast in neighbouring countries with CLT's participation (RTL Plus and RTL-TV1). CLT also owns large interests in other broadcasting companies, particularly in Germany (RTL Plus, 46.1%; TELE 5, 25%), France (M6, 25%), Luxembourg and the Netherlands (RTL Veronique, 35%) and Belgium (RTL-TV1, 66%), and in the English-language programme Eurobusiness (EBC, 10%).

Although the Luxembourg government does not have a stake in the company, it can exert influence on CLT's decisions through licence contracts and the terms of the licensing conditions and through its involvement in CLT's bodies. It has been agreed and laid down in CLT's statute that programmes must observe strict impartiality within the framework of international law and must respect the rights of minorities and religious beliefs. CLT's capital is owned by a number of holding companies comprising French, Belgian, Dutch and German shareholders (Audiofina S.A., Franco-Belgian 29.1%, FRATEL S.A., in particular Bertelsmann, 27.6%, PARIBAS Group, Franco-Dutch, 22.4%, Audiolux S.A., Luxembourg, 6.1%, etc.). There is no rule limiting holdings by newspaper publishers or foreign companies. In order to guarantee the transparency of the balance of ownership within the company and to be able to monitor it, 70% of the shares have to be registered and may not be disposed of without the Luxembourg government's authorization.

SES is also organized in the form of a private-sector company. It operates the ASTRA satellite on the basis of a concession from the Luxembourg government; it does not produce programmes itself, but "rents" satellite channels to broadcasters, usually foreign ones. It has managed to increase the coverage of its satellite by selecting programmes not so much on the

basis of the revenue which they could bring in, as on the basis of their popularity. A second 16-channel satellite (Astra 1b), was launched in February 1991.

Apart from the Luxembourg government, which owns 20% of the company, the shares in SES are held by companies from six European countries. Again, no limit is imposed on holdings by newspaper publishers or other media. CLT itself does not have a stake in SES, since SES was founded against its wishes, the Luxembourg government having considered that CLT was too cautious in its management of the satellite. Nevertheless, since then, CLT has also been using the Astra satellite for some of its programmes.

(b) Law of 30 July 1991 on electronic media

The law of 30 July 1991 transposes the Community broadcasting directive into Luxembourg law, its main aim being to regulate satellite television and to promote different national programmes. The law contains anti-concentration rules only in respect of sound broadcasting by low power transmitters, i.e., local radio, and of network programmes (regional radio).

- Local radio stations must take the form of a non-profit-making association and each association is allowed one licence.
- Broadcasting networks have to take the form of a private limited company and no person may own shares in more than one licensed company or more than 25% of the shares and voting rights, including indirect holdings, in a licensed company.

The licensing conditions for sound radio programmes broadcast by high power

transmitters may contain provisions relating to the "respect of pluralism in the presentation of news and ideas" (Article 13(4)(a)), and the conditions relating to local radio programmes may contain provisions relating to the "respect of pluralism in the presentation of local news and ideas" (Article 17(6)9)).

With regard to television, the law does not impose restrictions on ownership but only provides that the licensing conditions for programmes with an international radius (sound radio or TV) or television programmes aimed at the domestic public may contain provisions relating to pluralism (Article 10(1)(c) and 12(2)(b)).

Lastly, it should be noted that CLT's monopoly has to be brought to an end, in any case in radio, to make way for new broadcasters. The other domestic television and radio frequencies may, however, be allocated to the same company as foreign frequencies, since the cumulation of programme interests is not prohibited.

10. NETHERLANDS

A) General

In the traditional non-commercial Dutch audiovisual system, programmes are produced by organizations representing the main groups in Dutch society and by the NOS (Nederlandse Omroepprogramma Stichting) which coordinates them. Transmission is effected through the Netherlands Broadcasting Transmitter Company (NOZEMA), owned jointly by the state and the broadcasting associations. A semi-public company, Stichting Etherreclame (STER)

(Television and Radio Advertising Foundation), is responsible for the broadcasting of advertisements, the receipts from which are then shared between all broadcasters (in proportion to the size of their audience, calculated on the basis of the number of subscribers to the television magazine published by each of them).⁽¹⁴⁹⁾ The broadcasting organizations are non-commercial in character, as required by the law and by their statutes, and they are explicitly prohibited from cooperating with other commercial media enterprises.⁽¹⁵⁰⁾ Newspaper publishers are also prohibited from holding stakes in broadcasting organizations although the organizations themselves do engage in publishing, since they have the exclusive right to publish magazines listing television programmes.⁽¹⁵¹⁾ Publishers may nevertheless be permitted to participate in the exploitation of commercial advertising on public local and regional channels. Cable newspapers may also be licensed to broadcast in the public system, though they are not permitted to show moving images.

This system rules out mergers motivated by economic considerations and likely to pose a threat to pluralism. As a result, neither the law of 1967 on broadcasting⁽¹⁵²⁾ nor the law of 21 April 1987 on the media⁽¹⁵³⁾

(149) See Van Reenen, *Der Rundfunk in den Niederlanden*, in: *Internationales Handbuch für Rundfunk und Fernsehen 1988/1989*, Baden-Baden 1988, pp. 124 et seq.; Reijnders: *Die Medienpolitik der Niederlande*, *Media Perspektiven* 1985, pp. 419 et seq.; Brants/Jankowski, *Kabelfernsehen in den Niederlanden und Belgien*, *Media Perspektiven* 1985, pp. 412 et seq.

(150) Article 55(1) of the law of 21 April 1987.

(151) Article 57 of the law of 21 April 1987.

(152) Translated into German in UFITA vol. 60 (1971) pp 202 et seq.

(153) *Staatsblad van het Koninkrijk der Nederlanden* 1987, no 249. Published in English by NOS, Hilversum, 1987.

contain anti-trust regulations specific to broadcasting.

Even in the Netherlands, the audiovisual sector is now beginning to open up to commercial broadcasters. This development had already been set in train by the law on the media which came into force at the beginning of 1988, created a third television channel, authorized more advertising and has gradually privatized NOS (which has become NOB, Nederlandse Omroepproductie-Bedrijf). Since then, the very severe restrictions on advertising have also been relaxed in accordance with the Court of Justice judgments⁽¹⁵⁴⁾ and the "Television without frontiers" Directive. The new law on the media, no 769 of 18 December 1991, amends the law of 21 April 1987 and provides for the establishment of a commercial television channel and a commercial radio channel.

A recent report (the Donner report) on the allocation of frequencies and commercial broadcasting examines the implications of Community law for media policy in the Netherlands. On the basis of this report the Minister for Cultural Affairs has submitted a document to Parliament and other changes will probably be made to the 1987 law on the media.

B) Monomedia concentration

In the press field there has been considerable concentration in ownership and since 1955 the number of independent newspaper publishers has halved. Five press groups currently control the entire market for national daily newspapers. In 1989, after much political debate, the cabinet expressed its

(154) See Case C-352/85 Bond van Adverteerders v The Netherlands State [1988] ECR 2085; Case C-288/89 Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media, 25 July 1991, not yet reported; and Case C-353/89 Commission v

opinion that pluralism was threatened not so much by concentration in ownership as concentration in editorial control. It concluded from this that future legislation should focus on the independence of the editorial board vis-à-vis the publishers/proprietors rather than institute a form of merger regulation for the press. Since then, however, there has been continued pressure to revise this approach and enact legislation designed to restrict any further market concentration⁽¹⁵⁵⁾. The possibility of introducing legislation which would prohibit concentrations giving a company a share in excess of 20 to 25% of the newspaper market, has been dropped by the Cabinet following prolonged debate on the constitutional validity and practical effects of such measures.

