Part C

The European Union

European Community

The EC's audiovisual policy can be divided into two main areas: that concerned with the infrastructure (such as rules relating to cable networks and satellite dishes); and that concerned with content. The content element can be subdivided into measures where the Community seeks to stimulate the European audiovisual market (such as the MEDIA programmes) and measures which affect Member States' freedom to regulate their own broadcasting market. This note will consider requirements Community law impose on Member States, but will not address the positive measures the Community takes. Note, however, that the Community must be understood in the light of the Union's respect for fundamental rights, especially the right in Article 10 ECHR[45]. The EU Charter of Fundamental Rights also provides the right of freedom of expression, regardless of frontiers, although its legal status and impact is less than clear[46].

I Content

The main piece of Community legislation in this area is the Television without Frontiers Directive[47], as amended[48]. The Directive works on the basic principle that Member States are free to regulate their own broadcasters as they see fit (subject to some basic content requirements set out in the directive) but that broadcasts emanating from other Member States must be able to circulate freely throughout the Community, subject to limited exceptions. EC broadcasters should therefore be subject to only one regulatory regime within the EC. It should be noted that this directive imposes certain minimum standards. Member States are free to impose higher standards than those contained in the directive, but ONLY on broadcasters established within their jurisdiction.

This principle has therefore three elements:

a) the issue of which Member State has responsibility for regulating a given broadcaster (the issue of jurisdiction);

[45] The EC has not acceded to the ECHR. Article 6(2) TEU states, however, that the 'Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human rights'

[46] EU Charter of Fundamental Rights OJ [2000] C-364/1

[47] Directive 89/552/EEC On the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities of 3 October 1989 OJ [1989] L 298/23

[48] Directive 97/36 OJ [1997] L 202/60

b) whether a Member State which receives broadcasts from a broadcaster regulated by another Member State may rely on the limited exceptions to the free movement principles (derogation); and

c) the content requirements, which overlap with the grounds of derogation in (b) but also relate to the quota requirements and the rules relating to advertising and sponsorship.

The Television without Frontiers Directive is currently under review, but changes are not due until at least the end of 2002. Many Member States have not as yet managed to implement the Directive properly, the Commission having recently brought successful enforcement actions against a number of the Member States[49].

a) Scope

A preliminary point is the scope of the Directive: it relates to broadcasters and broadcasting. Article 1 of the Directive defines broadcasting as

> 'the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public.'

The Directive clearly covers both analogue and digital television broadcasting (i.e. point to multi-point), whether this be by terrestrial technology, by satellite or by cable. The question of whether the services are free to air or are subscription channels is also irrelevant: all fall within the scope of the Directive. Radio broadcasts do not fall within the scope of the Directive.

As the Directive also makes clear, 'It does not include communication services providing items of information or other messages on individual demand.' With the convergence of technology between the telecommunications and broadcasting industries the question of where to draw the line between broadcasting and telecommunications services arises. This is problematic in all jurisdictions. When the Directive was revised in 1997, it was suggested that new on-line audio-visual services would be included. This suggestion was not, however, taken up. For the time being, therefore, it seems as if *the Directive does not cover services such as video on demand*, although teleshopping is covered.

[49] Case C-119/00 Commission v. Luxembourg [2001] ECR I-4795

Any audio-visual services which fall outside the scope of the Directive may still fall within Article 49 of the Treaty, which provides for the freedom to provide cross-border services. Potentially, radio broadcasts could also fall within the scope of Article 49, provided the test for the application of Article 49 had been satisfied. Any national rule which would be likely to hinder or impede the cross border provision of services would then be acceptable under the terms of general Community law only if were non-discriminatory, aimed at protecting the public good, used means appropriate to satisfy that goal and the measures were not more intrusive than necessary[50]. Furthermore, home state regulation would have to be taken into account. In the case of discriminatory rules, they can be justified only on the grounds set out in the Treaty. Rules concerning broadcasting which have been caught by Article 49 include the Greek monopoly rules[51] and the Dutch rules limiting who could broadcast advertising[52].

All forms of programming are, in principle, covered by the Directive: the Directive makes specific reference to 'television advertising', sponsorship and teleshopping. Caution must be exercised as to the scope of the rules relating to advertising as the ECJ held in *de Agostini*[53] that certain Swedish rules prohibiting advertising aimed at children and prohibiting misleading advertising of products were 'selling arrangements' as defined by the Court in *Keck*[54], and therefore could fall outside the purview of Community law, provided always that they operated equally in law and in fact. This latter requirement is difficult to satisfy in practice, as the *de Agostini* case shows. Contrary to the general principle that a receiving State cannot impede the transmission of broadcasts by a broadcaster under the jurisdiction of another Member State, where the rules in question fall outside the scope of the Directive, a Member State may take action (though it may be subject to review for compatibility with Treaty requirements). The boundary between this holding and the rules contained in the Directive regarding advertising is not entirely clear.

[50] Case C-76/90 Sager v. Dennemeyer [1991] ECR I-421
[51] Case C-260/89 ERT v. DEP [1991] ECR I-2925
[52] Case C-353/89 Commission v. Netherlands (Mediawet) [1991] ECR I-4069
[53] Cases C-34-36/95 Konsumentombudsmannen v. De Agostini and TV-Shop [1997] ECR I-3843
[54] Joined Cases C-267 and 268/91 Keck and Mithouard [1993] ECR I-6097

b) Jurisdiction

For most issues regarding the content of programming the question of jurisdiction is key. This question is dealt with by amended Articles 2 and 2a. In its original form, the jurisdiction clause was the subject of some litigation: its precise meaning was not clear with the result that the United Kingdom wrongly implemented the Directive in this regard[55]. Following the judgments of the ECJ, the clause was revised taking into account the relevant judgments. As the Directive now stands Article 2(1) allocates the responsibility for ensuring that broadcasters comply with the Directive's provisions to one particular Member State in each case, the remaining paragraphs in that article setting down the procedures for identifying which Member State is responsible for regulating a given broadcaster. Article 2(3) enumerates a list of increasingly complicated factual patterns taking into account where the legal head office of the broadcaster is; where editorial decisions are taken; and where the workforce is located, whilst Article 2(4) contains a fall back clause. Basically, the matter of jurisdiction is determined by the question of establishment, but seeing as under EC law a company may be established in more than one Member State, other factors must now be taken into account[56]. The categories in Article 2(3) are:

(a) Editorial decisions about programme schedules (not individual programme content) and the broadcaster's head office are in the same Member State. In this case the Member State where the head office is located (and where editorial decisions are made) will have jurisdiction.

(b) Where editorial decision-making and the head office are not in the same Member State, the crucial factor is the location of the workforce. There are three possibilities in this category:

i. The Member State where a 'significant part' of the workforce operates will have jurisdiction.

ii. If a 'significant part' of the workforce operate in both the Member State where the head office is AND the Member State in which editorial decisions are made, the Member State in which the

[55] Case C-222/94 Commission v. UK [1996] ECR I-4025. In that case the ECJ referred to its test for establishment set down in Case C-221/89 R v. Secretary of State for Transport, ex parte Factortame Ltd [1991] ECR I-3905

[56] In its case law the ECJ highlighted the importance of the location of editorial decision-making where the is more than one place of establishment within the EC: Case C-222/94 Commission v. UK, supra see also Case C-11/95 Commission v. Belgium [1996] ECR I-4115

head office is located will have jurisdiction.

iii. If a 'significant part' of the workforce is found in neither the Member State in which editorial decisions are taken nor in the Member State in which the head office is located, then the Member State with jurisdiction to regulate the broadcaster will be that in which the broadcaster first began broadcasting in accordance with the law (i.e. pirate stations would not count for these purposes) provided the broadcaster maintains 'a stable and effective link' with that Member State's economy.

(c) Where broadcasters are linked to a third country (such as the United States of America) but have a link with a Member State (whether it be a head office or because broadcasting decisions are taken there), that Member State will have jurisdiction.

Article 2(4) applies when none of the above categories are applicable. It states that a broadcaster will be under the jurisdiction of a Member State if one of the following occur:

(a) the broadcaster uses a frequency granted by the Member State; or

(b) if (a) does not apply, the broadcaster uses satellite capacity appertaining to the Member State; or

(c) if (a) and (b) do not apply, the broadcaster uses a satellite up-link situated in the Member State.

If a Member State does not have jurisdiction it may not stop for reasons falling within the fields co-ordinated by the Directive cross border transmissions from other Member States[57], even if the recipient Member State believes that the originating Member State, for whatever reason, has not ensured that the broadcaster in question is complying with the advertising and quota requirements in the Directive[58]. In limited circumstances, a Member State may take action if the broadcast contains material which contravenes Article 22 and 22a.

c) Grounds of Derogation/ Negative Content Requirements

The Directive provides that Member States may prevent the broadcast of programming originating from other Member States on certain limited grounds:

[57]See Article 2a

[58]ICase C-14/96 Criminal Proceedings against Paul Denuit [1997] ECR I-3143

- those which might seriously impair the physical, mental or moral development of minors (and this includes pornography or programming which contains gratuitous violence) (Article 22);
- or those which contain any incitement to hatred on grounds of race, sex, religion or nationality (Article 22a).

As regards programming which might impair minors' well-being and development, as opposed to *seriously* impair it, Article 22(2) provides that such programming may be broadcast provided it is ensured either by reference to the time the material is broadcast or by the use of a technical device (such as a v-chip) so that minors would not normally see/hear such material. Should the programmes be broadcast in an unscrambled form, broadcasters should also ensure that:

- either the programming is preceded by an acoustic warning; or
- the programming is identified by the presence of a visual symbol throughout the programme's duration.

Member States may additionally prevent broadcasts which do not comply with these watershed/technical means requirements.

These terms identifying the scope of the derogation are to be determined by the Member States[59] and their precise extent is not yet known. There are some documents that might provide some guidance in this area: there is a resolution regarding the protection of minors[60] and a proposed legislative act under the JHA pillar. Neither of these contains legally binding norms. It does not seem that uniformity across the different Member States is necessary. Note also that any attempt to derogate from the free movement of services must comply with fundamental rights, such as the freedom of expression contained in Article 10 ECHR.

Before a Member State may take action against a broadcast, certain procedural requirements must be met.

[59]Case E-8/97 TV 1000 Sverige AB v. Norway, judgment 12 June 1998

[60]Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity OJ [1998] L 270/48. See also the more recent evaluation report (COM (2001) 106 final) on the measures the Member States adopted in relation to the Recommendation. The Commission has suggested that the resulting codes of conduct be reviewed as part of the Directive review process: IP 01/273

1) Not only must the broadcaster have violated one of the principles set out in Articles 22 and 22a, but the broadcaster must have done so 'manifestly, seriously and gravely'. To a certain extent, it would seem that it is for individual Member States to decide when this has occurred, although a Member State cannot use this provision as a disguised restriction on trade and the measure must be proportionate[61]
2) The broadcaster must have violated the relevant principles during the previous twelve months on at least two prior occasions.
3) The Member State must write to the broadcaster and to the Commission notifying them of the alleged infringements and the steps the Member State intends to take should another violation occur again
4) The recipient Member State must consult the transmitting Member State and the Commission to try to obtain an amicable settlement. After a period of 15 days from the notification in c), if the problem persists the Member State may take action.

