COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 14th June 1984

TELEVISION WITHOUT FRONTIERS

GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON [illegible] FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE

(Communication from the Commission to the Council)

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INTRODUCTION

THE BRIEF FOR THE COMMUNITY

Purpose of the Green Paper

On 25 May 1983, the Commission adopted its interim report on "Realities and tendencies in European television: perspectives and options".[1] The report is mainly concerned with examining the scope for creating a European television channel. The Commission decided that the question of how the common market for the national television channel could be established should be dealt with separately.[2] Examination of this question is presented here in the form of a Green Paper. This is intended by the Commission as a preparatory document providing a basis for legislative measures (harmonization of national law) and application measures (implementation of the freedoms enshrined in the Treaty of Rome). It describes as far as possible the situation at the beginning of May 1984.

The purpose of this paper is threefold: to demonstrate the importance of broadcasting (radio and television) for European integration and, in particular, for the free democratic structure of the European Communities; to illustrate the significance of the Treaty establishing the European Economic Community (EEC Treaty) for those responsible for producing, broadcasting and re-transmitting radio and television programmes and for those receiving such programmes; and to submit for public discussion the Commission's thinking on the approximation of certain aspects of Member States' broadcasting and copyright law before formal proposals are sent to the European Parliament and to the Council.[3]

The Commission's action is in response to Parliament's Resolution on radio and television broadcasting in the European Community of 12 March 1982, in which Parliament "considers that outline rules should be drawn up on European radio and television broadcasting, inter alia with a view to protecting young people and establishing a code of practice for advertising at Community level".[4]

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[1] It was published as document COM(83)229 final and is referred to below as the interim report.

[2] Interim report, p. 8, point 3 and pp. 23-24, point 32.

[3] Although this paper also deals with the copyright issues arising in connection with the establishment of a common market in broadcasting, it is not to be confused with the "Green Paper" on the reform of the law on copyright and related rights, announced by the Commission in its Communication to the European Parliament and to the Council entitled "Stronger Community action in the cultural sector" (Bulletin of the European Communities, Supplement 6/82, pp. 16-17).

[4] OJ No C 87 of 5 April 1982, p. 110, point 7.

In the report on radio and television broadcasting in the European Community drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport by Mr Wilhelm Hahn (EPP)[1] and adopted unanimously by Parliament, some of the reasons given are: "Information is a decisive, perhaps the most decisive factor in European unification. ... European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity. A European identity will only develop if Europeans are adequately informed. At present, information via the mass media is controlled at national level. ... Information and economics are closely inter-related - an obvious example being advertising - and consequently the involvement of the media in European unification clearly adds a new dimension within the context of the treaties of Rome. Economic exchanges, understanding of social processes, freedom of movement and trade, vocational training and many other activities are inconceivable without information. Indeed, for some time information itself has been an important branch of the economy. ... Further difficulties arise from the legal point of view: the Geneva broadcasting conference of 1977 tried to establish the responsibilities of the existing companies at that time in a form which would be legally binding for at least 10 years"; in other words, "it made efforts to fix national borders as the compulsory limits for satellite transmissions. This move is attributable to Eastern European fears about free movement of the media and to the concern among the Western countries about unlimited competition as a result of advertising."[2]

The Opinion of the Political Affairs Committee, drafted by Mr Johan van Minnen (S) and likewise unanimously adopted,[3] includes the following: "In the eighties and nineties, therefore, broadcasting will be faced with ... far-reaching social developments. ... Those Member States ... will not escape the breaking-open of this /closed broadcasting system/. ... But if the state control is threatened this does not necessarily mean that television as such is also threatened! ... Although one may regret the advent of such an open structure, it would, in the view of the Political Affairs Committee, be incompatible with the freedom of information exchange to pursue a protectionist policy in this field. Freedom of information exchange is laid down in Article 10 of the 1950 European Convention on Human Rights and Fundamental Freedoms which states: 'everyone has a right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

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[1] European Communities, European Parliament, Working Documents 1981-1982, Doc. 1-1013/81 of 23 February 1982 (PE 73.271/fin.), pp. 8, 10 and 11.
[2] Hahn report, loc. cit., p. 7.
[3] loc. cit., pp. 21-26.

"This open information market must not mean that satellite broadcasts should be allowed to flood the Community in unlimited quantities as though they were a commercial product. ... This could be prevented only by creating tight and harmonized Community legislation on broadcasting laying down arrangements for advertising for satellites used for broadcasting. The Political Affairs Committee gives its preference to a system ...: ... i.e. advertising spots at fixed times between programmes which do not interrupt broadcasts. ... To ban advertising on satellite-broadcasts would be as unrealistic and perverse as to forbid advertisements in newspapers; the British ITV authority is evidence of the fact that a broadcasting organization run on commercial lines can very well hold its own, in terms of quality, with a state-run broadcasting organization. Freedom of expression, however, cannot be the prerogative of the highest bidder and the Commission must therefore draw up a directive ensuring that commercial interests are channelled into a direction acceptable to the Community and made subject to certain conditions. ... A European outline regulation should embody the structural guarantees necessary for independence without which a European broadcasting war will inevitably break out which may destroy the cultural values of our Community."