At present there are no direct ownership restrictions in the press sector, but a publisher wishing to receive support for its paper from the Pressfund, established in 1974 to support daily and non-daily newspapers and opinion magazines in difficult finances as well as to help launch new titles, will only be successful where the paper in question is, inter alia, targeted at the Netherlands readership and is published in the Netherlands⁽¹⁵⁶⁾.

C) Multimedia concentrations

The new broadcasting act provides that a private commercial broadcasting licence will be refused to an applicant if he, or one or several legal persons or companies connected with the applicant, have a share of 25% or more of the daily newspaper market; or if a legal person (being the applicant), or one or several legal persons or companies connected with it,

(155) Fact sheet on the press in the Netherlands by the Ministry of Welfare, Health and Cultural Affairs, C-3-E-1990.

have a share of 25% or more of the daily newspaper market and alone or together, with or without an agreement with others having voting rights, can either control more than 1/3 of the voting rights at the meeting of shareholders in the applicant, or can appoint or discharge more than 1/3 of the Members of the Board or of the Commissioners of the applicant(157).

A private commercial broadcasting licence will be revoked by the Media Authority if the commercial broadcaster, or one or several of the legal persons with which he is connected, alone or together, hold a share of 25% or more of the daily newspaper market in 2 consecutive calendar years; or if a legal person (being the commercial broadcaster) or one or several legal persons or companies connected with it have a share of 25% or more of the daily newspaper market and, alone or together, with or without an agreement with others having voting rights, can either control more than 1/3 of the voting rights at the meeting of shareholders in the commercial broadcaster, or can appoint or discharge more than 1/3 of the Members of the Board or of the Commissioners of the commercial broadcaster(158).

Institutions which have been allocated broadcasting time are prohibited from engaging in any activities other than the provision of their programmes(159). This prohibition does not apply to private commercial broadcasters nor to government institutions, religious organisations, political parties and groups, and spiritual organisations. There are also restrictions on the exploitation of copyright in broadcasts in the context of publication by broadcasters(160).

(157) Article 71d of the law of 21.4.1987 as introduced by the law of 18.12.1991.

(158) Article 71e of the law of 21.4.1987 as introduced by the law of 18.12.1991.

(159) Article 57(1) of the law of 21.4.1987.

(160) Article 62 (3) of the law of 21.4.1987 as introduced by the law of

General publishers are not permitted to publish programme guides in the Netherlands. Broadcasting associations are nevertheless permitted to publish radio and television programme guides, though these must not be supplied in conjunction with another magazine⁽¹⁶¹⁾. This applies to private associations broadcasting in the public system but not to private commercial broadcasters. An exception is made for institutions providing educational programme components, which are permitted to produce and distribute material to back up their broadcasts. Foreign magazines are permitted to publish under licence detailed programme schedules provided that such magazines are not also sold on the market in the Netherlands.

Owners and operators of the Dutch cable networks are prohibited from owning or participating in the new private TV licences. The proposed television station is to be relayed solely over the well established and extensive cable networks: terrestrial frequencies having been reserved for the traditionally favoured public broadcasting services. Concerns over possible abuses stemming from ownership of both programme and distribution rights clearly underly this restriction. Also prohibited from participating in the new ventures is the Netherlands Broadcasting Production Company (NBPC) which holds a dominant position in the market for production facilities. The public service broadcasters are not allowed to acquire the ownership of production facilities (article 60 of the Media Act 1988) and have turned to the NBPC to provide studios, cameras, sound and other essential equipment.

The new legislation also prohibits private associations which already hold a broadcast licence under the public system from participating in private radio and television ventures. In contrast to the public system, and marking a clear break with the past, there has been an attempt to establish a degree of political neutrality in the ownership of the private broadcast channels.

(161) Articles 57 (2) and 58 (5) of the law of 21.4.87 as amended by the

Thus public service organisations are not allowed to own a private broadcasting station.

It is worth noting in parentheses that the prohibition on the participation in the private broadcasting system⁽¹⁶²⁾ is expressed in the legislation in terms of a prohibition on the provision of programmes which are distributed via a cable network (as opposed to a prohibition on participation per se). The term "provision of programmes" is defined as "the process of preparing, compiling and executing a programme for domestic broadcasting, the Dutch World Broadcasting Service or a subscription channel"⁽¹⁶³⁾. Since private commercial broadcasting will, in principle, be restricted to distribution via cable, the effect of the legislation is that the "disqualified persons" mentioned above will not be permitted to participate in private commercial broadcasting. In certain circumstances and on certain conditions the Media Authority may grant a broadcasting licence, in derogation from this rule, to local or regional broadcasting bodies for a limited period of time⁽¹⁶⁴⁾.

Other ownership restrictions prohibit institutions having national broadcasting time from acquiring production facilities, that is to say the staff and equipment required for programme production. Exceptions to this rule exist for religious and spiritual organisations, political parties and groups, and broadcasting organisations which owned radio broadcasting studios on 15th February 1985⁽¹⁶⁵⁾. The NBPC is permitted to set up radio broadcasting studios but only if the need for these is not already satisfied by existing studios belonging to the broadcasting organisations⁽¹⁶⁶⁾.

(162) Article 70a of the law of 21.4.87 introduced by the law of 18.12.91.

(163) Article 1 p of the law of 21.4.87 introduced by the law of 18.12.91.

(164) Articles 75a and 75b of the law of 21.4.87 introduced by the law of 18.12.91.

(165) Articles 60 and 148 (1) of the law of 21.4.87.

D) Guarantees of pluralism in programming content

As far as programme content in public service broadcasts is concerned, the providers of programmes for subscribers determine and retain responsibility for their form and content⁽¹⁶⁷⁾. In the private sector the broadcasters themselves are responsible for the form and content of the programmes which they provide⁽¹⁶⁸⁾.

Public service broadcasters are obliged to provide a complete programme, including components of a cultural, informative, educational, and entertaining nature and there are content restrictions on educational bodies, religious and spiritual organisations and political parties or groups. For example, religious organisations must use all their broadcasting time to provide a religious programme⁽¹⁶⁹⁾. In addition, television programmes for subscribers must include components of a Dutch cultural nature⁽¹⁷⁰⁾.

E) Transparency

Apart from the requirement to apply for broadcasting licences, there is no general duty to disclose the extent of a company's participation in a media body. However, the new broadcasting act provides that before applying for a

(167) Article 72 of the law of 21.4.1987.

(168) Article 71f of the law of 21.4.1987 as introduced by the law of 18.12.1991.

(169) Article 50 of the law of 21.4.1987 as amended by the law of 13.12.1990 and the law of 18.12.1991.