One thing is clear; a Member State cannot rely on these grounds of derogation to impose blanket bans; the prohibition must relate to specific channels or broadcasters. Further, Member States would not be permitted to impose standards on incoming broadcasts different from those that they impose on domestic broadcasters.

d) Content 1 - Decency, IPR, Sport and European Quotas

As a corollary to the procedures noted above for derogation from the free movement principle, Articles 22 and 22a put each Member State under an obligation to ensure that broadcasters under its jurisdiction do not broadcast programming which contains:

- material which might seriously impair the physical, mental or moral development of minors, in particular pornography or programming containing gratuitous violence; or
- any incitement to hatred on the grounds of race, sex, religion or nationality.

[61] See Commission opinions C(96) 3933 final Rendez-vous Television and C (95) 2678 final XXXTV

The question of the continued need for watershed requirements given technological developments will be reviewed as part of the review of the Directive.

By virtue of Article 23, Member States are under an obligation to provide a right of reply (or equivalent remedies) to any natural or legal persons whose legitimate interests, notably their that person's reputation, have been damaged by an assertion of incorrect facts in a television programme. This right is in addition to any rights under civil, administrative or criminal law that the person injured may have. The exercise of the right cannot be limited by unreasonable conditions and the reply must be transmitted within a reasonable time of the request being submitted and in an appropriate manner.

Each Member State is also under an obligation to ensure that broadcasters under its jurisdiction do not broadcast cinematographic works (films) outside periods agreed with the rights holders[62]. A separate directive provided for the introduction (if national IPR laws did not already cover the matter) of intellectual property rights for both satellite broadcasts and cable retransmission of television programming[63]. Further rules regarding copyright were introduced by the Directive on Copyright in the Information Age[64].

Following the 1997 amendment to the Directive, by virtue of Article 3a of the Directive each Member State has the freedom, if it wishes, to ensure that events that are perceived by the Member State to be of major importance for society are broadcast so that a substantial proportion of the viewing public in that Member State may see the event free to air. A Member State may choose not to avail itself of this power. To do so the Member State must follow the procedure set down in Article 3a.

1) The Member State must draw up the designated list of events of major importance 'in a clear and transparent manner in due and effective time'. The Member State should also determine

[62]A high level of piracy continued to be a problem in some Member States until relatively recently: see IP/01/435

[63]Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ [1993] L 248/15

[64]Directive 2001/29/EC of 22 May 2001, OJ [2001] L 167

whether the whole of the event should be available, or whether part would suffice and whether the coverage should be live or deferred. This may be enshrined in national law as the Member State sees fit (in line with its own constitution).

2) The Member State must notify the Commission immediately of any measures it takes in this regard.
3) The Commission has a three month period in which to verify whether the measures are compatible with Community law and to communicate them to other Member States. In doing so the Commission will contact the Contact Committee established under Article 23a of the Directive.

Each Member State is to ensure that broadcasters under its jurisdiction do not seek to circumvent the listing of an event in another Member State by acquiring the exclusive rights to such an event and broadcasting the event in such a way that a substantial proportion of the public in the Member State where the event is listed is precluded from viewing that event free to air in the manner specified in the listing. This obligation arises irrespective of whether the Member State has exercised its own right to list events of major importance. The scope of the UK implementing measures has recently been considered by the House of Lords, but the court did not find it necessary to make a preliminary ruling on the issue[65]. Currently, there is thus no guidance from the ECJ on how Member State may best comply with this requirement.

Articles 4-6 of the Directive set down quotas in respect of European works and European independent works. The Directive states that, as far as practicable, Member States must ensure that a majority of a broadcaster's transmission time must be devoted to 'European works' as defined in the Directive and that a further 10% should, again where practicable, be reserved for European independent works. Certain categories of programming are excluded from this calculation: sports events, news, game shows[66] advertising, teletext services and teleshopping.

[65] R v. Independent Television Commission, ex parte TV Danmark 1 Ltd, judgment 25 July 2001, [2001] UKHL 42, http://www.parliament.thestationery-office.co.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm

[66] Note that the EBU distinguished between games shows and quizzes, though it is not clear whether the EC has adopted this distinction

The first point to note is that it is not clear that these obligations are fully legally binding; it has been said that they are rather a political commitment. It would seem that in any event a Member State would seem to have some sort of good faith obligation in this respect not to ignore these rules completely.

The Commission also compiles a report showing the degree of compliance with these obligations. Member States therefore need to have some system in place for obtaining and collating the necessary information for transmission to the Commission. Note that although the obligation under EC law falls on the Member States, the Commission's practice has been to look at the performance of individual broadcasters.

The national system should consider a working definition of 'European works' and independent'. It should be noted that, although the European quotas could in practice be satisfied by national productions (save for those in excluded categories), national rules cannot discriminate against other EC programming. Therefore any national obligation must be phrased in terms of 'European' rather than 'national' programming. 'European works' is defined in Article 6 as meaning the following:

(a) works originating from Member States;
(b) works originating from European third States party to the European Convention on Transfrontier Television of the Council of Europe and made mainly with authors (writers and, arguably, directors and producers) and workers (presumably production crew) residing in one or more of the Member States or States party to the European Convention on Transfrontier Television of the Council of Europe;
(c) works originating from other European third countries and made exclusively, or in co-production with producers established in one or more Member States, by producers established in one or more European third countries with which the Community has concluded agreements relating to the audio-visual sector, provided the works are made mainly with authors and workers residing in one or more European States.

Although it might be possible to 'borrow' the definition of 'European works' from the Directive, the concept of independent works in the Directive is looser. The recitals to the Directive suggest that in the Member States, in implementing this aspect of the Directive, should take 'appropriate account of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of the secondary rights'. Amongst current Member States there is little uniformity as to what this term means, some Member States having failed to adopt a specific definition.

The quota rules do not apply as a matter of Community law to television broadcasts intended for local audiences, not forming part of a national network (Article 9). There is, of course, nothing to stop a Member State imposing these requirements on the local networks under its jurisdiction as a Member State remains free to impose higher standards on those broadcasters within its jurisdiction (Article 3(1)).

e) Content 2 - Advertising, Sponsorship and Teleshopping

The purpose of the Chapter on Advertising was to harmonise the rules on television advertising and sponsorship. Given the ruling in *de Agostini*[67], and the existence of other directives on advertising, someone seeking to advertise on television or to broadcast advertisements would be well advised not to limit their enquiries about relevant rules to just the provisions on advertising in the Directive. The question of whether such detailed rules, specifically as to duration, remain relevant in a digital environment is one of the issues to be addressed in the review of the Directive.

Advertising is defined in the Directive as:

> 'any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment'.

[67] Cases 34-36/95, supra

This would seem to exclude some categories of publicity material such as charities seeking donations, party political broadcasts and public information announcements ("Don't drink and drive" campaigns for example). Any limitation on frequency/duration of advertisements would not seem to apply to these forms of broadcasting (Article 18(3)).

Sponsorship means 'any contribution made by a public or private undertaking not engaged in television broadcasting activities or in the production of audio-visual works to the financing of television programmes with a view to promoting its name, its trade mark, its image, its activities or its products'.

Teleshopping consists of 'direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment'. Note that rules contained in other Directives (such as the Distance Selling Directive) may apply to the contract of sale/contract for the supply of services themselves, but that any such rules need not form part of broadcasting regulation.

Advertising and teleshopping must be easily recognisable as such and must be kept separate from other parts of the programme service by visual means or sound. Isolated advertising and teleshopping spots are to remain the exception and subliminal techniques and surreptitious advertising are prohibited. Surreptitious advertising is defined as:

> 'the representation in words or pictures of goods, services, the name, the trade mark or activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve as advertising and might mislead the public as to its nature.'

Intention is found, in particular, when the product placement is done in return for payment or similar consideration.

Placement and Duration of Advertising

The Directive also contains rules regarding the placement of advertising and teleshopping slots, and as to their duration. The underlying principle is that the integrity and value of the programme and the rights of

the rights holders are not prejudiced. In determining the integrity of the programme, the duration and nature of the programme together with any natural breaks should be taken into account. As regards sports programmes and other programmes which are structured in autonomous parts, advertising and teleshopping spots may only be inserted between the parts. As regards feature films, provided that their scheduled duration is in excess of 45 minutes, an interruption may be scheduled in respect of each period of 45 minutes and a further interruption may be permitted if the film is at least 20 minutes longer than 2 or more complete periods of 45 minutes. With the exception of sporting events and other similarly structured programming, at least 20 minutes should elapse between each successive advertising break. The question of whether broadcasters should use the gross (i.e. including the advertising time in the calculation of the length of a film) or the net (taking the length of the film without advertising) was addressed in *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD)* v. *Pro Sieben*[68]. In that case, the ECJ held that the gross principle was to be adopted but that the national authorities could impose higher standards on broadcasters established within their jurisdiction.

Advertising may NOT be inserted in any broadcast of a religious service. Advertising may not be inserted in news and current affairs programmes, documentaries, religious programmes and children's programmes when the scheduled duration is less than 30 minutes. Where their scheduled duration is more than 30 minutes, then there shall be a period of at least 20 minutes between successive advertising or teleshopping spots. News and current affairs programmes may not be sponsored.

Advertising and teleshopping (with the exception of teleshopping windows for the purposes of Article 18a) together may not exceed 20% of the transmission time. Advertising spots on their own may not exceed 15% of the transmission time. Within any one clock hour advertising/teleshopping shall not exceed 20% of the time. In calculating advertising time, announcements made by the broadcaster in respect of its own programming (including ancillary products directly derived from those

[68]Case C-6/98 Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. Pro Sieben [1999] ECR I-7599

programmes) and public service announcements/charitable appeals are not to be taken into account.

Article 18a permits the broadcasting of teleshopping 'windows'. These windows are to be of an uninterrupted duration of at least 15 minutes a broadcaster may broadcast no more that 8 such windows per day with a total broadcast time of no more than three hours per day. Any such windows must be clearly identified as such.

Content of Advertising/Teleshopping

Advertising and teleshopping shall have regard to the following principles. It shall not:

- prejudice respect for human dignity[69];
- include discrimination on grounds of race, sex or nationality;
- be offensive to religious or political beliefs;
- encourage behaviour prejudicial to health or safety;
- encourage behaviour prejudicial to the protection of the environment.

Special rules regarding the protection of minors also apply. Advertising and teleshopping must NOT do any of the following:

- directly exhort minors to buy a product or service by exploiting their credulity;
- directly encourage minors to persuade their parents or others to purchase goods or services
- exploit the special trust minors place in parents, teachers or other persons
- unreasonably show minors in dangerous situations.

Additionally, teleshopping must not exhort minors to contract for the sale or rental of goods or services.

The following types of product/service may <u>not</u> be advertised:

- cigarettes and other tobacco products;
- medicinal products or treatment available only on prescription within the Member State with jurisdiction;

[69]See Resolution of the Council and the representatives of the Governments of the Member States meeting within the Council of 5 October 1995 on the image of women and men portrayed in advertising and media OJ [1995] C 296/15

Teleshopping for medicinal products requiring a marketing authorization within Directive 65/65/EEC and for medical treatment is likewise prohibited. Tobacco companies may not sponsor programmes and undertakings involved in the manufacture or sale of medicinal products may not promote specific medicinal products or treatments.