In a unanimously adopted Opinion drafted by Mr Hellmut Sieglerschmidt (S),[1] Parliament's Legal Affairs Committee similarly came out in favour of an approximation of national legislation on broadcasting. It stresses that this exercise could not be confined to the freedom to provide services in the broadcasting field, the prevention of distortions of competition, notably in respect of advertising in broadcasting, and the protection of listeners, viewers and authors. "It /Community legislation on the media/ would also have to contain at the least provisions to ensure that a variety of opinions, information and cultures are expressed and provisions for the protection of youth."[2] "A corresponding Council of Europe convention would complete such legislation appropriately."[3]

To begin with, the Commission needed to conduct "a fundamental inquiry covering all aspects of international legislation on policy in relation to the media".[4] This "report on the media should contain in particular information as to the following: (a) the legislation relating to the media in the Member States, (b) the legal basis for action by the Community in this field, (c) the matters in respect of which provisions should be laid down, (d) whether a convention on the media drawn up within the Council of Europe is advisable and, if appropriate, what form it should take and (e) the legal requirements and practical facilities for the creation of a European television channel".[5]

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[1] loc. cit., pp. 27-36.
[2] loc. cit., p. 30.
[3] loc. cit., p. 33.
[4] loc. cit., p. 34.
[5] loc. cit., p. 35.

This request was taken up by the Committee on Culture[1] and incorporated by Parliament in point 1 of its Resolution of 12 March 1982. The Commission welcomed this Resolution and announced appropriate initiatives.[2] Thus, on 25 May 1983, it first compiled an interim report entitled "Realities and tendencies in European television: Perspectives and options".[3] This report contains, first and foremost, a whole range of facts on satellite and cable television and reviews broadcasting legislation in Member States[4] (point 8(a) of Parliament's Motion) and the work of the Council of Europe[5] (point 8(d)). This Report's main political thrust is to be found in the discussion of the facilities for creating a European television channel[6] (point 8(e)).

The subject of this Green Paper is the opening up of intra-Community frontiers for national television programmes (freedom to provide services). This entails the step-by-step establishment of a common market for broadcasters and audiences and hence moves to secure the free flow of information, ideas, opinions the cultural activities within the Community.

In response to Parliament's request made at point 7 of its Resolution, the outline rules for European broadcasting are discussed from two angles: (i) their relationship to the EEC Treaty, and (ii) the scope for their further development under the powers it confers to approximate laws. In particular, the relevant provisions of Member States' legislation on the media are examined (abovementioned point 8(a) of Parliament's Motion) and then looked at in the light of the Treaty. The Green Paper also considers the legal basis for Community action (point 8(b)), discusses the matters requiring legislation (point 8(c)) and sets out approximation proposals (point 7 of the Resolution).

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[1] loc. cit., p. 13, point 8.
[2] Statements by Mr Lorenzo Natali and Mr Karl-Heinz Narjes on 11 March 1982, OJ Annex No 1-282 of 11 February 1982, pp. 220 and 221-222.
[3] Doc. COM(83)229 final.
[4] loc. cit., pp. 161-190.
[5] loc. cit., pp. 81-97.
[6] loc. cit., pp. 23-32.

In a new Resolution, adopted on 30 March 1984, on a policy commensurate with new trends in European television, Parliament reaffirmed its previous position, calling on the Commission and the Council "to provide a reliable legal framework in which to implement the principles of the Treaty of Rome applicable to the subject /broadcasting/, particularly ... freedom to provide services".[1]

It also called on the Commission and the Council "to cooperate with each other and the Parliament to review national legislation to ensure that it is possible to coordinate the different systems as required. This could include ... rules for advertising" and "rules for the protection of children and young people, copyright and authors' rights".[2] It was necessary "to formulate rules to ensure that public broadcasting monopolies do not seek to prevent private broadcasters and programme makers from fully contributing to the future developments ...".[3]

In a further Resolution, also adopted on 30 March 1984, on broadcast communication in the European Community (the threat to diversity of opinion posed by the commercialization of new media),[4] Parliament stated that it "E. is aware that the new technologies require a reasonable degree of commercial support through advertising; F. believes that a decision must be taken at Community level regarding the limits applicable to the use of advertising by public and private television companies, so that all television companies operate on an equal footing; G. considers that, if current codes of conduct and commonly accepted standards of practice are pursued, neither an uncontrolled proliferation of new services nor a threat to quality or diversity will arise; ... 2. urges the Commission to prepare framework suggestions for transnational broadcasting which take account of the proposals currently being prepared by the Council of Europe".[5,6]

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[1] Point 2 in the Resolution, OJ No C 117, 30.4.1984, p. 201 (202). See also the report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport by Mr Gaetano Arfé (S), European Parliament Working Documents 1983-1984, doc. 1-1541/84, 16.3.1984 (PE 85.902/fin.), p. 20.

[2] Point 4 in the Resolution, loc. cit.

[3] Point 7 in the Resolution, loc. cit.

[4] OJ No C 117, 30.4.1984, p. 198. See also the report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport by Mr A. H. Hutton (ED), European Parliament Working Documents 1983-1984, doc. 1-1523/83, 15.3.1984 (PE 78.983/fin.).