(170) Article 72 of the law of 21.4.1987.

private broadcasting licence or participating in a private commercial broadcaster, a body which has been allocated broadcasting time must inform the Media Authority⁽¹⁷¹⁾.

F) Competition rules

The media are subject to general competition legislation. The Minister for Economic Affairs may declare competition arrangements (especially cartel agreements) partly or wholly inoperative if he considers them to be against the general interest. However, he may declare such agreements to be "generally binding" if this is in the interest of the branch of industry or trade concerned. The Minister may also impose obligations on or make orders in respect of undertakings or groups of undertakings occupying a dominant position which has effects contrary to the general interest.

11. PORTUGAL

A) Background

The law governing radio and television broadcasting in Portugal has recently undergone considerable development, opening up in the last three years to private radio and television initiatives after a long history of intrusive state control and virtual monopoly ownership. In December 1975, after the civil upheavals of the 1974 military coup, all broadcast services were nationalised and concentrated in state hands. In the radio sector the old government station Emissora Nacional was merged with nine private stations to form the public corporation Radiodifusão Portuguesa, 'RDP', while the pre-existing television concessionary, Radiotevisão

⁽¹⁷¹⁾ Article 71m of the law of 21.4.1987 as introduced by the law of

Portuguesa, 'RTP', was also converted into a public corporation under direct state supervision. The sole sanctioned exception to the state monopoly was Radio Renascença, the radio station of the Catholic Church.

The 1976 Constitution gave formal approval to the dominance of the public sector in the audiovisual field. Article 38 established a licensing requirement for radio broadcasters and prohibited outright the private ownership of television stations. In the radio sector, despite the leeway offered by article 38, control was kept firmly in public hands and it was only in 1988 that new legislation was passed specifically recognising a place for private radio. For television, however, article 38, which was unaffected by the constitutional revision of 1982, remained to block all attempts to initiate a parallel liberalisation. Revision took place only in September 1989 with new articles 38 and 39 of the constitution acting as precursors to Law no. 58 of 1990 which established the legal framework for private television broadcasting. Article 3 of the 1990 Act specifically states that television broadcasting can be performed by public and private operators 'according to the Constitution and the present law'.

B) Principles of Constitutional Law

Article 37 of the 1976 Constitution, in its most recent revised form, sets out the basic guarantee of freedom of information and expression; '(e)veryone shall have the right to express and make known his or her thoughts by words, images or any other means, and also the right to inform, obtain information and be informed without hindrance or discrimination'. Article 37 goes on to prohibit censorship and to provide for a right of reply, of rectification and compensation for loss. Offences committed in the exercise of these rights are punishable under the general principles of criminal law and fall within the jurisdiction of the courts.

The new article 38, as revised in May 1989, is in part addressed

specifically to the press (sections 1 and 2) but consideration is given more generally to the 'organs of social communication' (sections 3 and 4), embracing within this formulation the audiovisual media. Article 38 considers directly the problem of media pluralism and in its specificity goes well beyond the generalised guarantees of protection which tend to characterise constitutional provisions in the mass media field. Four distinct aspects, variously considered to promote pluralism, are identified in the constitutional text: internal participation by journalists in the editorial direction, transparency of ownership, independence from political and economic influence and specialisation. Thus, freedom for the press is held to involve not merely the usual freedom from prior administrative censorship or restraint but also a right for journalists and literary collaborators to participate in the editorial orientation of the journal, save where this belongs to the state or is of a doctrinal or religious nature, and to elect editorial councils. A degree of positive participation by journalists in editorial policy-making is therefore envisaged.

The second concern, that of transparency, also finds recognition in article 38. Section 3 requires that the law ensures that proper divulcation is made of the ownership and financial sources of the mass media. Section 4 calls on the State to protect the independence of mass media organs from both political and economic power, preventing ownership from being concentrated in a few hands. The danger which a concentration in ownership poses for freedom of expression finds, therefore, direct constitutional recognition. Finally, 'specialisation' is demanded of those enterprises which invest in the mass media field, a term which indicates that such organisations are expected to limit their involvement in other potentially conflicting sectors.

In the audiovisual domain, article 38 requires the state to provide a public radio and television service. State bodies are, however, to be independent of government and the administration, leaving scope for the expression of and confrontation between different opinions. Finally, the

prohibition on private television has been replaced by a general provision which states that both radio and television stations require a licence, granted after a call for tenders, in accordance with the law.

Portugal stands apart from many of its European neighbours in its decision to give constitutional recognition to a central regulatory body for the mass media, the High Authority for Mass Communication. Article 39 establishes the structural make-up and general competences of the Authority, which is required to ensure, inter alia, realisation of the rights constitutionally set out in article 38 and examined above. The Authority is to give its opinion on the award of licences by the government to private television operators and on the appointment and removal of the directors of media organisations owned by the state or by public entities or organisations directly or indirectly under their economic control.

C) The Regulation of Intramedia Concentration

a) The Press

Portugal set up a potentially far-reaching regulatory system for the press. Article 8.2 of Law no. 85 - C/75 of the 26th February 1975 provides that special legislation is to be passed to ensure that the press fulfills its public role, independent from political and economic influence. This goal is to be achieved, notably, through the prevention of concentration among press companies and agencies. Although this law is now fifteen years old no specific legislation has been passed to limit concentration in the press field.

b) Radio

Liberalisation of radio took place in 1988 and, in contrast with countries such as Greece or Denmark who have carefully limited any new

private ventures to the local dimension, Decree-Law no. 338 of 1988 envisages (article 5) the grant not only of regional and local but also national broadcast licences. The public service retains a monopoly over the use of long and short waves, leaving the private operators with medium and very short (fm) frequencies.

Although there is no express prohibition on holding multiple radio licences the fact that the applicant does not hold, directly or indirectly, another radio licence will be considered a positive factor when awarding licences (article 7). To prevent circumvention of this provision through the application for licences by a number of legally distinct companies, all with the same matrix of shareholders and administrators, article 2.5 and 2.7 provides that a company can only own shares (up to a 30% maximum) in one other radio broadcasting company and that individuals can only own shares or act in the administration of one such company.

c) Television

The way was opened for private television broadcasting two years later by Law no.58 of 1990. Here again licences may be either national or regional, with preference being given to national coverage (article 4), licence holders may broadcast using hertzian waves or employ satellite or cable transmission facilities (article 3.4).

There is no express prohibition on holding multiple licences and in contrast with the radio provisions non-ownership of a television licence is not specified to be a positive factor in favour of applicants. Heavy emphasis is instead placed on the quality and range of programmes proposed by a licence applicant, with licences being granted to the company whose proposals appear most in the 'public interest'. There is thus no explicit bar to an existing licence holder applying for a further licence. Nevertheless, the 1990 Act contains similar provisions to those found in the radio sector: individuals and companies are prohibited from

holding shares in more than one television broadcasting company and individuals cannot act in an administrative capacity for more than one such operator. These provisions ensure that a company already in receipt of a television licence, beyond making an outright application itself for a second licence, will only be able to hold shares in one other applicant company, and its shareholding in this second company is itself subject to a threshold 25% limit. No two applicants, at any given licensing round, can thus have the same equity participants, a provision designed to ensure maximum diversity in the ownership of television franchises.