The Directive does not, as yet, expressly address new forms of promotional material such as infomercials, so it is not yet clear which rules apply to them: depending on the make up of the infomercial they could be seen as advertising or teleshopping or, arguably, neither. It would seem that the spirit of the Directive (and the rules on surreptitious advertising) would suggest that at the least, infomercials be easily recognizable as such and following the ruling of the ECJ in *RTI*[70] the wording of Article 18 'and other forms of advertising' is not limited to the types of advertising specified in that article. The rules relating to maximum duration of advertising could well apply to them

II Infrastructure

a) Satellite

The Green Paper in the field of satellite communications recommended full liberalization of the satellite services and equipment sectors, including the abolition of all exclusive or special rights in this area (subject to licensing procedures) as well as the unrestricted access to space segment capacity[71]. The Telecommunications Terminal Equipment Directive[72] (as amended[73]) required Member States to eliminate licensing requirements for consumer reception antennae. More recently, national rules regarding taxes on satellite dishes, planning rules and other rules relating to the acquisition and installation of a satellite dish have come to the attention of the Commission. In a Communication[74], the Commi-

[70]Case C-320/94 RTI v. Ministero delle Poste e Telecommunicazioni [1996] ECR I-6471

[71]Council Resolution on the Green Paper OJ [1992] C8/1

[72]Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular regard to satellite communications OJ [1994] L 268/15 (the Satellite Services Directive)

[73]Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular regard to satellite communications OJ [1994] L 268/15 (the Satellite Services Directive)

[74]Commission Communication on the Application of the General Principles of Free Movement of Goods and Services - Articles 28 and 49 EC - Concerning the Use of Satellite Dishes

ssion has suggested that in principles such rules are contrary to Article 49 EC, although they may be justified on public interest grounds. A case on this point has come before the ECJ concerning the imposition of a tax on satellite dishes, and the ECJ took a similar approach to that adopted by the Commission[75].

The Satellite Services Directive[76] provided for an open market in the use of satellite telecommunications facilities, including uplink stations used to transport broadcast signals to the satellite. The provision of satellite network services for the conveyance of television programmes (and also radio) is a telecommunications service for the purpose of the Directive - the content of such broadcasts does not fall within the scope of this Directive (see further above). Member States were thus required to withdraw special or exclusive rights which substantially affect the ability of other undertakings to import, market, connect bring into service and/or maintain telecommunication terminal equipment in a given area or to provide telecommunications services, save where such rights are awarded according to objective, proportional and non-discriminatory criteria. Licensing procedures to safeguard essential interests, such as security of network operations, maintenance of network integrity, interoperability of services, data protection and the effective use of the frequency spectrum and the avoidance of harmful interference between satellite telecommunication systems and other space based or terrestrial technical systems. An important point to note is that under Article 7, the allocation of radio frequency spectrum and surveillance of usage conditions need to be separated from the incumbent telecommunications operator: that is an independent organisation.

Satellite earth station equipment must satisfy the essential requirements set down in Council Directive 93/97/EEC[77]. Licensing procedures for telecommunications facilities including satellite facilities and services (excluding broadcasting content) are subject to a common framework set out in the Licensing Directive[78]. Furthermore, the Services Directive aims to facilitate administrative or judicial review of such licensing pro-

[75]Case C-17/00 Francois de Coster v. College des Bourgmestres et Echevins de Watermael-Boitsfort [2001] ECR I-9445
[76]Commission Directive 94/46/EC, ibid.
[77]OJ [1993] L 290/1
[78]Directive 97/13/EC OJ [1997] L 117/15

cedures by arguing that 'reasons are given for any refusal and that there is a procedure for appealing any such refusal'. This is similar to the approach taken in Article 6 of the Terminal Equipment Directive.

b) Cable

From 1 January 1996 Member States were required to remove restrictions prohibiting cable operators from providing all liberalized telecommunications services such as home banking, interactive video games[79]. Since 1st January 1998 cable companies have been allowed to provide basic voice telephony[80]. Following a study which concluded that joint provision of cable tv and telecommunications networks slows down the development to a full multimedia infrastructure, the Commission in 1999 amended its directive on telecommunications networks to permit telecommunications operators to operate cable networks, only if it used a separate legal entity to do so[81]. The question of whether/how telecommunications companies may operate cable networks is due to be reviewed at the end of 2002.

c) Television Standards

Following the Decision for an Action Plan on the Introduction of advanced Television services in Europe[82], which had the aim of accelerating development of the 16:9 wide screen format on 625 or 1,250 irrespective of the technology used (terrestrial, satellite or cable), the Community also adopted a Directive on Television Standards (see Article 1)[83]. Unlike previous attempts to foist a particular technology on Europe, the Directive is technology and service neutral, giving a range of options to the Member States as to standards used. In one sense this is its great weakness: there have been fears that because of the variations in national implementation of the Directive there is a danger of rival systems and regulatory fragmentation. A review has been called for.

[79] Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services OJ [1995] L 256/49

[80] Directive 95/51/EC amending Directive 90/388/EEC OJ [1995] L256/49

[81] Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities. OJ [1999] L 175/39

[82] Council Decision 93/424/EEC of 22 July 1993

[83] Directive 95/47/EC of 24 October 1995 on the use of standards for transmission of television signals OJ [1995] L 281/51

Article 2 of the Television Standards Directive sets out the standards that can be used whether by cable, satellite of terrestrial broadcast.

1) where services are not fully digital:
wide screen/625 lines:
- 16:9 D2-MAC transmission system; or
- a 16:9 transmission system that is fully compatible with PAL or SECAM

High definition: HD-MAC transmission system

2) where services are fully digital: 'a transmission system which has been standardized by a recognized European standardization body'. The system must be capable of distributing wide screen format services.

Televisions of a certain size (in excess of 42cm diagonal) must be fitted with at least one open interface socket of a standard recognized by a European standards body[84]. The purpose behind this requirement is the facilitation of connection of peripheral devices such as additional decoders and digital receivers.

When cable companies retransmit signals received in 16:9 format shall be retransmitted in at least the wide screen 16:9 format.

d) Conditional Access

The Directive envisages that standard common unscrambling algorithms shall be adopted for decrypting encrypted broadcasts. Consumer equipment capable of unscrambling encrypted signals must have the capability of using the European common standard (i.e. a common algorithm specified by ETSI) and the capability of display signals which have been broadcast in the clear, that is in unencrypted format. More generally, Member States are under an obligation to ensure that operators of conditional access services who produce and market access services to digital television services do so on a fair, reasonable and non-discriminatory basis and that they comply with the principles of EC competition law. This is particularly important when the operator occupies a dominant position within the market for the purposes of Article 82, a provision which prohibits the abuse of such a position. Operators are to be required to keep separate accounts of their activities as conditional access providers and their other activities (e.g. as broadcasters).

[84] Article 3 of the Transmission Standards Directive, ibid

Similarly those that hold IPR in respect to conditional access technology, the holders of the IPRs should, when granting licences to manufacture, do so on fair, reasonable and non-discriminatory terms and should not include conditions which would prohibit, deter or discourage the inclusion in the same product of any of the following:

- a common interface allowing connection with several other access systems
- means specific to another access system.

Note the obligation for a common interface should not be understood as obliging all manufacturers to fit a common interface but rather as precluding the owner of a conditional access system from stopping conditional access manufacturers from including such a common interface. Further, televisions containing an integrated decoder must allow for the possibility of fitting at least one standardized socket permitting connection of other devices.

Member States are under an additional obligation to ensure that potential complainants in disputes in this area have easy, inexpensive access to appropriate dispute resolution mechanisms.

It should be noted in this context that the Competition Directorate General of the European Commission is beginning to develop its case law in the field of multimedia mergers and vertical integration in the information technology and communications industries so as to prevent future markets being foreclosed through the use of gatekeeper technologies. These issues may have an effect on operators of conditional access services, particular those with gatekeeper intellectual property rights. This field is, however, only now being developed and is therefore too soon to draw any firm conclusions. The impact of competition policy is discussed briefly, below.

The Community has also enacted a Directive on conditional access[85] following consultations on the Green Paper on Legal Protection for Encrypted Services[86]. The purpose of the Directive is to approximate national measures which relate to illicit devices giving unauthorised access to protected services (e.g. pirate decoders).

[84] Directive 98/84/EC on the Legal Protection of services based on, or consisting of, conditional access OJ [1998] L 320/54

[86] COM (96) 0076

The Directive is more broadly drawn than just television broadcasting, including radio and information society services[87]. For the purpose of this Directive conditional access is taken to mean where access to the protected services in an intelligent form is conditional upon prior individual authorisation. Associated services include the installation, maintenance or replacement of conditional access devices together with commercial communication in connection with both conditional access devices and protected services.

Taking an approach similar to that taken in Television without Frontiers Directive, this Directive aims to provide a one stop set of regulations with one Member State being responsible for the prohibition of the prohibited activities on its territory and the provision of sanctions for failure to comply. Thus Member States may not restrict the provision of protected services, or associated services, which originate in another Member State or restrict the free movement of conditional access devices on any grounds coordinated by the Directive. As with the Television without Frontiers Directive, should a Member State seek to restrict either conditional access services or devices on grounds not dealt with by the Directive, any such national measures will be assessed according to standard Treaty principles under Article 49 or 28 EC as the case may be.

The obligation on the Member State is to prohibit certain activities:

- the manufacture, import, distribution sale, rental or possession for commercial purposes of illicit devices;
- the installation, maintenance or replacement for commercial purposes of an illicit device;
- commercial communications promoting such devices.

Sanctions are to be provided within the normal framework of national legislation but are to be effective, dissuasive and proportionate. Member States should also ensure that the victims of the infringing activity have appropriate remedies.

[87] Information Society Services are defined inn Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services OJ [1998] L 204/37 as amended by Directive 98/48/EC OJ [1998] L 217/18. Information society services are defined as services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

e) Telecommunications Package: An Overview

The Community undertook a review of the electronic communications sector during 1999, against the backdrop of converging technologies in the electronic communications sector (a sector which is seen as including telecommunications; broadcasting and use of the Internet). The fundamental principle is that the infrastructure for these different types of communication should be regulated in the same way (i.e. the rules are technology neutral), whereas content may be justifiably treated differently. As a result of the review, the 'communications package' was finally adopted in 2002 and the Member States have until 24th July 2003 to implement the directives making up the package. Until the existing regulatory framework, the ONP Directive[88], will remain in place. Although the communications package will principally affect the regulation of the telecommunications sector, it will have some knock on consequences for broadcasters, particularly as far as access to other networks; application programme interface; and spectrum policy are concerned. The main aim of the review was to introduce a competition law based regulatory regime.

The regime is made up of a number of directives fitting within a Framework Directive[89]. The other directives are: the Access and Interconnection Directive[90]; the Universal Service Directive[91]; and the Authorisations Directive[92].