[5] The reference is to what was later adopted on 20 February 1984 as Recommendation R (84) 3 of the Committee of Ministers of the Council of Europe to its 21 member states on the principles relating to television advertising (see Conseil de l'Europe, Communiqué de presse I (84) 7 of 23.2.1984 for the text of the Recommendation). There are at present no plans for a legally binding agreement (Convention) between the member states of the Council of Europe.

[6] The full debate is published in European Parliament, Verbatim Report of proceedings, provisional edition, Strasbourg, 29.3.1984 - 30.3.1984, pp. 296-299, 305-315, 339-340.

EEC Treaty and cultural activities

Contrary to what is widely imagined, the EEC Treaty applies not only to economic activities but, as a rule, also to all activities carried out for remuneration, regardless of whether they take place in the economic, social, cultural (including in particular information, creative or artistic activities and entertainment), sporting or any other sphere. Thus, just as it guarantees Member States' nationals who are workers freedom of movement and those who are self-employed freedom of establishment no matter what their occupation, the Treaty guarantees free movement within the Community for whatever goods and services they supply.

Newspapers, magazines, collectors' items, records and films of all kinds as well as the showing of films benefit just as much from free movement within the Community as do food, capital goods, consumer durables and services provided by banks, insurance companies and advertising agencies. Likewise, intellectual property rights are as much subject to the EEC Treaty as industrial property rights (patents, trademarks, designs and models).

This comprehensive view of free movement for goods and services embodied in the Treaty is mirrored by the fact that the rights it confers are not the prerogative of workers in industry, the craft industries and the distributive trades but also extend to those working in the media and to bodies active in the worlds of art, entertainment and sport.

Nor is the right of establishment provided for in the EEC Treaty confined to industry, the craft industries, the distributive trades, banks and insurance companies. It is, in fact, a right to be enjoyed also by book and newspaper publishers, by film producers and distributors, by orchestra and entertainment organizers, and by press, film, theatre, opera and concert agencies, in short by all cultural undertakings and by all self-employed artists, authors, journalists, photographers and sportsmen equally. The Treaty does not exclude any sphere of activity. As a matter of principle, therefore, it grants the right of establishment to broadcasting organizations.

The freedom of movement that exists within the Community for workers and the self-employed, including all cultural and journalistic occupations, extends to the supply to the public of political information on other Member States and to their cultural interpenetration in the same way as it does to the free movement of newspapers, magazines, books, films, recorded cassettes, pictures, sculptures, etc., in short the free movement of movable physical cultural assets. Under the system of the four freedoms, immovable cultural assets and, hence, radio and television broadcasting are treated no differently.

Lastly, copyright holders (writers, composers, sculptors, film-makers, etc.) and performing artists (actors, musicians, singers, dancers, etc.) can rely on Article 117 of the EEC Treaty, which promises all workers "improved working conditions and an improved standard of living ..., so as to make possible their harmonization while the improvement is being maintained". Harmonization of national laws on copyright and performers' rights is one way of securing those desired improvements.

It thus transpires that the activity of the Community has, since the outset, encompassed essential aspects of cultural life in Member States. Even those who are culturally creative and their creations "belong" to the Community. They too were meant to share in the protracted process of creating a common market. They have a claim to the freedoms and forms of equality available at Community level, and primarily to the protection afforded by the basic rights of freedom of movement, freedom of establishment, freedom to supply goods and services, and treatment abroad as a national. To quote the Court of Justice of the European Communities: "Although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training. Chapters 1 / Workers / and 2 / Right of establishment / of Title III of Part Two of the Treaty in particular contain several provisions the application of which could affect this policy."[1]

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[1] Case 9/74 Casagrande /1974/ ECR 773, at 779, ground 6. Similarly Case 152/82 Forcheri /1983/ ECR ..., ground 17 / cyclostyled version pp. 24-25 /.

EEC Treaty and broadcasting

The EEC Treaty encompasses broadcasting in a multitude of ways, the most important of which are discussed below:

(i) It applies to signals transmitted or relayed by radio, considering them to be services (Article 60). It provides for the abolition of restrictions on the freedom to broadcast within the Community (Article 59). It prohibits any new restrictions on the freedom to provide such services (Article 62). It thus guarantees broadcasters the right to transmit or relay their signals to other Member States (freedom of Community-wide broadcasting). It affords recipients in the other Member States the opportunity to capture such signals (freedom of Community-wide broadcasting reception) and to include them in their own selection of broadcasting (freedom of Community-wide choice of transmissions).

(ii) The EEC Treaty applies to broadcasters in their capacity as persons carrying on a self-employed activity for remuneration (second paragraph of Article 52). It is irrelevant here whether they are natural or legal persons, companies with or without legal personality, associations, cooperatives or foundations, or public-law or private-law organizations (Article 58). The Treaty provides for the abolition of restrictions on their freedom of establishment in the territory of another Member State (first paragraph of Article 52). It prohibits the introduction of any new restrictions on the right of establishment (Article 53). Consequently, it guarantees Member States' nationals the freedom to take up and pursue broadcasting activities in other Member States (freedom of establishment throughout the Community).