D) The Regulation of multimedia Concentration

Portugal has no specific restrictions on the accumulation of interests in different media. Substantial cross ownership of private radio and television outlets is nevertheless restricted in practice by the one licence only principle for capital participation limits. In addition, article 9 of the 1990 television law, requires applicant companies to have as their sole object the provision of 'television activities', thus preventing the television licensees themselves, as opposed to their shareholders, from involvement in other media domains. A parallel provision can be found in article 7.7 of Decree-Law no. 85-C/75 which stipulates that press companies, editing houses and press agencies can only have, beyond their principal object, the exercise of activities inherent in or complementary to that main activity. This is somewhat more open than the restriction imposed on television companies since it is possible that 'complementary activities' could be interpreted to cover participation in the audiovisual media. This view is supported by one of the few other legislative provision specifically in point: article 7 of Decree law no. 338 of 1988 stipulates that it will be considered a positive factor in awarding radio licences that the applicant company has a majority participation by professionals from the communication sector

or owns regional papers of at least three years standing.

E) Capital Participation Limits

Radio and Television

Portuguese law precludes individuals or companies from holding shares in more than one private radio or television company. In the radio sector, article 2.5 of the 1988 Decree-Law no. 338, provides that any company can participate only up to 30% of the capital of the radio broadcasting company. Interestingly, article 2.7 does not apply the same limit to participation by individuals. Given, however, that licences can only be awarded to companies this enables an individual to exercise effective control over a radio outlet, albeit behind a company structure.

By contrast in the television sector, no company or individual can hold in excess of 25% of the capital of a broadcasting company.

F) Foreign Nationality and other Ownership Restrictions

a) Radio and Television

Radio licences are awarded only to companies and although there are no foreign participation limits, as there are for television, article 8.3 provides that where applicants appear to be of approximately equal stature preference will be given to those based in the geographical area covered by the licence. There are no specific prohibitions on ownership of radio stations by political or professional organisations.

For television the provisions are more restrictive with a strong emphasis on Portuguese nationality. Licences can only be granted to Portuguese companies with their head office in Portugal and with a minimum social

capital of 2.5 million thousand PTEs (article 9 of the 1990 legislation). The same article limits foreign participation to 15% of the social capital. Companies seeking television licences must have as their sole object 'television activities'; while article 3.6 precludes political parties or associations, trade unions, professional associations and local authorities, or bodies in which such entities have a capital participation, from owning or financing television broadcasting stations.

b) The Press

Portugal adopted measures which restrict ownership in the press field. Here again the restrictions focus on ensuring Portuguese control. Article 7 of Decree-Law no. 85-C/75 provides that only entities which have Portuguese nationality, which reside in Portugal and enjoy full civil and political rights can own a periodical paper, although exceptions are made for the publications of foreign diplomatic, commercial and cultural representations. Commercial press companies must have their principal seat in Portugal and foreign shareholdings must not exceed 10% of the social capital nor give voting rights (article 7.8). Finally, members of the administration or direction of press companies must be individuals of Portuguese nationality (article 7.11).

G) Domestic Competition Rules

The Competition Act, Decree-Law no. 422/83, has as its stated object (article 1) the protection of competition in the national market with a view, inter alia, to ensure the transparency of the market and reinforce the competitiveness of economic actors. It is applicable to all activities in the public, cooperative or private sectors. The Act outlaws certain individual restrictive practices, for example the imposition of minimum prices, as well as concerted practices by a number of distinct

organisations. Exceptions are, however, made in article 5 to the prohibition on setting minimum prices for certain sectors, among them the book, newspaper and magazine trades. Also prohibited, in article 14, are those 'abusive' activities by a company or companies, dominant in the market, which have as their object or effect the restriction of competition. Enforcement of these provisions is entrusted to the Competition Council.

The 1983 Act is not applicable to central, regional and local administrations, to the post and telecommunications services, nor does it cover those restrictions which are the result of legal or regulatory provisions, whether or not enacted before or after the competition legislation itself (article 36).

H) The Protection of Pluralism through Content Regulation

RTE, as the established public broadcaster, has traditionally been subjected to public service obligations, concerned both to ensure a wide range of programme types and to promote the national culture. To further the television's educational role the Open University is to be granted preferential terms by the public service operator. As public broadcaster it is also required, under the terms of the 1990 Television Act, to allow access time to certain preferred social organisations. Thus, up to one hour a day is to be allocated to religious bodies (article 25) while political parties, trade unions, professional and economic organisations can also claim a share of available airtime (article 32). Messages from the President of the Republic, the President of the Parliament and the Prime Minister must be carried by the public service broadcaster, and in times of emergency private television operators are placed under an equivalent obligation (article 24). Nevertheless, non government political parties which have a representation in parliament may together share an equal period of public broadcast time to that granted

government (article 40). Individuals and companies are afforded a right of reply where offensive, erroneous or personally damaging material has been transmitted on the public or private television channels (article 35).

In the private radio sector considerable emphasis is placed on the technical and financial aspects of applicants, their economic viability, projected coverage etc. Where there are applicants of equal stature, however, one preferential factor is stated to be a major allocation of time to cultural, educational and informational programmes (article 7.3.c of Decree-Law no. 338 of 1988).

In the television sector the recent law, no. 58/90, sets out in article 6 a range of objectives considered to underpin all television broadcasting, whether provided by public or private actors. These include the familiar aims to educate, inform and entertain the viewing public, with an emphasis being placed on the promotion of cultural values in order to 'express the national identity' and increase the exchange of ideas between Portuguese and foreign citizens. Programming is to be independent, plural, rigorous, objective and distanced from government interference (on this, see also article 15). The wide range of public interests are to be taken into consideration, as well as the needs of children, youth and cultural minorities.

In the private television domain somewhat more rigorous programme requirements have been set than those which pertain for private radio. Here licences are awarded to the applicant whose projected service appears to be most in the public interest, taking into consideration the projected time for cultural, fictional and informational programmes, together with the applicants capacity to satisfy the public diversity of tastes. Finally, television broadcasters are required to transmit regular news services performed by professional journalists (article 23).

1). Transparency Requirements

Considerable importance has been afforded the need for transparency in the mass media, with detailed requirements laid down in the governing legislation for the press and television sectors. These call both for self disclosure of certain details to the public as well as the creation of official registers to catalogue such information as media ownership and shareholdings.

Shares held in private television companies must be nominative (article 9.4 of Law no. 58/90) and television operators are required to publish annually in a national newspaper their company report and accounts. The origin of their finance, whether from their own operations or obtained from external sources must be indicated (article 63 *ibid*). In addition the Director General for Social Communication is required to keep record of all licensed television operators, with details of their capital participation in other mass media organisations (article 61 *ibid*). Finally, all television programmes are to include details of the author, producer and director (article 23 *ibid*).

Shares in press companies must be nominative and the names of all shareholders and the extent of their holdings must also be published each April in all periodicals owned by the company in question (article 7 of Decree-Law no. 85-C/75). Furthermore, all periodicals must have printed within them the names of the director and owner together with the company seat (article 11 *ibid*). The Press Council is to produce an annual report on the state of the Portuguese press detailing the degree of concentration among publishing companies and their financial situation (article 17 *ibid*).