The Framework Directive hopes to encourage the adoption of an open application program interface (API) - that is the software that interfaces between different sorts of applications. In the absence of an open standard, those with proprietary software are to be encouraged to make the necessary information available on fair and non-discriminatory grounds. This provision is to be kept under review. If, within one year of implementation, the Commission considers it necessary to attain to ensure interoperability and freedom of choice, it may take steps to adopt mandatory standards. Further, the Access Directive contains specific provision on allowing access to intelligent network services and software systems[93].

[88] Directive 90/387/EEC OJ [1990] L 192/1
[89] Directive 2002/21/EC OJ [2002] L 108/33
[90] Directive 2002/19/EC OJ [2002] L 108/7
[91] Directive 2002/22/EC OJ [2002] L 108/51
[92] Directive 2002/20/EC OJ [2002] L 108/21
[93] See e.g. Article 12(g) and (h)

The Conditional Access Directive seeks to ensure that operators can negotiate fair and reasonable access to each others' facilities. It accepts that some players are stronger than others and therefore puts those operators that have significant market power or dominance under further obligations; such as transparency, accounting obligations and non-discrimination. In this it is developing ideas present in the earlier conditional access television directive.

Spectrum policy is dealt with in the by a provision in the Framework Directive[94], the Authorisations Directive[95] and with a Radio Spectrum Decision[96]. The Decision aims at encouraging Member States to co-ordinate spectrum management policies. The Authorisations Directive sets down principles relating to the grant of individual rights for the use of radio frequencies; it applies 'to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service, normally for remuneration[97].' As a result, use of systems such as citizens band radio is not covered by the Directive. The Directive does not, however, cover conditional access systems, which are dealt with by Directive 98/84[98].

The general principle underlying the directive is that the 'least onerous authorisation system possible should be used', that is a general authorization approach which does not require any specific decision or administrative act. In effect, the Directive suggests a class licence approach. This is intended to be a business friendly approach to regulation, but it does not mean that Member States cannot impose conditions on the licences, or verify that those conditions have been met. Articles 3 and 4 identify the rights to be granted by such general authorisations, which should be subject to transparent and non-discriminatory processes.

Crucially Article 13 of the Framework Directive allows Member States the rights to impose fees for the use of frequencies. An amendment to the recitals, inserted at the

[94] Directive 2002/21/EC OJ [2002] L 108/33
[95] Directive 2002/20/EC OJ [2002] L 108/21
[96] Decision 676/2002/EC on a regulatory framework for radio spectrum policy OJ [2002] L 108/1
[97] Recital 5 to Directive 2002/20/EC
[98] Directive 98/84/EC OJ [1998] L 320/54

insistence of the European Parliament, makes clear that where 'in the case of competitive of comparative selection procedures' such as spectrum auctions 'payment arrangements should ensure that such fees do not in practice lead to selection on the basis of criteria unrelated to the objective of ensuring optimal use of radio frequencies'[99]. This, is to be hoped, will provide the smaller players with some protection against being outbid at such auctions; or even protect larger operators against themselves[100]. The framework directive also permits Member States to make provision for licensees to trade spectrum.

III Impact of Competition Policy

Although the possibility of a media merger regulation has been discussed within the European institutions, currently there are no media specific rules concerning restrictions on accumulation of ownership. The normal competitions provisions in the Treaty, Articles 81 and 82 will apply. Article 81 provides:

> 'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

Article 81(3) provides for the possibility of some rules which have a pro-competitve effect being exempted from this prohibition. Article 82 states:

[99] Recital 32
[100] see the fiasco of the national 3G auctions

> 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.'

These provisions have been interpreted widely and have in some instances been held to cover the decisions of trade associations. Traditionally, the Commission and the ECJ have been concerned particularly with horizontal restraint of trade. In more recent decisions, the Commission is being to look at vertical arrangements as well, particularly as regards the new economy sector.

Broadcasting may also be affected by the state aid rules contained in Articles 87-89 EC. These rules seek to limit the aid given by Member States which has the effect of distorting competition or which threatens to distort competition. In principle, aid given by Member States, in whatever form (licence fee, tax rebate, preferential loan rate) fall within the scope of these provision. There are limited exceptions for aid granted in respect of certain public service obligations[101]. It seems that clear definitions of the public service obligations will be required as will clear accounting on the part of the recipients of such aid to show that the aid is linked to public service obligations[102]. The Commission in assessing this issue, must also take into account the Protocol on Public Service Broadcasting' adopted in June 1997. The Commission adopted, in December 2001, specific guidelines on state aid in relation to public service broadcasting. In doing so, it seemed concerned not to foreclose Member States' choices regarding scope and mechanism for funding public service broadcasting.

[101] See Services of General Interest in Europe OJ [1996] C 281/3

[102] See Recommendations of High Level Group on Audio-visual Policy and Commission Decision State Aid No NN88/98 - United Kingdom - Financing of a 24-hour advertising free news channel out of the licence fee by the BBC - see especially paragraphs 75 et seq.

France

Overview

Originally in France, as with other current Member States of the European Union, there was a broadcasting monopoly. There were some concerns about governmental influence in content. Again, like many other European states, the broadcasting sector has opened up considerably since the 1980's, with an influx of private operators and the impact of new broadcasting technologies, cable and satellite.

The starting point for this was probably the establishment on Canal Plus in 1984, a subscription television channel broadcasting across the terrestrial network. It should be noted that initially, despite Canal Plus' 'private' status, the French government initially retained certain holdings in the company and, arguably, at that stage still had the capacity to influence the broadcaster. Subsequently, more private operators were introduced and TF1 was privatized and the influence of the government in Canal Plus was diminished when Agence Havas, one of its principal shareholders, was privatised.

Cable networks developed slowly in France, although during the 1990's, as a result of government measures, the position seems to have been improving. Similarly, the French government has taken action to stimulate satellite broadcasting. In particular, the French entered into an agreement with Germany to try to develop European satellite standards[103] and also to create a cultural channel, designed to counter mass-appeal programming, particularly that of American origin. These new channels, especially theme channels, brought an increase in competition which the public sector broadcasters - used to the comfortable monopoly and then oligopoly, found threatening, partly also because the fees funding the public service broadcasters had not kept pace with costs.

The French market currently comprises seven national terrestrial television channels, three of which are private and four public service channels. The market leader is the private channel TF1, although France 2

[103] See for example the development of the D2 MAC - how successful the standard was is debatable, due to poor consumet pick up of the technology.

(one of the public service broadcasters) is the next biggest in terms of audience share.

I Freedom of Expression

a) European Convention on Human Rights

France has signed up to the European Convention of Human Rights, which has direct effect within the French legal system. Rights contained in convention may thus be relied on in disputes between private parties in the French national courts.

b) Constitutional Values

The most recent version of the French Constitution refers back to the Declaration of the Rights of Man and of the Citizen, 1789, which contains a guarantee of rights, including the right to freedom of expression. It should be noted that these rights may be used by the Conseil Constitutionnel to review legislation before it is enacted. Once a law has been passed, it can no longer be subject to review by reference to constitutional values.

In a decision in 1986, the Conseil Constitutionnel handed down a judgment dealing with the scope of the requirement that the must be pluralism in the media: pluralism was held to be a constitutional value constituting a precondition for democracy. In doing so, the Conseil Constitutionnel referred to Article 11 of the Declaration of the Rights of Man and of the Citizen, 1789. Interestingly, the French view regarding the adequacy of the market to ensure adequacy of representation for different opinions is similar to that expressed by the FCC in Germany, in that the market is thought to be inadequate for the purpose. Some element of public broadcasting would be required. Despite this, the tradition of editorial independence, seen in both the German and British systems, is in France comparatively weak: public service broadcasting was seen as proximity to government, a view which led to conflicts with journalists' views of professional independence.

II Legislative Framework

The main responsibilities of the French broadcasting authority are set down in the law of 1986, which was amended in 1989 by a further law introducing a new

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regulatory authority (loi du 17 Janv 1989). The system was most recently amended in 2000, with the introduction of rules relating to digital television. Effectively, since these pieces of legislation operated to amend the 1983 legislation, the framework on broadcasting is the 1986 Act as amended. Telecommunications are regulated under a separate framework, established by the Telecommunications Act 1996.

III Regulatory Authority

With the abolition of state monopoly, a sector specific authority was introduced for regulating the broadcasting sector. Political difficulties ensued for both the 'Haute Autorité de la communication audiovisuelle' (1982) and the later 'Commission nationale de la communication et des libertés' (1986) (CNCL). Nonetheless, the introduction of the Haute Autorité was of great symbolic value as it implied the introduction of a division between state and the audiovisual media. The CNCL had, however, greater resources and a broader sphere of responsibility than its predecessor, including within its remit the telecommunications sector. In the same year TF1, one of the public broadcasters, was privatized.

In 1989, the CSA was formed. The CSA's powers were in one respect extended, although the CSA's scope was restricted to the audiovisual sphere. In one sense the CSA is an innovation in France as it introduces the notion of regulation (in the English sense) to the French system; the CSA tries to operate on a cooperative basis rather then on coercion. The law relating to the public service audiovisual sector was further amended in 1997.

a) Status and Membership

Article 1 of the law establishing the CSA proclaimed that the CSA was 'independent'. In doing so, the law did nothing more than confirm the position already handed by the judiciary in relation to the preceding regulatory authorities.

The CSA was modeled on the structure of the Haute Autorité, which itself was based on the French Conseil Constitutionnnel. Thus, three members are appointed by the French President, three by the president of the Senat and three by the president of the national assem-

bly. By contrast to the position for its immediate predecessor organization, the CNCL, the president of the CSA is designated by the French president. Members are appointed for a period of six years, and may not be appointed when they are over sixty five. Their mandate is neither revocable nor renewable. New members join the CSA on a rolling basis, every two years.

Conditions apply to those appointed to the CSA. They cannot hold an elected post, be in the public employ or undertake any other professional activity whilst a member. In particular, Article 5 of the law specified that members of the CSA should not have direct or indirect connections with the audiovisual industries - or the press, advertising or telecommunications. If a member does have prohibited interests, a delay of three months must elapse before he or she is considered to comply with these requirements. Further, during their period of office and for a year afterwards, members must abstain from adopting any public position on questions relevant to the CSA's sphere of competence.

b) General Functions

The principle function of the CSA is to guarantee the exercise of the principle of the freedom of broadcasting. Its introduction was a 'new start' in the regulation of the French broadcasting sector, as its predecessors had run into many difficulties, arising from limited powers and lack of resources. The CSA was given the function of safeguarding the liberty of 'audiovisual communication' within the terms of the 1989 Media Act. In particular, it is supposed to ensure equality of treatment, guarantee the impartiality and independence of the public sector and to take steps to safeguard certain objectives: free competition; quality and diversity of programming; the development of national programming and the protection and the renown of the French language and culture. These general objectives are given greater detail through a number of obligations in relation to different sectors of the broadcast media.