The Commission is responsible for ensuring, both on its own initiative and in response to complaints, that this European fundamental right and that of freedom to provide services are respected (Article 155, first indent, and Article 169, first paragraph). If a Member State fails to comply with the Commission's reasoned opinion, the Commission may bring the matter before the Court of Justice (Article 169, second paragraph). The other Member States have the same right (Article 170).

(iii) The EEC Treaty applies to national broadcasting and telecommunications legislation as the sum of the provisions laid down in individual Member States concerning the taking up and pursuit of a self-employed activity, viz. broadcasting (Article 57(2)). "In order to make it easier for persons to take up and pursue activities as self-employed persons", the Treaty

provides for coordination of the relevant provisions of broadcasting and telecommunications legislation (Article 57(1), taken in conjunction with Article 57(2), and Article 66). This approximation of legislation is to be achieved through directives adopted by the Council, acting on a proposal from the Commission and after consulting Parliament (Articles 57(2) and 66).

(iv) The EEC Treaty applies to those working for broadcasting organizations. To those who are employees it guarantees freedom of movement within the Community (Article 48). To those working for them in a self-employed capacity it affords freedom of establishment (Article 52) and freedom to provide cross-frontier services (Article 59). In so doing, it extends the freedom of reporting, expressing opinions and presenting cultural performances to the entire territory of the Community. All occupations, including journalistic and artistic activities, are covered (Articles 48, 52 and 60). In order to establish freedom of movement for workers, including those active in the spheres of culture, sport and reporting (Article 49) and to make it easier for persons to take up and pursue activities in a self-employed capacity (Article 57(1) and (2)), the EEC Treaty prescribes a series of Community measures (Articles 49, 50, 51, 57(2) and 66), including the mutual recognition of diplomas, certificates and other evidence of formal qualifications (Article 57(1)). Such recognition is to be secured through directives issued by the Council, acting on a proposal from the Commission and after consulting Parliament.

(v) The EEC Treaty applies to such of the Member States' technical provisions governing broadcasting (relay procedures and equipment, transmitters, receivers, standardization, etc.) as directly affect the establishment or functioning of the common market (first paragraph of Article 100), in particular therefore the transmission, dissemination or reception of signals from other Member States and the manufacture and Community-wide marketing of such procedures and equipment by industry and commerce in the Community. The EEC Treaty provides for the approximation of such provisions, to be achieved through directives issued by the Council, acting on a proposal from the Commission and after consulting Parliament and the Economic and Social Committee (Article 100).

(vi) The EEC Treaty applies to broadcasting organizations as undertakings that deal in materials, sound recordings, films and other products which they need to carry on their activity. It prohibits all State restrictions on free movement in such goods between Member States (Articles 9, 12, 30 and 31). It thus guarantees broadcasting organizations, as well as their suppliers and customers both at home and abroad, the freedom to take part in Community-wide trade.

(vii) The EEC Treaty applies to broadcasting organizations in their capacity as undertakings engaged in competition. It prohibits them from entering into agreements that restrict competition and from abusing a dominant position that may affect trade between Member States (Articles 85 and 86). It thus guarantees broadcasting organizations the freedom to compete with one another within the Community and protects their suppliers and customers from any abuse of economic power.

The Commission is entrusted under the Treaty with the task of securing compliance with these provisions on the freedom of Community-wide competition and trade.

PART ONE

TECHNICAL ASPECTS

A. NEW DEVELOPMENTS IN THE AUDIO-VISUAL FIELD

The rapid development of audio-visual techniques in the Community is regarded in all Member States as exceptionally important for the future coexistence of individuals and of nations.

The increasing speed and lower costs of electronic data transmission will, apart from other considerations, make this mode of communication more generally accessible and lead to an internationalization of communications. This is true not only of individual communications, where decentralized computers now enjoy access to the well-developed international telecommunications network, thus giving electronic data-processing an international dimension, but also of electronic means of mass communication. Direct satellites and cable are techniques which, individually but above all jointly, make it possible simultaneously to transmit vast quantities of information over long distances.[1]

This development is occurring at the same time as the expanding use of the new storage techniques involving video cassettes and discs, which permit a further substantial improvement in the international availability of electronic data transmission.

In the Community, the free movement of goods extends to video cassettes and discs as economic assets in the same way as it does to sound cassettes and records. As a rule, therefore, films, television recordings and the like may circulate without restriction in the Community.

Wide-band cable makes it technically possible to relay national television programmes throughout the Community. Those on cable are able to choose between the national and foreign programmes offered by the cable operator. Direct broadcasting by satellite (DBS) knows no frontiers, since the programmes relayed can be received direct by any viewers in the coverage area that possess the necessary receiving equipment.

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[1] Interim report, loc. cit., pp. 43 et seq.

It is impossible at the moment to say how DBS will develop in comparison with the cable transmission of radio and television programmes. In any case, the internationalization of broadcasting, to which both techniques will lead, gives rise to serious legal problems. It is not out of the question that, in line with the results of the experimental phases of DBS and given the rising costs associated with individual receiving aerials including the requisite accessories, cable transmission of radio and television programmes will gain readier acceptance, especially as cable offers a wide variety of possible applications. It is to be expected though that both broadcasting techniques will complement one another: satellites will feed the programmes they carry into the cable networks.