Registers containing full details of periodical publications, press publishing companies, national press agencies, editing houses, foreign press agencies and journalists of the foreign press are kept by the Minister for Social Communication.

12. UNITED KINGDOM

(A) Principles of constitutional law

The United Kingdom is alone in the European Community in not having a written constitution from which an obligation to safeguard media pluralism could be deduced. Neither does it have, therefore, a constitutional court that could influence the way in which broadcasting is organized.

Judicial involvement in the media has also been restricted by an unwillingness to intervene in the decisions of specialist regulatory bodies, or step too far into policy decisions which may be considered to fall within parliamentary, rather than judicial, competence. Most recently the House of Lords refused to overturn the decision of the Home Secretary, taken in October 1988, to use his powers under section 29(3) of the Broadcasting Act 1981, to prohibit the broadcast of direct interviews or statements by members of certain organisations linked with terrorism in Northern Ireland: a ban which covers, most noticeably, elected members of the Sinn Féin political party. Thus, although the concept of "freedom of speech" has found some recognition in British Courts⁽¹⁷²⁾, the lack of a written constitution and the residual nature of such public interests render it a principle of little use to an aspiring litigant.

It is largely the policy of the government of the day that shapes developments in broadcasting, especially when it comes to safeguarding pluralism and preventing concentration. However, as British broadcasting is currently undergoing a process of radical reform and restructuring

(172) A.G. v BBC 1981 A.C. 303, Marshall v BBC 1979, 1 W.L.R. Schering Chemicals v Falkman 1981, 2 All E.R. 848.

following the passage of the Broadcasting Act 1990, a few words of explanation are needed by way of introduction.

(B) A system in a state of flux

(1) The broadcasting system before the reform

Under the traditional UK broadcasting regime, private broadcasting was largely bound by the obligation to serve the general interest and abide by a host of rules which limited the scope for competition and the operation of market forces. The broadcast services provided by the ITV contractors and Channel 4 are to continue under their existing terms until 31 December 1992, with the Independent Television Commission stepping into the regulatory shoes of the IBA for the interim period. The 15 television production companies grouped together within ITV could broadcast only on a regional basis and had to comply with strict programming rules designed to ensure that programmes were diversified, with quotas to be observed for regional material. Channel 4 is to continue broadcasting programmes reflecting tastes and interests that are not catered for by ITV, the aim being to ensure that an adequate proportion of air time is devoted to educational programmes and to encourage innovation in the form and content of programmes.⁽¹⁷³⁾ Channel 4 has hitherto been financed not by its own advertising revenue, but from the profits of the ITV companies, which in return were entitled to sell advertising time on Channel 4. Since Channel 4 had a guaranteed level of income, irrespective of its commercial success, it could not be regarded as just another commercial private T

(173) Section 2(1) of the Broadcasting Act 1981. These obligations have been carried over under the terms of the Broadcasting Act 1990 Section 25

station. In radio, there have not so far been any private broadcasters operating nationwide, but around 50 ILR (Independent Local Radio) companies, which have to provide high-quality programmes, are closely monitored and are occasionally issued with instructions.

Cable and satellite broadcasting regulations under the Cable and Broadcasting Act of 1984 were less restrictive than those of the 1990 Broadcasting Act. Cable ceased to be merely a relay vehicle for existing domestic channels in the early 1980's, but its growth as a distinct broadcast medium has been slow. The total number of homes passed in July 1990 numbered only 1.7 million with a subscriber figure of just 347,000⁽¹⁷⁴⁾. There has been considerable interest from North American investors already established in the field, with US cable and telephone companies controlling 90% of UK cable franchises. Cable operators obtained a considerable market advantage from the confusion surrounding the competing Sky and BSB satellite services: they were able to offer the two services on one system, thus obviating the need to buy and install two different reception aerials. With the merger of the two satellite firms, however, some have seen a black cloud over the future of British cable, fearing that satellite broadcasters could fix service rates high enough to push the cable operators out of business.

The new direct to home satellite services have been more popular than cable with the viewing public and it is thought that the combined service offered by BSkyB will prove even more attractive.

Because there has generally been little competition in broadcasting in the UK, the merger wave that characterizes this market has not so far been much in evidence. The IBA (Independent Broadcasting Authority), a powerful regulator, had flexible instruments at its disposal to prevent such a trend.

⁽¹⁷⁴⁾ Variety, November 10th, 1990 at page 122

(II) The Broadcasting Act 1990

The new Broadcasting Act 1990 has radically changed the structure of private radio and television in the UK. The Government announced the general philosophy underlying the reform, namely keener competition and wider choice for the public, first for radio in its 1987 Green Paper entitled "Radio: Choice and Opportunities",⁽¹⁷⁵⁾ and then for radio and TV in its White Paper of November 1988 entitled "Broadcasting in the Nineties: Competition, Choice and Quality".⁽¹⁷⁶⁾ To broaden the choice of stations, there is to be a fifth broadcast television channel from 1993 ("Channel 5"), as well as new cable and satellite channels and, for the first time, three independent national radio stations. The old ITV companies are to become independent regional broadcasters on what will be known as "Channel 3". They will also be able to broadcast partial programmes of limited length (for example, their own news bulletins). Channel 4 will have a production company, to be established by the regulatory authority, and has retained its special status in most other respects. Nevertheless, Channel 4's status as an innovative and alternative television station may be threatened by the new requirement introduced by the 1990 Broadcasting Act that the station sell its own advertising time. At a time of recession and in a newly competitive audiovisual climate the pressures on Channel 4 to be commercially successful, even at the expense of minority programming will be considerable. Some reassurance may, however, be gleaned from section 26 of the 1990 Act which provides that where Channel 4's estimated qualifying revenue for a given year falls below the prescribed minimum income for that year the ITC may impose a levy on the Channel 3 licencees to be paid to

(175) Home Office, 1987, Consultative Document, London 1987.

(176) Home Office 1988, the Government's Plan for Broadcasting

Channel 4 to cover the shortfall.

The programming requirements which private broadcasters previously had to observe have been replaced by more flexible consumer protection rules that enable the programming structure to be shaped according to criteria that have to do with competition and the public interest. Previous supervision by the IBA will be superseded by a "lighter touch" form of regulation by the Independent Television Commission (ITC) and, for radio, by the Radio Authority. More importantly, ITV will react after the event to programmes broadcast by licensees rather than playing an active role in programming as it had to do under IBA guidelines.

The authors of the White Paper were fully aware of the risk that this policy of "deregulation" and allowing market forces to work could open the door to greater concentration and threaten pluralism: they consequently deemed it necessary, despite some easing of the rules, to limit possible concentration.⁽¹⁷⁷⁾ Schedule 2 of the Broadcasting Act 1990 consequently lays down detailed rules on mergers.