By contrast to the CNCL, the CSA does not have the power to regulate in the telecommunications sector. Regulation of the telecommunications sector is the responsibility of ART, another independent regulatory

body, established by the Telecommunications Act 1996. Conversely, the CSA was given the power to regulate Canal Plus. The responsibility for monitoring competition in the media sector was transferred, by the 1989 Act, to the 'Conseil de la Concurrence' (Competition Council). The CSA therefore only has the competence to apply the sector specific competition rules contained in the Media Act. Originally, the CSA was to be given power to draft general rules in specified areas relating to programme and advertising content. The Conseil Constitutionnel struck this down, arguing that a transfer of law making powers was contrary to Article 21 of the French constitution[104]. Thus, the CSA has only a limited regulatory power, in the sense of being able to impose regulations.

The responsibilities of CSA are:

- the nomination of the presidents of state-owned radio and television stations (The CSA also nominates the members of the *Conseil*'s radiobroadcasting technical committees, which play the role of regional subsidiaries of the *Conseil* for FM radios. The Presidents of the radiobroadcasting technical committees are designated by the vice-president of the French *Conseil d'Etat*);
- issuing of broadcasting licences to FM and AM radio and private television companies. It also has authority over radio and television services broadcasted by satellite and/or distributed by cable;
- issuing opinions on government bills on broadcasting;
- managing the frequencies for radio and television - essentially frequency planning, but this element of responsibility also includes actions for the development of new technology;
- safeguarding the pluralist political expression on TV and radio;
- establishment of the rules of election campaign programmes that public radio stations and television channels have to produce and programme;
- oversight of the quality of programmes.

[104] Decision no. 91-304, DC du 15 Janv, 1992, 13 et 16 considerant, JO, 18 anv 1992, p. 883

IV Licensing and Sanctions

a) Development of Licensing Regime

The CSA has responsibility for licensing broadcasters. The position of the CSA may be contrasted with the powers of the previous broadcasting authorities. The Haute Autorité was limited in this regard: with limited exceptions, the granting of licenses rested with the Government. In any event, the Government had the right to suspend the decisions of the Haute Autorité in general. Given the weakness of the Haute Autorité in terms of finances and sanctions, it proved difficult to eliminate pirate radio stations and for it to take action against unlawful increases in transmission strength, difficulties that were exacerbated by the popularity of the radio stations and listeners' complaints about the Haute Autorité's actions.

Following these difficulties, the successor authority was made responsible for the grant of licenses for both radio and television via terrestrial, satellite and cable networks. The powers previously held by the transmission network regarding the allocation of transmission facilities were likewise transferred to CNCL. Fines for the disregard of technical rules were possible, although these were to be imposed through the court system, as was the suspension of licences (after a warning had been given). From the annual reports of CNCL, it can be seen that it used these powers to counter illegal television and radio stations, as well as offences such as use of unassigned frequencies or exceeding specified transmission strength. CNCL was also responsible for the re-assignment of radio frequencies and the privatization of TF1, as well as the reallocation of two of the national television licences.

Although CNCL's reports indicate much activity, it did encounter difficulties, especially outside metropolitan Paris, where monitoring what went on was difficult. Further, when relying on criminal sanctions, the Public Prosecutor's office did not always give CNCL the necessary support. Although CNCL can be seen as more successful in this regard that the Haute Autorité, in part this may be because it also avoided confrontation with popular stations. CNCL was also unsuccessful in eliminating the illegal trade in radio licences, which was possible

because the operating company could be purchased without the ownership of the company, or the relationships between shareholders being made clear. In this, there is a sharp contrast with the approach take in Britain: see Schedule 2 to the Broadcasting Act (as amended).

b) Current Situation

The Media Act 1989 introduced significant changes to try to remedy the weakness of the system, even under the CNCL. Some of these relate to the CSA's powers to impose sanctions generally, discussed elsewhere. Many of CNCL's responsibilities and powers remain. As regards licensing, the main innovation was the introduction of the system whereby broadcasters must now negotiate the terms of a 'convention' with the CSA, which sets out the terms of the licence. The convention will be granted for 5 years for radio and ten for television. These terms cover content issues (production quotas, advertising etc) and can be compared with the sorts of issues in the licences issued, for example, by the ITC in the UK. This sort of process is argued to have the advantage of building up a co-operative relationship between broadcaster and regulatory body. In addition to this general change in approach, the Media Act contains specific requirements: the Act establishes decentralised monitoring committees (Comités Techniques Radiophoniques), which are an integral part of the CSA. They are responsible for special requirements relating to local radio are respected.

The allocation of frequencies necessary for the broadcasting of programmes on public radio and television and Arte is determined by the CSA independently of the bidding for licences under Article 26. These broadcasters have priority of access to broadcasting frequencies when extra frequencies are necessary for them to carry out their function as a public service. Although these broadcasters are not technically subject to the same licensing procedure as private broadcasters, they are subject to mission directives, which include responsibilities such as the obligation to ensure diversity in their programmes or to promote innovation.

The current procedure for awarding licences is similar for both television and radio. For FM and AM private radio, the authorisation procedure is as follows:

- the CSA publishes an invitation to bid for candidacy stipulating what geographical zones and what categories of radio stations are concerned;
- when the bidding period ends, the list of admissible candidates is decided upon and then a short list is drawn up;
- in relation to the bids made, the CSA establishes a list of frequencies that can be attributed;
- finally, the CSA accords the licences for a maximum of five years.

The Law of 1st February 1994 allows the CSA to renew a licence twice for five years, without the licensee having to resubmit an application. Temporary radio stations are also given licences by the CSA independently of the bidding, for a duration of up to nine months.

The licensing procedure for private national, regional or local television stations broadcast on terrestrial channels is identical to that for private radio stations. However, the list of frequencies available is published at the same time as the offer of licences and a public presentation is obligatory. The licences have a maximum duration of ten years. As for radio stations, licences can be renewed twice for five years by the CSA, independently of the bidding. These are issued subject to the signing of an agreement between the CSA and the operator. Temporary private television stations can receive licences independently of the bidding process for a duration of up to nine months.

The CSA also issues licences to cable networks. The licenses can last up to 30 years maximum and can only be issued to companies, public corporations or council housing organisations at the instigation of the relevant towns and villages. All modifications to the programmes on offer on a network are subject to the CSA's authorisation. Special rules apply to cable networks supplying fewer than one hundred households, according to which they need only go through a simple declaration procedure.Similarly, since 1997, European

channels wishing to be broadcast on French cable networks only need to register with the CSA.

c) Digital Television

The Law of 1st August 2000 amended the Law of 30th September 1986 on freedom of communication, including in that law details of how digital terrestrial television is to be set up. A major role in this process was entrusted to the CSA. As regard frequency allocation, Article 53 of the Law of 1st August 2000 decreed that the CSA should publish

> „an initial list of frequencies available for national and local radio services which are broadcast on terrestrial hertzian channels within a year of the present law's promulgation".

The CSA published the initial list of frequencies on 24 July 2001 along with an invitation to bid for licences for national services to be broadcast by digital terrestrial mode. National channels were intended effectively to begin broadcasting on the new digital terrestrial network before the end of 2002, initially covering 50% of the population.

d) Licence Conditions/Content

These obligations essentially cover six areas: pluralism and veracity of information; conditions for the broadcasting of film and television productions; TV channels' contribution to the development of video and film production, protection of adolescence and childhood; advertising, sponsorship and teleshopping, promotion of the French language. The rules relating to these obligations can either be of a quantitative or qualitative nature. As discussed below, the CSA and broadcasters entered into a process of negotiation to determine the terms of the relevant broadcasting licence, whither this be in relation to radio or television. Content issues are dealt with in this way.

Party political broadcasts: Each year, the CSA establishes the terms according to which airtime is granted to political groups represented in the Senate or the National Assembly and to the trade unions and professional organisations that are represented on a national level. These programmes are broadcast by France Inter,

France 2 and France 3. The CSA has further responsibilities regarding the production and broadcast of election campaigns[105].

The quota requirements have been modified over time, not least as a result of pressure from the European Community. The quotas remain high, however. Broadcasters have sought to minimise the impact of the quotas by meeting their obligations by broadcasting material which met the requirements of the quota obligations between 1am and 6am. The CSA, however, took action against this! French law sets a 60% quota of European audiovisual works to be broadcast during peak time ('heures de grande ecoute' or 'heures d'ecoute significatives').

In general the CSA may make recommendations in the areas covered by its jurisdiction as elaborated in Article 1 of the 1989 law. The CSA is thus not limited to issuing recommendations in the areas specifically identified by statute. Thus the general responsibility for safeguarding the quality of programming gave rise to a recommendation on the use of archive material and also in relation to the ubiquity of reality television. These recommendations come in a variety of forms, but constitute the 'doctrine' of the CSA. The CSA may also make such recommendations in the field of competition rules.

Under its responsibility to ensure respect for human dignity, the CSA issued a code ethics concerning programmes and the protection of children and teenagers. Given the breadth of the notion of human dignity, the CAS may also make recommendations on content in other areas too, regarding its interpretation of the law's requirements. This point is clarified in the new article 43 introduced by the law of 2000, by specifically making reference to the recommendations of the CSA.

In 1996, the youth protection rating system introduced to protect young people, at the CSA's initiative. It was intended as a compromise between the principle of freedom of expression and the need to protect more vulnerable groups from disturbing content. In

[105] See e.g. CSA Report on 'Election Presidentialle 2002'

August 1998, the system was altered and harmonized with the system Canal+ had been using, in order to make its symbols more easily understood by the public. The harmonized system has recently been revised, with the aim of introducing new symbols that were easier to understand. The system is intended to be adopted eventually by all broadcast services whether unscrambled or not, and regardless of the broadcasting medium (cable, satellite or terrestrial).

The CSA draws up conventions with French and foreign cable channels establishing rules that are applicable to their particular service. These rules apply in particular to advertising, sponsorship, the production and broadcasting of film and television productions.

Funding: only the overseas local television stations are permitted to carry national advertising in order to protect the regional press. Public service broadcasters are funded partly by public funds and partly by advertising. The private broadcasters are mainly funded through advertising although there are a number of subscription channels.

VI International Conventions

France has implemented the requirements of the EC Treaty and more particularly the Television without Frontiers Directive. These latter obligations were introduced through the amendment of the 1986 law by a law of 18 Jan. 1992 and by three decrees of 27 Mar. 92[106]. The amending directive of 1997 was implemented by the law of 1 Aug 2000. In introducing an independent regulatory body, France is broadly in line with the Council of Europe requirements, especially Rec (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector. Further, France has allowed individuals the right of individual petition before the European Convention of Human Rights in case of alleged violation of Article 10 ECHR.

[106] Nos 92-279, 92-280, 92-281, JO 28 Mars 1991, p. 431

Federal Republic of Germany

I Freedom of Expression

The starting point for regulation of the broadcast media in Germany in the German constitution, the Basic Law. Article 5(1)(2) specifically guarantees the freedom of reporting through audio-visual media; this protection extends not only to the free expression of ideas and information but also includes broadcasters' institutional independence, irrespective of whether the broadcaster is a public or private body. It is therefore not enough that the broadcasters have freedom of expression, as institutions they must be free of the state.

Germany, additionally, is a signatory to the ECHR; it is therefore bound by the requirements of the Convention and Article 10 in particular. The German Constitution is arguably more rigorous than Article 10, as the exceptions to the right are more narrowly construed.