The Commission is looking into the problems associated with the development of these techniques and will present appropriate proposals as part of its work to formulate a Community telecommunications policy.[1]

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[1] Commission of the European Communities, Communication to the Council on Telecommunications - Lines of Action, doc. COM(83) 573 final of 29 September 1983, and Communication to the Council on Telecommunications, Progress Report on the Thinking and Work done in the field and initial Proposals for an Action Programme, doc. COM(84) 277 final of 18 May 1984.

B. DIRECT SATELLITE TELEVISION - A CONCEPT TO OVERCOME THE SPATIAL LIMITATIONS OF CONVENTIONAL TELEVISION TRANSMISSION

I. Agreements under international law

The World Administrative Radio Conference held in Geneva in January 1977 (WARC 77) drew up the technical rules for a satellite broadcasting service for Regions I and III (Europe, Africa, Asia, Australia and Oceania).[1] The Final Acts of this Conference[2] give the details of the allocation of frequencies and orbital positions (i.e. the "locations" of satellites above the Equator), contain information on the protected service area, the elliptical coverage area and the transmitting power of satellites, and set out the technical broadcasting specifications for a total of 40 channels (in Europe). All the Member States, but not the Community as such, are involved in this allocation of frequencies, which came into force on 1 January 1979 and is valid for at least 15 years.

II. Technical concept

The satellite, which remains in a circular orbit some 36 000 kilometres above the Equator, picks up the radio signals beamed from a ground station (upward transmission) and relays them back to Earth in heavily bunched form once the technically necessary conversion and amplification processes have been completed (downward transmission). It works in the same way as would a conventional transmission mast located high above the Earth.

With the help of a special parabolic-reflector aerial some 90 cm in diameter and an electronic conversion and demodulation component, the signals relayed from the satellite can be received direct by individual television viewers.[3]

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[1] A conference dealing with Region II (America) was held in 1983 in Geneva with similar results.

[2] International Telecommunication Union, Final Acts of the World Administrative Radio Conference for the Planning of the Broadcasting-Satellite Service, Geneva 1977, Geneva RE III/1982.

[3] For details, see Interim report, loc. cit., pp. 41 et seq.

III. Reception possibilities

The so-called super beams, which are consistent with the principle of the free flow of information and are able to harness the special technical possibilities of satellite television for serving large cross-frontier areas, failed to gain acceptance - except by seventeen countries forming four country groupings[1] - at WARC 77 because of the insistence on national service areas, even though, from both a frequency-allocation and a financing viewpoint, direct satellites are a particularly economic and suitable way of broadcasting television over wide areas.

At WARC 77, the telecommunications conditions for direct broadcasting by satellite (e.g. beam direction, aerial elevation angle, transmitting power) were defined with a view to creating national service areas.[2] The satellite frequencies allocated to the Member States enjoy protection only in respect of reception within the respective national frontiers. In other words, they may be used for other purposes elsewhere even if, as a result, reception in the area in question is disturbed. The Member States are also required, when determining the characteristics of a world broadcasting agency for satellite broadcasting, to employ all available technical means to keep to a minimum transmissions beamed over the territory of other countries, unless prior agreement on the matter has been reached with the authorities of those countries.[3]

In spite of these technical precautions to preserve the national character of satellite television, it is evident even now that the reception areas will, in practice, be much wider (coverage areas).[4]

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[1] The groupings with a common broadcasting area are the following: (i) the North African countries of Algeria, Libya, Morocco and Tunisia; (ii) one grouping of six Arab countries; (iii) one grouping of three Arab countries; (iv) the five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden). In the last-mentioned grouping, two of the five channels allocated to each of them are intended for transmissions to the Nordic area as a whole. The other groupings have each set aside one channel for their joint programmes.

[2] Definition of service area (Annex to the Final Acts of WARC 1977): "The area on the surface of the Earth in which the administration responsible for the service has the right to demand that the agreed protection conditions be provided."

[3] No 2674 (previously No 428 A) of the 1982 Radio Regulation of the International Telecommunication Union.

[4] Definition of coverage area (Annex 8 to the Final Acts of WARC 1977): "The area on the surface of the Earth delineated by a contour of a constant given value of power flux density which would permit the wanted quality of reception in the absence of interference."

Since elliptical service areas cannot possibly be made to fit into national frontiers, there is no way of preventing a programme transmitted via direct satellites spilling over into other countries (overlapping).

In order to ensure high-quality reception in all parts of the service area, and for security reasons, it was decided in Geneva that the signal should be sufficiently strong (high-power satellite) to provide good reception even in outlying areas.

Advances in receiver technology are improving these cross-frontier reception possibilities. Recently developed aerials as well as receivers of a sufficiently broad technical design are lower-powered than was envisaged in Geneva in 1977.