(C) Monomedia concentration

(177) 1988 White Paper, Home Office November 1988, pp. 31-32: "(...) clear rules will be needed which impose limits on concentrations of ownership and on excessive cross-media ownership, in order to keep the market open for newcomers and to prevent any tendency towards

I) Television

The Broadcasting Act 1990 limits the number of licences which can be held by a given organization for each possible type of broadcast⁽¹⁷⁸⁾. Une entreprise donnée ne peut détenir que deux licences régionales pour le nouveau "Channel 3". Only one national Channel 3 licence can be held by any one person and one Channel 5 licence. According to new government guidelines those with controlling stakes in one of the nine "large" regional Channel 3 franchises will be prohibited from taking controlling stakes in other "large" franchises but will be allowed to control in addition one of the smaller six franchises, plus up to twenty per cent in one other franchise and five percent in others. Although under these guidelines neighbouring franchises may be held in common, it is thought that the Home Secretary may disqualify initial bids for adjacent areas, while allowing a "large" franchise holder to take-over a smaller neighbour once the moratorium on take-overs comes to an end in 1994⁽¹⁷⁹⁾. If a company holds a regional or national Channel 3 licence or a Channel 5 licence, it is not allowed to have more than a 20% stake in a company holding a licence for either of the other two categories.⁽¹⁸⁰⁾ This must not only prevent a concentration of programmes but also must guarantee the original independence of channel 3 broadcasters which could be jeopardized if the supply and exchange of programmes were to take place between the same regional and national broadcasters.

II) Satellite

The holder of a non-domestic satellite service licence or a person

(178) Broadcasting Act 1990, Schedule 2, Part III, paragraph 2(1).

(179) Screen Digest, January 1991, page 5, Media Guardian; January 21st 1991, page 21.

providing a satellite television service (other than a non-domestic satellite service) provided on a non-UK allocated frequency but intended for general reception in the UK for general reception in the UK may not have more than a 20% interest in companies holding a domestic satellite licence. Just as, vice versa, domestic satellite licensees can only hold up to 20% in such a satellite service⁽¹⁸¹⁾. All the restrictions on holdings laid down in the Act may be amended by order of the Home Secretary.

In relation to satellite radio services, it is provided that a person who holds a licence for such a service cannot hold more than a 20% interest in a company which holds a licence for a national radio service⁽¹⁸²⁾. The converse applies also. In addition, a person holding a licence to provide a satellite radio service on any frequency allocated to the United Kingdom for broadcasting by satellite ("a domestic licence") cannot hold more than a 20% interest in a company which holds a licence to provide a satellite radio service which is not provided on any such frequency ("a non-domestic licence")⁽¹⁸³⁾. Again, the rule applies also conversely.

III) Radio

Existing local sound broadcasting contracts are to continue in force under the terms of the 1981 Act for the remainder of their contractual term, with only a few amendments and the substitution, as regulatory body, of the new Radio Authority (RA) for the IBA.

For the future, licences will be awarded by the Radio Authority and the

(181). Broadcasting Act 1990, Schedule 2, Part III, paragraph 6(2).

(182) Broadcasting Act 1990, Schedule 2, Part III, paragraph 6(5).

Broadcasting Act 1990 limits to 20 the maximum number of local radio stations that can be owned by each company.⁽¹⁸⁴⁾ A company may hold a licence in respect of only one of the three new national commercial radio stations that are to be set up.⁽¹⁸⁵⁾ Finally, a person may not hold more than six restricted radio licences⁽¹⁸⁶⁾. Apart from those mentioned above in relation to satellite radio services, rules limiting concentration at both national and local level, or restricting multiple shareholdings in the radio sector, have yet to be established.

(D) Multimedia concentration

1) Press/broadcasting cross-ownership

In the United Kingdom, the debate on cross-ownership between broadcasting and the press has been going on since the sixties.⁽¹⁸⁷⁾ The Television Act 1964 made it possible to terminate a broadcaster's licence where the regulatory authorities took the view that a newspaper proprietor's stake in a broadcasting company was contrary to the public interest. Although this rule remained unchanged until the passage of the Broadcasting Act 1990, even when the Television Act was successively amended, it was in practice applied with great caution. Since 1968, the IBA (or its predecessor) has at all events allowed only one newspaper proprietor to hold a majority interest in a television company. Technically, it has prevented such cross-ownership by incorporating

(184) Broadcasting Act 1990, Schedule 2, Part III, paragraph 2(1).

(185) Ibidem.

(186) Ibidem.

(187) For example, a report by the Pilkington Committee on Broadcasting in 1962 sounded a very clear warning about the risks of pluralism being undermined and competition distorted by cross-marketing.

appropriate conditions and clauses in the licensing contracts concluded with broadcasters. This practice was endorsed by the Royal Commission on the Press in 1977 and maintained until the new 1990 Act.

No limits other than the ban on majority holdings have been imposed on press involvement in broadcasting. Local newspaper proprietors have even occasionally been encouraged to acquire an interest in regional television companies.

The Broadcasting Act 1990 lays down more concrete and more specific rules on cross-ownership. Under the Act, the proprietor of a national or local newspaper cannot acquire more than a 20% interest in a company holding a Channel 3 or Channel 5 licence.⁽¹⁸⁸⁾ The provision also applies vice versa, to prevent such a licence holder from acquiring more than a 20% interest in a company running a national or local newspaper.⁽¹⁸⁹⁾ The 20% limit also applies to any interest acquired by the proprietor of a national or local newspaper in an Independent National Radio Station.⁽¹⁹⁰⁾ This restriction also applies conversely to limit those with national radio licences from holding more than a 20% interest in the proprietor of a national or local paper⁽¹⁹¹⁾. It is important to note that the above-mentioned restriction imposed on the proprietor of a local newspaper in respect of a participation in the holder of a licence to provide a regional Channel 3 service applies only where the newspaper and the service each serve an area which is to a significant extent the same as that served by the other⁽¹⁹²⁾.

(188) Broadcasting Act 1990, Schedule 2, Part IV, paragraph 2(1)(a).

(189) Broadcasting Act 1990, Schedule 2, Part IV, paragraph 3(1)(a).

(190) Broadcasting Act 1990, Schedule 2, Part IV, paragraph 2(1)(b).

(191) Broadcasting Act 1990, Schedule 2, Part IV, paragraph 3(1)(b).

In addition, it is provided that the proprietor of a national newspaper who holds more than a 5% interest (but not greater than 20%) in a company holding a Channel 3 or Channel 5 licence or a national radio licence cannot hold more than a 5% interest in any other such company⁽¹⁹³⁾. This rule applies also conversely in respect of the participation by such companies in a company which runs a national newspaper.⁽¹⁹⁴⁾

At local level, the Broadcasting Act 1990 provides that the proprietor of a local newspaper cannot hold more than a 20% interest in a company which holds a licence to provide a relevant local radio service where there is a significant overlap in the zones served⁽¹⁹⁵⁾. This provision applies also conversely in respect of the participation in local newspapers by companies with local radio licences.⁽¹⁹⁶⁾

Although the desirability of press-radio concentration at the local level was debated at committee stage during the passage of the Broadcasting Bill, the 20 % limit to cross investment where there is a common service area was retained. To ensure that undue concentration does not arise through cable-press cross holdings at local level the same provision also prohibits participation over 20 % by local newspapers in local delivery services (and vice versa), again where there is a significant overlap in the areas served⁽¹⁹⁷⁾. However, these thresholds could be modified by the Secretary of State.

(193) Broadcasting Act 1990, Schedule 2, Part IV, paragraph 2(3).

(194) Broadcasting Act 1990, Schedule 2, Part IV, paragraph 3(3).