II National Legislative Acts

The basic distinction in Germany is between the federal level and the Land level. This also comes down to a divide between telecommunications, which broadly is a federal responsibility, and broadcasting which, as it relates to culture, is part of the Land level competence. This distinction is obviously increasingly important and problematic given the development of new technologies and has led to a certain amount of comment about the boundaries between Bund and Land competence. In addition to the requirements of the constitution and the judgments of the German Federal Constitutional Court (FCC), the most significant legislative acts regarding the media are those made at Land level. Specifically, there are treaties between the constituent states of Germany (Rundfunkstaatsvertrag (RStV), the most recent version is the fifth, effective from 1 January 2001[107]) which forms the framework for media regulation. This does not preclude the individual Länder from having individual sets of rules but they must not be incompatible with the RStV.

Additionally the Bundestag adopted a new Telecommunications Act (Telekommunikationsgesetz (TKG)) and, more recently, a federal law on information and com-

[107] Text in German available on the Internet: http://www.artikel5.de/

munication (Gesetz zur Regelung für Informations-und Kommunikationsdienste (IuKDG)) was adopted. For services which fall outside the federal telecommunications competence, with a parallel state treaty (Staatsvertrag über Mediendienste MDStV) dealing with new multi-media services has been enacted. Broadcasting is defined as "the provision and transmission for the general public of presentations of all kinds of speech, sound and picture using electrical oscillations without junction lines, or along or by means of a conductor. The definition includes presentations transmitted in encoded form or receivable for a special payment, as well as broadcast videotext." This definition clearly includes digital broadcasting. The boundary between broadcasting and other services is problematic.

There are a number of rules in the RStV relating to the protection of minors and relating to advertising made under the aegis of ALM (see below) which fill in the statutory framework. Other statutes also contain provisions which aim to protect the young from "harmful" programming, for example the Criminal Code (Strafgesetzbuch).

III Regulatory Authority

Although there is no one law in common throughout the Länder regarding commercial broadcasters, certain common key elements can be identified, notably the establishment of a regional media authority (Landesmedienanstalt). The highest body within this authority is the Council, which has the responsibility for

licensing commercial broadcasters; and
regulating programming, including

enforcement powers (including powers to levy fines of up to DEM 500,000).

For more details of enforcement see the Anwendungs- und Auslegungsregeln der Landesmedienanstalten zur Durchführung von Ordnungswidrigkeitenverfahren nach dem Rundfunkstaatsvertrag (OWiRL)(January 2001) agreed through ALM (see below).

To ensure distance between the council and the state, the council is composed of representatives of the public. Statutes set down rules as to which societal groups are represented and by how many representatives. The

Councils are funded by 2% of the licence revenue. Some concerns have been expressed about the ability of the regional media authorities' ability to regulate private broadcasters. Little action in imposing fines have been taken in respect both to the general content issues (protection of minors) and advertising rules (e.g. limitation on advertising time), although when fines have been levied the broadcaster has paid the fine. The problem is that the courts and the regional government in particular tend to favour the broadcaster, as there is always the threat that the broadcaster will move elsewhere, taking jobs with them. Further, it seems accepted that there are certain strong, if unofficial links, between some parties and broadcasters.

The various Landesmedienanstalt cooperate on matters of principle and on national issues in an association of regulatory authorities for broadcasting (Arbeitsgemeinschaft der Landesmedienanstalten, ALM). The purposes of the ALM include the following tasks:

1) establishing that a particular media service is to be classified as broadcasting [second sentence of Section 20(2) of the Rundfunkstaatsvertrag, RStV];
2) the issue of joint guidelines on measures designed to ensure diversity in line with Sections 31 and 32 RStV;
3) coordination aimed at a uniform state-level procedure [first and second sentences of Section 38(2) RStV] to ensure adherence to other provisions of the Rundfunkstaatsvertrag prior to and following the approval of nationwide television [Section 38 (1) RStV];
4) collaboration in preliminary planning and technical work [third sentence of section 38(2) RStV];
5) issue of and agreement on the use of joint guidelines, specifically as regards inadmissible broadcasts and the protection of minors, advertising and sponsoring, provision for consultation and exchanging experience with Germany's two public-service broadcasting corporations ARD and ZDF [Section 46 RStV]; and
6) questions of freedom of access under the terms of Section 53 RStV .

The ALM and the Landesmedienanstalt publish annual reports, available via the ALM website[108].

The regional public broadcasting authorities combined in 1950 to form the Arbeitsgemeinschaft der Rundfunkanstalten (ARD) which broadcasts a national public service broadcasting channel. The Länder set up the Zweiter Deutsche Fernsehen (ZDF) by agreement between them. Subsequently regional public service broadcasters were established. As with the regional media authorities the organising bodies of the public service broadcasters must ensure that the state does not interfere with broadcasting. The public service installations are each headed by a director and guided and supervised by a broadcasting board and an administrative board. The broadcasting board is made up of representatives of groups with social relevance such as political parties, trades unions, and churches, which are supposedly representative of the public at large. The public sector is financed mainly be licence fees. The amount of the fee is set by unanimous agreement of the Länder, although recently an independent commission, (KEF) has been set up to give guidance as to the appropriate level of fee and thus reduce the risk of political influence in the public broadcasting sector. Despite the public funding (and the constitutional guarantee of the right to develop), public service broadcasting is under pressure in Germany; its funding has difficulty in keeping pace with the cost of certain types of programming (notably films and sport).

IV Licensing

Licensing is the responsibility of the regulatory authorities. They also have responsibility for frequency allocation. It should be noted that the award of a broadcasting licence does not bring with it automatically an award of frequency. In particular, the cable network (under the monopoly control of Telekom AG) is running out of capacity. Channel occupation is still determined by the regional media authorities by distinguishing between those channels that were essential; desirable or merely feasible. The position might be improved as a result of the 1997 Telecommunications Act, the purposes of which were to establish universal service obligations in the field of telecommunications and to use the available

[108] http://www.alm.de/index2.htm

spectrum more efficiently. Telekom AG has also agreed to expand its cable network capacity.

V Licence Conditions/ Content Regulation

The consequences of the guarantee of freedom of expression means that there is little room for content regulation; what there is seems to comply with international law standards and European obligations. The FCC has insisted that, in operating a dual system, the state must ensure that the 'constitutional requirements of pluralistic reporting are fulfilled by the totality of programmes offered'. Even private stations are not exempt from this obligation. Thus, the regional media authorities are supposed to ensure that there is proper diversity and balance in what the broadcasters within their jurisdiction offer (see Sections 31 and 32 RStV). The precise relationship between the public and private broadcasters and, in particular, the role of public service broadcasting and the 'basic services' it is supposed to provide to the German citizens is, however, the subject of some discussion.

The public service broadcasters currently organise numerous televisions channels, two of which (ARD and ZDF) are nationwide and broadcast without regional windows. These channels broadcast news and information and also compete with the commercial broadcasters with entertainment programming. Notably, the public service broadcasters broadcast considerably more own-produced work than the commercial channels. There are regional channels, so called 'third channels', pretty much based on the principle of one Land one broadcaster (though this idea is now under pressure). The programming on the regional channels tends towards the educational and cultural. There are also specialist channels run by the public service broadcasters, including the parliamentary channel Phönix, and Kinderkanal. The commercial broadcasters attempted to challenge the legality of the provision of these specialist channels as public service broadcasting via the EC state aid rules. The commercial broadcasters were unsuccessful. A number of other cultural channels are operated by the public service broadcasters in conjunction with foreign broadcasters (3-Sat and Arte). These

channels tend only to have a small audience in Germany. In the private sector there are 21 nation-wide services and 45 regional channels. The market leaders are RTL and SAT.1 and since the mid-90s the public service broadcasters have lost their dominant market position to RTL, in particular. Many of the other channels are niche channels, including teleshopping channels. The private broadcasters tend to be free-to-air; there is one pay-tv channel owned jointly by Kirsch and Bertelsmann. On the whole the private broadcasters do not focus on news so much; the feeling seems to be that the private broadcasters are there to provide entertainment.

The Basic Law contains various provisions which have been interpreted as restricting hate speech. In the specific context of broadcasting, the Rundfunkstaatsvertrag also prohibits the distribution of certain types of content which include:

- hatred;
- war and racial propaganda; and
- pornography.

There are 'watershed' limitations imposed on some material so as to protect children and young persons (see section 46 RStV). More detailed rules facilitating those in the set down in the legislative provisions are found in Gemeinsame Richtlinien der Jugendschutzes of 19 September 2000. Section 131 of the Criminal Code (Strafgesetzbuch) bans the production, dissemination and introduction of media which glorify violence or which depict it as harmless. Certain provisions of the RStV are based on the criminal code (Article 184), but a judgment of earlier this year suggests that pornographic material can be broadcast on encrypted television channels (pay TV) if it can be shown that no children can access it. The Criminal Code also precludes the provision of certain media to adults, as well as children - for example media showing sexual activities with children, animals or in connection with violence are considered socially damaging and their supply is prohibited. Other legislative provisions relate to specific media: Section 7 Gesetze zum Schutze der Jugend in der Öffenthchkeit deals with videos and provisions in the IuKDG deal with "writings" - such as computer games, sound

receivers and CD Roms. It now seems that the Landesmedienanstalten are proposing a new form of regulation to protect young people which takes a common approach to broadcasting and to other services

More general conditions may be imposed on the broadcaster in the terms of its licence; such requirements include:

- a minimum requirement for speech
- windows for regional programming
- windows for the productions of other companies
- requirement that a specific form of programme must be broadcast.

As part of the rules on the limitation on ownership, the Rundfunkstaatsvertrag requires 'dominant' companies:

to reserve 260 minutes per week (including some prime time slots) for third parties; and

to establish a 'programme council' to advise the broadcaster on programming.

The organisers have established a Voluntary Television Auto-Supervision Board (FSF), to check whether films and other broadcast content submitted to them are fit for broadcasting.

The public sector broadcasters are financed in the main by licence fees; there are limitation on advertising time in the public sector. The appropriate level of advertising in the public sector is currently the matter of some discussion. Advertising on public service television is restricted to weekdays with a maximum of twenty minutes per day which must be broadcast before 8pm. The position of the regional public service broadcaster is regulated individual at Land level but in the main advertising is limited to specific times and, in some cases, the broadcaster is kept entirely free of advertising. Private television is financed mainly by sponsorship and advertising, although one pay-tv company has over one and a half million subscribers and many households subscribe to cable networks. Limitations apply to the amount of broadcast time devoted to advertising. Special restrictions apply to certain types of advertising, notably tobacco advertising is prohibited. Extra restrictions apply in relation to the public service broadcaster: alcohol, for example, may only be adver-

tised on Erste, ARD's first channel, and on ZDF. The ALM has agreed more detailed rules on advertising and sponsoring to implement those in para 46 RStV: Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen (10.02.2000). Guidance also exists as to broadcasting prior to an election.