In particular, the use of more costly aerials with larger diameters and/or incorporating more sophisticated electronics, e.g. community aerials, significantly enhances reception capability outside the original service areas. Lastly, cable companies use antennas 3m-5m in diameter that are able to pick up virtually all direct satellite programmes transmitted in the Community.

IV. Compatibility of broadcasting systems

Moves are under way in Europe to harmonize the technical broadcasting norms for direct satellite television. The broadcasting organizations in Europe that form the European Broadcasting Union have adopted and sent to the International Radio Consultative Committee a technical report setting out the final detailed specifications for a more sophisticated technique, the Multiplex Analogue Component (CMAC packet) System, to replace the existing PAL and SECAM systems. It is expected that a governmental conference will be convened to take the final decision on whether or not to adopt this system, which would make it possible, among other things, to improve broadcasting quality significantly and to extend further the coverage area.

The Commission has announced that it will take the measures it considers necessary to promote adoption of a European standard by the Member States.[1]

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[1] Answer to Written Question No 51/83, OJ No C 243 of 19 September 1983, p. 4.

V. Plans for direct satellite television in Member States

Several Member States have firm plans for developing and operating direct television satellite systems.[1]

On 29 April 1980, Germany and France concluded a government-level agreement on technical and industrial cooperation in the field of satellite broadcasting. Under the agreement, a German satellite (TV-Sat D 3) and a French satellite of the same design (TDF 1 F 3) will be developed, manufactured, launched, positioned and tested by 1985.

The United Kingdom Government has decided to introduce direct satellite television starting in 1986 and has allocated two channels each to the British Broadcasting Corporation (BBC) and the Independent Broadcasting Authority (IBA).

In Italy, Radiotelevisione Italiana (RAI) is planning to broadcast a direct satellite programme on a trial basis using one of the channels offered by the L-Sat Olympus, which belongs to the European Space Agency (ESA). The satellite is expected to be in operation from around 1986.

In Luxembourg, Radio-Télé-Luxembourg (RTL) is studying the potential of direct satellite television and is involved in discussions with other operators on the use of future direct satellites.

Belgium, Greece, Ireland and the Netherlands are currently studying the potential of direct satellite television.

Denmark, which has withdrawn from the joint Nordsat Programme involving the Scandinavian countries, has no intention at the moment of introducing direct satellite television.

[1] For details, see Interim report, loc. cit., pp. 199 et seq and pp. 143 et seq.

C. CABLE TELEVISION - A CONCEPT FOR OVERCOMING THE RESTRICTIONS ON THE CONTENT OF TELEVISION BROADCASTS

I. Enhancing broadcasting capability

Cable television permits the simultaneous transmission of a large number of television programmes. Unlike broadcasting via ground transmitters, cable technology does not have to contend with the natural limitation imposed by the frequency bands available; it tends to be "limitless" where the number of parallel information channels is concerned.

The dissemination of information (in the first place, the transmission of conventional programmes) is, therefore, only one of the areas that can be handled. Provided the network has been properly designed, in particular with the use of optical fibre technology, the whole gamut of interactive services can also be provided. The recall facility enables a user to access specific information stored elsewhere. Unlike in the case of conventional or direct-satellite transmissions, the dissemination of information by cable is invariably restricted to particular areas.

II. Technical criteria

Instead of radio waves being freely transmitted over the air, signals are sent along "wide-band" cables direct to individual receivers. With this transmission technique, signals retain their high quality even over long distances. Overlapping of different programmes is virtually eliminated.

Straightforward distribution systems (tree-and-branch network) are specialized in the transmission of radio and television programmes. At the same time, interactive systems (switched-star network) are increasingly being installed, enabling a dialogue to be carried on between the participant and the information provider and thus permitting any form of information exchange desired by the participant. A precondition for this is the profitable operation of modern light-wave conductors (optical fibre cables), which have an enormously greater transmission capability while also ensuring better quality.

III. Reception capability

Unlike those broadcasting for direct reception via land-based transmitters or satellite, the cable-network operator exercises control over what is receivable. Depending on what he may legally transmit and in the light of economic criteria, he selects the programmes that are to be relayed.

The main legal conditions imposed are a ban on "active" cable television, which, with a few exceptions,[1] still applies in all Member States, the obligation to broadcast national programmes within the service area and the requirements attaching to the transmission of foreign programmes.

From an economic angle, the demand for additional programmes must be sufficient to finance the costs of receiving and transmitting the programmes and acquiring any legal rights involved.

Under the circumstances, cable television in the Community has developed in the first place as a passive system, the companies involved being content to relay programmes produced by existing domestic and foreign broadcasting organizations. To this extent, there is no functional difference between them and the large number of smaller master aerials and community aerials that have now sprung up.

IV. Progress with cabling[2]

Taking the broadest definition of cable networks (including master and community aerials), there are some 600 000 different networks in Western Europe. However, 50% of cable subscribers belong to networks serving fewer than 100 subscribers. Around 7% of households are wired to cable networks and a further 17% receive transmissions from community aerials or smaller master aerials (serving apartment blocks, etc.). This means that just under one quarter of Western European households receive television programmes otherwise than via individual aerials.[3]

Belgium has the densest cable network in Europe and, after Canada, the second-densest in the world. Ten cable television companies (some communal, some inter-communal and some private) make available between 13 and 16 domestic and foreign channels to some 75-80% of all registered television connections.[4]

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[1] In a number of Member States, pilot projects are being carried out to test new programmes and services.