(195) Broadcasting Act 1990, Schedule 2, Part IV, paragraphs 1(4) and 2(4).

(196) Broadcasting Act 1990, Schedule 2, Part IV, paragraph 3(4).

(197) Broadcasting Act 1990, Schedule 2, Part IV, paragraphs 1(4), 2(4).

The Broadcasting Act does not impose any comparable restrictions on holders of satellite broadcasting licences and their associates, but it does empower the Home Secretary where appropriate to issue orders limiting the interests held by newspaper proprietors.(198) These rules on cross-ownership do not apply to proprietors of papers which do not circulate wholly or mainly in the United Kingdom or a part of it, although the ITC or RA may extend this to papers with a particular influence or circulation in the UK where they deem this to be appropriate.(199)

(ii) Limitations on multimedia concentration in broadcasting

The Broadcasting Act 1990 introduces a detailed series of provisions(200) to deal with concentrations across the various broadcast media. These focus both on the national and local levels as well as on cross interests involving non-domestic or foreign satellite services. At national level, holders of regional or national Channel 3 or Channel 5 television licences, of domestic satellite licences or national radio licences cannot hold more than a 20 % interest in a company holding a licence for either of the other two categories.(201)

(198) Edwards/Buttler, The Broadcasting Bill. Restrictions on Ownership, International Media Law, Avril 1990, page 29(30); Broadcasting Act 1990, Schedule 2, Part IV paragraph 2(5)(e).

(199) Broadcasting Act 1990, Schedule 2, Part IV, paragraphs 1(1) and 1(2).

(200) A 20% cross investment limit has been adopted as one which in the words of the then Secretary of State, Mr. Mellor, "prevents a controlling interest but recognises the benefit to the industry as a whole of permitting access to investment finance". Broadcasting Bill, Standing Committee F, 25th January 1990, Hansard p. 300.

A similar 20 % limit on cross interests has been imposed at local level for the holders of local delivery (cable and MVDS) licences, local radio licences and regional Channel 3 television licences where the zones served significantly overlap⁽²⁰²⁾. It is provided also that the holder of a non-domestic satellite licence or the provider of a satellite television service, broadcasting on frequencies which have not been allocated to the UK but whose service appears to the ITC to be intended for general reception in the UK, cannot hold more than a 20 % interest in a regional or national Channel 3 or Channel 5 licensee, in a domestic satellite licensee or a national radio licensee⁽²⁰³⁾. This is an isolated attempt, in the context of European legislation, to address the issue of concentration at both domestic and foreign (that is for those services which do not use UK allocated frequencies) levels. Finally, holders of satellite radio licences are disqualified from holding more than a 20 % interest in a regional or national Channel 3 or Channel 5 licensee or holders of a national radio licence⁽²⁰⁴⁾. This provision applies also vice versa to limit participation to a maximum of 20 % by holders of one of the specified licences in satellite radio licensees.

The Broadcasting Act 1990 also provides that these restrictions apply to limit participation in companies controlling licence holders and connected persons, to prevent attempts to evade the cross-participation provisions considered above⁽²⁰⁵⁾.

(E) Foreign and other ownership restrictions

(202) Broadcasting Act 1990, Schedule 2, Part III, paragraph 6(7).

(203) Broadcasting Act 1990, Schedule 2, Part III, paragraph 6(2). This rule applies also conversely.

(204) Broadcasting Act 1990, Schedule 2, Part III, paragraph 6(5).

(205) Broadcasting Act 1990, Schedule 2, Part III paragraphs 7 and 8.

The Broadcasting Act 1990 adopts a two-pronged approach to foreign ownership in the audiovisual media. For those activities where the centre of operations would simply be moved outside the UK if foreign ownership restrictions were enforced (e.g. non-domestic satellite services) or where foreign, and in particular North American, investment has been sought (e.g. cable) no such restrictions have been imposed. Thus foreign ownership requirements have not been established for local delivery services, non-domestic satellite radio and satellite television services, licensable sound programme and licensable programme services or for additional services⁽²⁰⁶⁾. For all other licences granted by the ITC or RA applicants must, if individuals, either be EC nationals ordinarily resident in the EC, or, ordinarily resident in the UK, the Isle of Man or the Channel Islands⁽²⁰⁷⁾; if a corporation, a body formed under the law of a Member State of the EC with its registered or head office or principal place of business within the EC, or a body incorporated under the law of the Isle of Man or the Channel Islands⁽²⁰⁸⁾. Any body which does not meet these criteria is disqualified, as are bodies which are controlled by any such body⁽²⁰⁹⁾.

In addition, the Broadcasting Act 1990 sets out a series of disqualifications for ownership which reflect the long-standing suspicion of direct political or religious involvement in British broadcasting. Thus, local authorities and companies in which they have more than a 5% interest are disqualified⁽²¹⁰⁾. Also disqualified are bodies whose

(206) Broadcasting Act 1990, Schedule 2, Part II, paragraph 1(2).
(207) Broadcasting Act 1990, Schedule 2, Part II, paragraph 1(1)(a).
(208) Broadcasting Act 1990, Schedule 2, Part II, paragraph 1(1)(b).
(209) Broadcasting Act 1990, Schedule 2, Part II, paragraph 1(1)(i).
(210) Broadcasting Act 1990, Schedule 2, Part II, paragraph 1(1)(c) and (b).

objects are wholly or mainly of a political nature, certain related bodies and companies in which such bodies have more than a 5% interest(211). The same applies in respect of bodies whose objects are wholly or mainly of a religious nature, certain related bodies and companies in which they have more than a 5% interest(212). In respect of such religious bodies only, the Broadcasting Act 1990 provides that the general rule on disqualification shall not apply, where the ITC or the RA deem appropriate, to licences for non-domestic satellite services, licensable programme services and non-national independent radio services(213). In respect of radio services only the 1990 Act disqualifies certain "publicly-funded" bodies. These are bodies (other than local authorities) which receive more than 50% of their income in the last financial year from public funds, certain related bodies and companies in which they have more than a 5% interest(214). Also disqualified are persons who are subject to "undue influence" from a local authority or political body and certain related bodies, but only where the ITC or the RA deems this to be contrary to the "public interest"(215). In relation to radio services this disqualification applies also where such "undue influence" is exerted by any of the "publicly-funded" bodies mentioned above(216). Finally, the general disqualification applies also to the BBC, the Welsh Authority and certain related bodies(217); advertising agencies, certain related bodies and companies in which they have more than a 5% interest(218). National public telecommunications operators and certain related bodies are not

(211) Broadcasting Act 1990, Schedule 2, Part II, paragraph 1(1)(d) to (h).

(212) Broadcasting Act 1990, Schedule 2, part II, paragraph 2(1).

(213) Broadcasting Act 1990, Schedule 2, Part II, paragraph 2(2).

(214) Broadcasting Act 1990, Schedule 2, Part II, paragraph 3(1).

(215) Broadcasting Act 1990, Schedule 2, Part II, paragraph 4(1).

(216) Broadcasting Act 1990, Schedule 2, Part II, paragraph 4(2)(b).

(217) Broadcasting Act 1990, Schedule 2, Part II, paragraph 5.