The concentration of media ownership is a matter of some concern in Germany, despite the high number of channels available, as two companies own the vast majority of channels. This has, it is claimed, led to a lowering of standards and a less varied diet of programming, which has also affected the public service broadcasters in the attempt to maintain ratings. Thus, in addition to the content based rules noted earlier, the Rundfunkstaatsvertrag imposes certain limitations on accumulation of media interests, based on an audience share test. This test is applied more stringently in the context of information-related programmes. The Rundfunkstaatsvertrag also established two bodies for the purpose of coordination media regulation: the KDLM, which is responsible for political coordination; and the KEK, which considers the development of media concentration in the private sector. The KEK is made up of 6 independent experts appointed by the Länder governments for a 5-year term and, in effect, it reports to KDLM. Ultimately, a company whose interest exceeds the 30% market share test may be required to divest itself of certain holdings.

United Kingdom

I Freedom of Expression

The United Kingdom constitution does not comprise a formal document with elevated legal status. There is thus no specific constitutional guarantee for freedom of expression. Instead, the constitution proceeds on a number of constitutional conventions amongst which are the ideas that everyone may do that which he is not specifically prohibited from doing and that the state is subject to the same laws as the citizen. Thus, unless specifically prohibited from speaking (for example by doctrines such as libel, contempt of court or by legislation such as the Official Secrets Act as amended) the media is free to say what they like.

The UK has long been a signatory to the European Convention on Human Rights and the courts have often reiterated that the common law of England and Wales is based on respect for freedom of expression. This position has now been given statutory footing as the Human Rights Act, which came into force in October 2000, incorporates the European Convention on Human Rights into domestic law. This means both Articles 8 and 10 should find expression in English law. It should, however, be noted that the Human Rights Act is an ordinary Act of Parliament and is not in any way entrenched. It would therefore be legally possible for Parliament at a future point to repeal the act - though this may be politically unlikely.

The only mechanism by which broadcasters could complain of violations of broadcasting freedom is through the ordinary court system. When challenging the acts or decisions of public bodies an applicant will use the judicial review procedure. This has limited effect, because the courts may review the procedure but the courts cannot substitute their own judgment for that of the administrative body the subject of review.

There have been a number of cases when private individuals have sought an injunction to prevent the broadcast of certain materials -these often are cases regarding the individuals' right to privacy; and in some instances involving children the local government authorities who were responsible for the care of the children

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sought such an injunction. The occasions on which the government has sought to intervene have been rare: where the regulatory bodies have sought to intervene, the action has been as a result of a breach of programme codes. Med TV had its licence revoked - after official warnings - for broadcasting material inciting violence; another company, Babylon Blue had its licence revoked for failure to pay fines issued as a result of the broadcasting of unencrypted material in breach of programme codes and other companies have failed to respect rules regarding advertising and sponsorship. (See Zee TV for 'undue prominence' and Telewest regarding amount and timing of advertising.) More recently, the BBC was accused of submitting to political pressure as regards the terminology used in its new reports regarding news reports on the situation in Israel and Palestine. The BBC, however, denied this.

II National Legislative Acts

Broadcasting is, on the whole, governed by the Broadcasting Acts 1990 and 1996 and subordinate legislation made under these acts or, where the secondary legislation implements EC requirements, under the European Communities Act 1972. The BBC is subject to requirements contained in its Charter. Various codes of conduct have been drawn up by the relevant regulator authorities under the Broadcasting Act 1990.

The Freedom of Information Act, passed by Parliament last year, is still not yet in force and there are questions over when the Government intends to bring it into force. Currently, however, access to public information is governed by a code of conduct. Currently, the Information Commissioner states that the Act will be fully in force by January 2005. Prior to the introduction of the Act, government bodies will be required to draw up a 'publication scheme' which is, more or less, a guide to the sort of information they hold. This process will begin in November 2002.

The Government is currently revising the broadcasting regulatory structure to implement the EC communications package. It is anticipated that the Communications Bill will be brought before Parliament in this parliamentary year.

III Regulatory Authority

The main public service broadcaster, the BBC, and the other broadcasters are regulated by separate regimes. Both, however, are subject to review by the Broadcasting Standards Council, which is concerned with issues such as fairness and decency. The BBC imposes rules of conduct on itself. Additionally, the commercial broadcasters are regulated by the Independent Television Commission (ITC) (radio broadcasters being subject to review by the Radio Authority (RA)). The BBC would come under greater independent scrutiny were the Communications Bill to be enacted.

The ITC is a public body established by the Broadcasting Act 1990[109] as amended by the Broadcasting Act 1996, which sets down its functions, composition and income. The members of the ITC are appointed by the Secretary of State in the Department of Culture, Media and Sport. Members' backgrounds vary; some have previous experience in the broadcasting sector others have commercial interests; for example one member of the ITC is an investment banker with an interest in UK and European media and telecommunications sectors. Although the Secretary of State may issue guidance to the Commission, the Commission members are subject to a code of practice based on the Seven Principles of Public Life set down by the Nolan Committee. This code requires the Committee, *inter alia*, to act with independently and with due impartiality; rules also exist regarding conflicts of interest. The members of the Commission, who are part time appointments, are supported by full time specialist support staff and by a range of advisory committees.

Technically, the ITC is accountable to the Minister and it is the Minister who is accountable to Parliament. In practice, members of the Commission have given evidence before Parliamentary select committees.

The ITC is funded by payments made by the licensees. It has a responsibility under Schedule 1 to the Broadcasting Act 1990 to keep proper accounts. The ITC is further required to ensure that it runs as a going

[109] See Broadcasting Act 1990 sections 1 and 2 and Schedule 1 and Schedule 7, part 1 and Broadcasting Act 1996 parts I and IV - VIII

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concern. The ITC accounts are prepared so far as is possible in accordance with Companies Act requirements. The ITC's Annual Report and Accounts, which additionally includes annual performance reviews in respect of the terrestrial television licensees, are published annually and are available free from the ITC.

Although the ITC has power to request recordings of particular programmes and the commercial companies are required to submit returns as to the breakdown of their programming, in terms of monitoring the ITC is dependent on complaints - either those of viewers or of other television companies. Licensees are also required to keep a record of the complaints they receive which must be kept for two years and released to the ITC for inspection on request.

The ITC does not make programmes nor does it fund private broadcasters. The Gaelic Broadcasting Committee, which is a separate committee whose members are appointed by the ITC, has government funding to ensure that a range of high quality programming is made in Gaelic.

The ITC has some freedom to make broadcasting policy within the overall constraints of the statutory framework. In doing so, it consults with the public body and with advisory councils, particularly when contemplating a change to policy

There are plans to merge the television regulators with the telecommunications regulator and other relevant bodies such as the Radio Communications Agency to create 'OFCOM'. The Communications Bill, which would merge the regulators of the communications industry, as well as implement the 'Communications Package', is currently under discussion.

IV Licensing System

The planning of non-military spectrum frequencies is the responsibility of the National Radiocommunications Agency, which is an executive agency attached to the Department of Trade and Industry. In particular, it is responsible for allocating spectrum and licensing its use. Users of radio equipment must have a

Wireless Telegraphy Act licence unless a class exemption applies to the category of device in question. The Agency implements spectrum pricing, reviews licence fees and, following the necessary changes in UK law, will oversee spectrum trading. It is also responsible for enforcement, in particular for the investigation and resolution of incidents of interference. The ITC and BBC are also involved in determining the frequency plans for digital multiplexes and for digital switchover. Once frequencies for television broadcast have been identified it is the ITC which advertises their availability. This system is being reviewed and new provisions are contained in the Communications Bill.

The terrestrial transmission network was formerly part of the BBC, the BBC Home Service Transmission Division. It was privatised in 1997 and is now owned and operated by a public listed company, Crown Castle International and by ntl. Both the BBC and the commercial companies use the network. Cable companies were under obligations to roll out their own cable networks; there has been some difficulty about cable companies meeting their roll-out obligations. Where a broadcaster is using telecommunications systems a Telecommunications Act licence is also required. These are currently issued by OFTEL, another public funded non-departmental body with responsibility for regulating the telecommunications sector.

The BBC terrestrial services (BBC1 and BBC2) cover most of the country as does Channel 4, another national service. The Channel 3 companies are, on the whole, intended to be regional; between them they cover the UK. Channel 5 does not reach all the population. Digital terrestrial television is still in its infancy and so reaches a limited part of the population, both as regards the number of subscribers and the areas of the country that can receive digital broadcasts, although the numbers are increasing. Cable television is available as a general rule only in urban areas. Satellite in principle can be received throughout the UK. When the ITC advertises/awards licences the area the licence is to cover is specified. The BBC (on BBC1 And BBC2) has around 40% of audience share, Channel 3 companies together approximately 30%, Channel 4 10%, Channel5 5% with the remainder going to subscription channels.

As regards the award of terrestrial analogue licences, an auction process was used in 1991 for determining who would become Channel 3 franchisees and subsequently for Channel 5. The BBC has not had to bid for its frequencies nor has Channel 4. The Broadcasting Act 1990 (as amended by the 1996 Act) sets out in detail steps which the ITC must follow in advertising and awarding various licences although within this framework the ITC still has some discretion. When licences are available, the ITC publishes an Invitation to Apply. For the ITV (Channel 3) licences, applicants had to pass a 'quality threshold' in relation to programme content and quality, technical quality and as regards financial resources to fund the proposed programming. In principle, once the threshold was set the highest cash bid would be awarded the licence, although the ITC retained the discretion 'in exceptional circumstances' to award the licence to a lower bidder. In considering the bids, the ITC had to take into account a number of factors: that the bidder was a fit and proper person (taking into account also the ownership rules); that adequate regional programming (s. 16(2) Broadcasting Act) and news programming (s. 31 Broadcasting Act) was included in the bid. Programming requirements as to certain categories of programming (e.g. children's programming, religious programming) were also included.

Each licence is for 10 years and may be renewed. On renewal all Channel 3 companies accepted the ITC offer and have therefore had their licences renewed for a further 10 years. In 1991, however, when the current system was introduced four of the incumbent companies under the previous system were not awarded licences - and 8 of the 16 licences available did not go to the highest bidder.

In contrast to the system used when the licences were first up for auction, the ITC has set the fees for the licences on renewal. This was because originally the cost of the licence varied depending on the perceived value of the franchise (e.g. taking into account the size of the viewing population) and the number of companies bidding for the franchise. In 1991 when the first round of tendering took place, two companies correctly guessed that there would be no competition for their

franchise area and therefore successfully bid very low. There are thus significant differences in the cost of the licence to an individual franchisee not all of which is attributable to the size and value of that franchise. Thus Border, for example, in 2001 was paying a cash amount of £64,000 with the percentage of qualifying revenue set at nil. By contrast, Granada was paying as a cash sum £11 million and the percentage of qualifying revenue was set at 11%. The ITC took the opportunity to put the various ITV companies' payments on a more consistent basis. In setting the prices for the renewals the ITC consulted all interested parties about the methodology it should adopt in determining the fees, using a discounted flow technique to derive a net present value for each licence. The ITC used a pre-tax discount of 10%.

For cable and satellite services, the regulatory regime is based on the premise that, in contrast to the position for terrestrial broadcasting, in practical terms there is no limitation on the number of channels that may be broadcast and so no reason why the number of licensed services should be limited. The ITC thus virtually grants licences on demand except where a company is prohibited by law from holding a licence or where the programming would appear to contravene the requirements of s.6 Broadcasting Act (taste, decency etc). The ITC does not specify the nature of the service or the elements of its content.