[2] See also Interim report, loc. cit., pp. 99 et seq.

[3] CIT-Research: Cable-TV Communications in Europe, quoted in: Patrick Whitten, "Die Zukunft der Kabelkommunikation in Europa", Media Perspektiven 4/83, pp. 233 and 234.

[4] Information on facts concerning cable distribution, document of the ILO, UNESCO, WIPO, BEC/IGC/ICR/SC.2/CTV/2, Paris, November 1982, Annex, p. 10; Inter-Parliamentary Consultative Council of Benelux, Report "L'influence des satellites de télévision et de la télédistribution sur l'organisation de la radio-télédiffusion dans les Pays du Bénélux" presented on behalf of the Cultural Affairs Committee by Mr Eyschen, Mr Schotten and Mr Wyninckx on 3 and 4 April 1981, pp. 17 et seq.

In Denmark, over 1 000 000 households, or more than half of all television viewers, are linked to community or master aerials. There are no cable television companies that transmit programmes that are not receivable locally.[1] In a number of border areas, however, programmes from neighbouring countries can be picked up (Jutland: German television; Copenhagen: Swedish television).[2]

In Germany, 9 700 000 households (out of some 22 000 000 registered receivers) are linked to community or master aerials. Individual cable networks are to be found in Hamburg and Nuremberg. Pilot cable projects have been launched in Munich, Ludwigshafen, Dortmund and Berlin. The Federal Government has decided to press ahead with the expansion of cable networks.[3]

In France, between 6 000 000 and 8 000 000 households are linked to small community aerials transmitting programmes that are receivable locally. Cable television networks (some 400 000 subscribers) relaying foreign programmes have been introduced primarily in the regions of Northern France. The French Government has decided to launch a cabling programme and has made the necessary arrangements for financing this costly venture. The initial objective is to have 1 400 000 subscribers by 1985, with around half of the households in France being linked to a modern cable network using light-wave transmission technology by 1995.

There are as yet no cable networks in Greece. Cable television in Italy has not progressed beyond the first tentative attempts to introduce it. In Ireland, some 26% of all television viewers are linked to 21 - mainly small - cable networks which carry domestic and, above all, British programmes.

In Luxembourg, the number of households receiving their television programmes via small cable networks is put at some 65 000, or around 90% of all households.[4] In the Netherlands, around 2 800 000 television viewers (just under 65% of the total) are at the moment linked to a community aerial or a cable network. In addition to the two Dutch channels, German, Belgian and, in some cases, British and French television is offered.[5]

In the United Kingdom, 2 600 000 households, or 14% of television-set owners, currently receive television transmissions via cable. Of these, 1 500 000 subscribe to the services provided by 440 private operators, with the remainder being linked to non-commercial networks operated by the local authorities, housing associations, etc.[6]

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[1] Information Technology Advisory Panel (ITAP), Cable Systems, A report, Cabinet Office, London 1982, p. 18.
[2] BEC/IGC/ICR/SC.2/CTV/2, Annex, p. 6.
[3] Government declaration by Helmut Kohl, "Bulletin des Presse- und Informationsamtes" of 14 October 1982, No 93, p. 857.
[4] Doc. BEC/IGC/ICR/SC.2/CTV/2, loc. cit., p. 13.
[5] Inter-Parliamentary Consultative Council of Benelux, loc. cit., p. 26.
[6] ITAP report, loc. cit., p. 10.

D. RELATIONSHIP BETWEEN SATELLITE AND CABLE BROADCASTING

The two new broadcasting techniques of satellite transmission and cable transmission are complementary, and not mutually incompatible, developments.

One of the characteristics of direct broadcasting by satellite is its ability to beam signals to large, cross-frontier areas at comparatively little cost. The system's advantages are clearly discernible when it comes to servicing thinly-populated or "shadow" areas. It leaves individuals the utmost discretion as to whether, when and to what extent they wish to avail themselves of the opportunities thus afforded for receiving signals direct from domestic and foreign transmitters. However, because of the cost of purchasing and installing an individual receiver and in view of certain other, technical difficulties, e.g. mobile reception in the case of cars or portable equipment, broadcasting satellites will not replace land-based transmissions for some time to come.

For its part, cable distribution can be profitably operated only in areas with a high density of subscribers. Once in place, the modern, high-capacity networks are able to relay programmes transmitted via satellite. The cost of the receiving equipment needed is inversely proportional to the cost of laying the cables and, when shared between all the subscribers, is hardly significant.

The Satellite-transmission and cable-transmission systems are complementary and mutually advantageous. In the difficult starting-up period, cable subscribers provide new direct-satellite channels with the viewer potential essential to their future viability, while the availability of direct-satellite channels acts as an additional incentive to be on cable and the increase in the number of subscribers and monthly fees means that the cabling operation can be financed more quickly. Indeed, a cable network on which not all programmes receivable locally are available will probably encounter considerable scepticism, both on financial grounds (double the cost because of the extra aerials needed) and for reasons of media policy, especially if, at the same time, the operation of individual aerials is restricted for legal reasons or because of actual circumstances.