(218) Broadcasting Act 1990, Schedule 2, Part II, paragraph 6.

disqualified by the 1990 Act but the Secretary of State is empowered to disqualify them from holding certain categories of licences⁽²¹⁹⁾. The provisions noted above are carefully designed to prevent ownership "through the back door" by certain related or associated organisations. The underlying philosophy of the 1990 Act is that the licence holders themselves should not have direct religious or political involvement, nor should they express their own viewpoints on such issues: rather they are to facilitate the expression of a range of political and religious opinions on their stations.

(F) Ban on mergers under competition law

Alongside the above-mentioned specific rules on media concentration, the UK has general competition rules that can prevent mergers going ahead and are designed above all to stop monopolies being formed. Although they do not contain provisions relating specifically to broadcasters, the competition rules do apply to them too.

Under the Fair Trading Act 1973, the Secretary of State may refer implemented or proposed mergers to the Monopolies and Mergers Commission for vetting and, if they are liable to distort competition, block them or order them to be reversed. The Office of Fair Trading (OFT) also has powers under the Competition Act 1980 to take action against positions of broadcasting firms that are liable to distort competition.

In the press sector section 58 of the Fair Trading Act 1973 provides that the transfer of a newspaper, or of newspaper assets, to a newspaper proprietor whose papers, plus the paper to be transferred, have an average daily circulation of 500 000 or more copies, requires the prior consent of

the Secretary of State. In most circumstances the Secretary of State is required to consider before granting or withholding consent a report prepared by the Commission on whether the proposed transfer will operate against the public interest. Where, however, the Secretary of State is satisfied that the newspaper in question is not economic as a going concern, he may give his consent without reference to the Commission where the newspaper is to continue as a separate newspaper and the case is one of urgency; and must give his consent without requiring a report from the Commission if the newspaper is not intended to continue as a separate newspaper. Similarly, where the Secretary of State is satisfied that the newspaper concerned has an average daily circulation of not more than 25 000 copies he may also give his consent without a reference to the Commission. Where a report is given the Secretary of State remains free to decide whether or not to give his consent to the transfer. Although few newspaper mergers have been blocked under the Fair Trading Act's provisions David Sullivan, publisher of the Sport and Sunday Sport, was prevented from increasing his holding in the Bristol Evening Post in June 1990. Despite recent moves to view the merger regulations solely in competition terms the "public interest" was resurrected, largely, it was felt in certain quarters, to block an operator whose fanciful and "soft porn" papers had found disfavour with the establishment(220).

(G) Guarantees of pluralism within the structure of the broadcaster and in programming content

In the Broadcasting Act 1990 there are no specific restrictions concerning the structure of the broadcaster. The Act marks something of a sea change in British broadcasting, designed to introduce a "lighter touch" form of regulation, more suited to the competitive environment. Thus gone is the familiar requirement to provide a public service to disseminate "information, education and entertainment" and to secure a "wide showing"

for "programmes of merit"(221). In their place the ITC is to "ensure fair and effective competition" in the provision of licensed services and in services connected with them. It must also ensure the provision of services which, taken as a whole, are "of high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests"(222).

The RA is subject to obligations similar to those imposed on the ITC. Thus, it is to ensure diversity of national and local radio services, facilitate the provision of high quality programmes and offer a wide range of programmes calculated to appeal to a variety of tastes and interests, as well as ensuring fair and effective competition in the provision of such services(223).

What is most marked is not, perhaps, the stated objectives to be attained, for a clear continuity with the past exists, but in the way in which such objectives are to be fostered and enforced. Under the Broadcasting Act 1981 the IBA laboured under an obligation to ensure its contractors complied with its codes and the statutory requirements. It had wide powers to review programme schedules, suggest modifications and even deletions(224) - its powers were essentially pro- rather than reactive. In contrast, although the ITC is to oversee compliance with the general licence requirements (covering such matters as taste, decency, the prevention of disorder and with heavy emphasis on accuracy and impartiality), the Commission is required merely to "do all that it can" in this respect and has no power to

(221) Broadcasting Act 1981, section 2.

(222) Broadcasting Act 1990, section 2(2).

(223) Broadcasting Act 1990, section 85(2).

(224) Broadcasting Act 1981, sections 5 and 6.

review schedules in advance. The breach of the terms contained in a licence granted to a Channel 3 or Channel 5 operator may, however, lead to the imposition of a fine, a reduction in the licence period or ultimate withdrawal of the licence, after an initial warning notice⁽²²⁵⁾.

There is also a marked difference in the procedure under which Channel 3 licences are awarded. Once the applicant has met a basic "quality threshold" the ITC is to award a licence to the highest bidder unless exceptional circumstances indicate that the quality of the service proposed by a "low bidder" substantially exceeds that of the "higher bidder". The initial quality threshold is now considerably higher than many had expected, however, with applicants required to show a commitment to allocate sufficient time for high quality news and current affairs programmes, for high quality programmes generally, for regional, religious and childrens' programmes, together with a "proper proportion" of EC programmes⁽²²⁶⁾. A total 25% of time allocated for qualifying programmes is to be set aside for independent productions⁽²²⁷⁾. Applicants may be held to comply with their proposals in these matters by licence conditions imposed by the ITC⁽²²⁸⁾ and enforced by threat of fine or ultimate withdrawal of the licence. In relation to licensed radio services the RA is to secure, inter alia, that programmes do not offend good taste or decency and that news programmes are presented with "due accuracy and impartiality"⁽²²⁹⁾.

(225) These enforcement provisions are extended to domestic satellite services, non-domestic satellite services (with an amendment over the amount of the fine which can be imposed) and to local delivery licences. Similar provisions apply to the radio sector.

(226) Broadcasting Act 1990, section 16.

(227) Broadcasting Act 1990, section 16(2)(h).

(228) Broadcasting Act 1990, section 33.

(229) Broadcasting Act 1990, section 20.

(H) Disclosure and concentration

The Broadcasting Act 1990 contains provisions designed to ensure that acquisitions of interest are disclosed and to prevent circumvention of the restrictions. The ITC may thus impose licence conditions requiring licensees to give advance notice of planned changes in shareholdings or the membership of boards of directors.⁽²³⁰⁾ It can withdraw a licence where the structure of the broadcaster is altered substantially.⁽²³¹⁾ Similar provisions apply also in respect of the Radio Authority⁽²³²⁾. To safeguard against circumvention of the restrictions on concentration, the rules to which the licensee is subject largely apply also to his dependents or persons who may influence him, such as his associates and members of his family.⁽²³³⁾

In contrast to the situation in other countries, however, there is no blanket prohibition in the UK on transferring licences: a licence may be transferred to another company where that company also meets the minimum standards concerning pluralism laid down by law. The ITC or the Radio Authority may withdraw the licence only where this is not the case. One of the special features of the new system is thus that licences may be sold on to the highest bidder once he has passed a pluralism check.

(230) Broadcasting Act 1990, section 5(2)(d).

(231) Broadcasting Act 1990; section 5(2) and (5).

(232) Broadcasting Act 1990, section 88(2)(d) and (5).

(233) Broadcasting Act 1990, Schedule 2, Part I, paragraphs 1(2) to (5).