Licences can be shortened or revoked for severe violations of licence conditions/programme code; this is the case whether the licence in question is terrestrial, cable or satellite. None of the terrestrial channels have had their licences withdrawn; only satellite or cable channels have incurred this penalty. In addition to the examples noted earlier, some cable licences have been revoked on the grounds of licensee inaction including Ulster Cablevision in 1991 and a further seven licences in 1992.

The UK's obligations under the Convention have been overtaken by its obligations to implement the EC Television without Frontiers Directive. Compliance with the requirements under the Directive is dealt with by the Broadcasting Act and certain pieces of secondary legislation to deal with subsequent changes in the Directive/the understanding of the Directive. Much of

the detailed requirements are included as a matter of general content regulation in ITC codes.

V Licence Conditions/ Content Regulation

Licences issued by the ITC include targets of particular types of programming: the Broadcasting Act sets the general objective, but it is the licence that contains precise details of the particular types of programming to be broadcast. Under the Broadcasting Act, ITV companies are required to broadcast the following genres: news (national and international) current affairs, religion, children's and regional programming. Companies are required to broadcast at least 25% independent productions and 51% of programming is to be of European origin. ITV also has a requirement that 65% total output be original UK productions and commissions. The licence conditions additionally require the companies to ensure a diverse mix of programming which appeal to a wide diversity of taste. Furthermore, it is a standard condition of all broadcasting licences that the broadcaster must comply with the ITC programme codes, which deal with issues such as taste and decency. As noted the ITC monitors broadcasters' output. The performance review also identifies the producer of the programme so as to encourage the broadcast of independent productions. The review also distinguished between first run broadcasts and repeats.

As well as quantity of broadcasts, the ITC in its review comments on the quality of the broadcast: for example in its most recent review it criticised the ITV companies for broadcasting documentaries which covered only a very narrow subject area and which showed homogeneity in treatment. It also comments on the scheduling of programming: in the 2000 Annual Review it commented on the late scheduling of religious programming. Although the comments in the Annual Review do not necessarily constitute a finding of a violation of the licences/ programme codes, on many occasions the companies take the comments into account. Where problems are encountered, the ITC and the licensee may agree changes to the terms of the licence. In 2000, for example, Channel 5's licence commitments to increase current affairs programming, balanced by less entertainment and documentary material.

Under s 31 Broadcasting Act 1990 (as amended by section 74 and 75 Broadcasting Act 1996), Channel 3 companies and Channel 5 are required to broadcast high quality news at intervals including, with the exception of the national Channel 3 licensee, at peak viewing time. The news should be presented live and, as regards the Channel 3 licensees, simultaneously. Applicants for the regional Channel 3 licences were required to propose at least three daily national and international news programmes on weekdays: it was specified that these must be at least 20 minutes at lunchtime, 15 minutes in the early evening and 30 minutes in peak time. The proposals were incorporated in to the companies' licence conditions. The Channel 3 news is provided by a single appointed news provider, ITN, which also provides news to Channel 4 and Channel 5. Since 1998 the ITC is required to nominate news providers from which the Channel 3 companies choose the news provider; the ITC is under an obligation to ensure that the news provider is effectively equipped and adequately financed.

S4C is the Welsh broadcaster which broadcasts a certain percentage of its programming in Welsh, as does BBC Wales. The Scottish franchisees are also required to broadcast certain percentages of programming in Gaelic. For the ITV companies, they have regional programming obligations and of this amount of regional style programming broadcast, at least 80% of it must be made within the region in question. Section 78 Broadcasting Act 1996 strengthens the ITC's powers vis a vis regional programming in the event of a change of ownership of a franchisee. Nonetheless, there have been concerns expressed about the ITV companies' commitment to regional programming (see ITC Press Release 31/01).

The BBC is not subject to licence requirements. It must, however, comply with the terms of its Charter and has in recent years issued a set of promises about its programming. Its producer guidelines also require that BBC programming should reflect and draw on the diversity of peoples and cultures in the UK and across the world to reflect life as it is. The Guidelines also state that BBC programmes should be relevant and appropriate for all audiences in all parts of the UK.

These guidelines also contain rules on what might be termed ethical issues, such as impartiality, accuracy, fairness, portrayal of stereotypes, editorial integrity and independence, respect for privacy, test and decency, avoiding the imitation of anti-social and criminal behaviour, safeguarding the welfare of children and fairness to interviewees. All broadcasters are subject to the Broadcasting Standards Council as regards general rules of taste, decency and privacy. Its code is available on the BSC website[110].

Under the Broadcasting Act 1996, cable licensees (or local delivery services licensees as they are referred to in the act) may in the future be subjected to obligations to carry BBC1, BBC2 and Channels 3, 4 and 5 when both the system concerned carries at least one of its programme services in digital format and the ITC is satisfied that it would be appropriate to treat it as a 'digital local delivery service'.

Section of the Broadcasting Act 1990 requires the ITC to ensure that among other issues:

- nothing is included in its programmes which offends against good taste or decency or is likely to encourage or incite crime or lead to disorder or to be offensive to public feeling;
- programming do not include any abusive treatment of the religious views and beliefs of those belonging to a particular religion.

Further, there are requirements regarding broadcasters' impartiality. To facilitate these requirements the ITC is required to draw up a programme code which is binding upon all commercial broadcasters. This includes specific provision regarding respect for human dignity and the treatment of minorities. The Race Relations Act, which prohibits the incitement to racial hatred, also applies.

Broadcasters are subject to the terms of the Official Secrets Act; this makes it a criminal offence to broadcast information protected by the act and there is no public interest defence. The act was amended in 1989 as it had been considered overly broad. Unfortunately, the 1989 version still allows for a broad view of the interests of the state. Further, government can take civil

[110] Shttp://www.bsc.org.uk/

action to prevent the publication of confidential information. Whether journalists have published a story, they can be required, under the s.10 Contempt of Court Act 1981, to reveal their sources where this is in the interests of justice. Unfortunately, the English courts have tended to take a broad view of this exception.

The other terrestrial broadcasters are funded by advertising revenue and by sponsorship. Satellite and cable television are subscription channels and in addition carry advertising and sponsorship. As the BBC does not carry advertising, rules relating to advertising apply to the commercial channels only. The ITC has an obligation to draw up a code dealing the content of both advertising and sponsorship (section 9 Broadcasting Act 1990). Certain types of advertising are prohibited: breath-testing devices and products which purport to mask the effects of alcohol; the occult; betting tips; most forms of betting and gaming; all tobacco products; private investigation agencies; commercial services offering advice on personal or consumer problems (this does not preclude advertising by solicitors); guns and gun clubs; pornography (including 'top shelf' publications); and escort agencies. Although a recent review of the Code this year suggested that some of these prohibitions should be lifted, in the event many were left untouched by the revised Programme Code (Sept 2002). An advertisement for a product or service which may normally be advertised may be unacceptable should it seem to the ITC that a significant effect would be to publicise indirectly any unacceptable product or service.

Additionally, there are rules relating to frequency and duration of advertising as well as watershed requirements on the advertising of certain products contained in a separate code on amount and Scheduling of Advertising. These rules transpose the TWFD requirements, although in some instances the provisions applying to terrestrial broadcasting are more stringent than strictly required by the TWFD. As a general rule, the total amount of advertising in any one day must not exceed an average of seven minutes per hour of broadcasting and in any one clock hour there must be no more than 12 minutes of advertising spots and/or teleshopping spots. Television advertising must be readily identifiable

as such. Breaks may only occur at greater than 20 minute intervals and must take account of natural breaks in the programming. Special rules apply to films: they must not carry an internal break if their scheduled duration is 45 minutes or less. Taking their scheduled duration as a whole, longer films may be interrupted once for each complete period of 45 minutes with a further break if scheduled duration is at least 20 minutes longer than two or more complete periods of 45 minutes.

In addition certain rules apply regarding the scheduling of advertising. Certain categories of programme may carry no advertising: a religious ceremony; a royal ceremony or occasion; a programme designed for reception in schools; a programme for children or news, current affairs or documentary programme of less than 30 minute's scheduled duration. Further, where advertising follows a programme of a religious or royal ceremony, there must be a gap of at least 30 seconds between the advertising and the programme. There are also rules relating to the juxtaposition of types of advertising and certain programming: for example, particular categories of advertising (alcoholic drinks, religious advertising) may not be broadcast around children's programming.

The ITC also oversees rules on airtime sales arrangements. Earlier this year, the rules on joint airtime sales have been relaxed so as to allow smaller licensees to sell jointly. Some prohibitions remain: Channels 4, and 5 and BSkyB will not be allowed to sell together; neither will Carlton and Granada (two of the biggest Channel 3 franchisees); and a similar ban remains on the two London Channel 3 licensees selling their airtime together remains.

The ITC Code on Sponsorship sets down the rules governing sponsorship on commercial television. In general, sponsorship must be separated from the programming itself (detailed guidelines exists as to how this is to be achieved) and the editorial integrity of the programming must be maintained. News and current affairs cannot be sponsored and this includes business and financial reports which contain interpretation or comment. Companies prohibited from advertising on the television are usually precluded from sponsoring

television, although there is a difficult boundary concerning the sponsorship of sporting events. Product placement and undue prominence of products are not permitted, a point which is re-iterated in the Programme Code. The code also covers programmes made for or substantially funded by an advertiser. The BBC producer guidelines state the BBC programmes must never give the impression that they are endorsing or promoting any product, service or company.

Section 36 of the Broadcasting Act 1990 requires the ITC to ensure that party political broadcasts are included in Channel 3, 4 and 5 services. The ITC programme code gives more detail as to length and frequency of such broadcasts. As regards the broadcasting of other programmes relating to political questions, broadcasters are required to show due impartiality, whether within an individual programme or a series of programmes[111]. Similar rules apply to the BBC also.

The Broadcasting Act 1990 Schedule 2 (which has subsequently been amended by the Broadcasting Act 1996 and several statutory instruments) contains detailed rules on media ownership, including provisions relating to cross media ownership. Different rules apply to different categories of licence: thus, for cable companies cross media ownership rules were abolished in recognition of the fact that the licenses were a means of delivery rather than a programme service. Limitations are set on the number and types of licences that may be held by one person or associated persons. As well as the broadcast media, the press are taken into account also. Additionally, normal competition rules may apply. Certain groups are precluded from holding licences (such as advertising agencies) but these do not relate to UK minority groups. There are proposals in the Communications Bill to remove some of these constraints, for example the prohibition on non-Europeans owning licences.

[111] A recent example is the directions issued by the ITC to Scottish Television. The company had broadcast a one hour programme called 'Ask the Prime Minister' in which questions were put by the stuio audience to the Prime Minister. Given that a by-election was to take place 9 days later the company was required to give other political parties the opportunity to comment on current political issues in a manner proportionate to that afforded to the Prime Minister. The opportunity had to be broadcast at peak time (as 'Ask the Prime Minister' was) and prior to the by election. See ITC Press Release 83/00