With a view to the standardization of technical input specifications, preparatory work has been undertaken within the EBU to ensure that programmes picked up are relayed in full, i.e. with no deterioration in quality and including any multilingual sound channels, teletext subtitles, etc., and that, as a result, cable reception is put on the same footing as direct reception.

Such considerations do not apply to the relay of programmes via another kind of satellite, the so-called telecommunications satellite.

The signals transmitted via these satellites (telecommunications between individuals, live transmissions over long distances, exchange of Eurovision programmes) are not intended for the general public but for one or more qualified receivers (postal and telecommunications authorities, broadcasting authorities, cable operators).

Individual "insular" cable networks can be supplied cheaply with centrally produced programmes via such relatively low-power satellites. This development is already well advanced in the United States, for example, and will also gather momentum in the Community. In the United Kingdom, Satellite Television PLC already uses such a delivery satellite, the ECS, with the approval of both the Government and the satellite operator, Eutelsat, to transmit its own television programme, "Skychannel", for between three and five hours a day to Norway, Helsinki and Switzerland, where it is fed into local cable networks with some 500 000 subscribers in all. Negotiations on the relaying of the programme to other cable companies are under way.

Under telecommunications legislation, it is not the transmission by satellite but only the feeding of programmes into the cable network that ranks as broadcasting, since this alone is intended for the general public. A cable operator who supplies programmes in this way is, in many cases, treated as a domestic broadcaster even if the programme comes from abroad.

PART TWO

CULTURAL AND SOCIAL ASPECTS

The number of those reached by radio and television in the Community is impressive; Annex 1, at the end of this Green Paper, gives some figures. They show the extraordinary cultural, social and economic significance of the two media. However, the bulk of television viewers, and a great many radio listeners too, receive programmes only from the country in which they live. For practical purposes only people living in Belgium, Luxembourg and the Netherlands, and in some areas along the Community's internal frontiers, currently enjoy a common market in broadcasting services. Details of the present television overspill in Europe are given in Annex 2.

New transmission and broadcasting techniques, such as direct broadcasting by satellite and cable diffusion, will allow those in the other Community regions also to be reached from other Member States,[1] giving them access to a broad range of information, opinion and culture in the Community.

The citizens of the Community will welcome the extension of the potential coverage and content of television all the more if the Community is in a position to view the opportunities offered by these new broadcasting techniques as a cultural challenge and to place them within the context of a broad plan for the future of Europe not based on economic precepts alone.

[1] Interim report, loc. cit., pp. 103 et seq., and pp. 151 et seq.

A. POLITICAL FREEDOMS

Community-wide television broadcasting is already guaranteed by the fundamental rights of freedom of information and opinion which are binding in the Community.

I. Freedom of information and opinion

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which has been ratified by all the Community Member States and to which the European Parliament, the Council and the Commission of the European Communities pledged themselves in a common declaration on 2 April 1977, lays down in Article 10(1): "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

The Universal Declaration of Human Rights, which was unanimously adopted by the United Nations General Assembly on 10 December 1948, embodies the following principle in Article 19: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

The International Covenant on Civil and Political Rights to which, of the Member States, Denmark, Germany and the United Kingdom have acceded, also assumes the principle of freedom of information. Article 19(1) and (2) state: "Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

The conclusions of the Final Act of the Conference on Security and Cooperation in Europe (CSCE) also referred to this principle of the free exchange of information. Although these are not binding, they have great value as a moral commitment by the signatory states, which include the Member States. Section VII of the catalogue of principles includes the statement that the participating states "will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief for all". Direct reference is made to freedom of information under the heading "Information" in basket 2. There the participating states express their intention, in particular, to improve the circulation of, access to and exchange of information, including "filmed and broadcast information".

All these international instruments, to which others could be added[1] feature not just freedom to express opinions (active freedom of information), but also freedom to receive information from all the usual sources of access (passive freedom of information). Both of these freedoms act as guarantees for cross-frontier broadcasting. Broadcasts over the airways are a particularly important example of a generally accessible source of information. With respect to freedom to express opinions, improvements in the technical potential for simultaneous broadcasting of a large number of programmes open up new opportunities for all shades of opinion to participate more directly in broadcasting.

In addition to these human rights guarantees with regard to the freedom to express opinions and of information, there is an older body of rules, arising from international bilateral and multilateral treaties relating to international exchanges of information or significant for such exchanges. Many bilateral cultural, friendship, maritime and trade agreements provide guarantees for cross-frontier exchanges of information as a means of promoting economic and cultural relations.

In addition, the principle of the freedom to broadcast radio or television programmes has largely been accepted into international customary law. This can be confirmed by examining the practice of radio broadcasting and the reactions of receiving states.

Radio has already become an international medium. Television will move towards becoming one through the use of direct satellite broadcasting and cable relay systems.

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[1] UN Resolution 59(1), 14.2.1946: "Freedom of information is a fundamental human right and basis for all freedoms to which the UN is committed". UN Charter Article 56, in conjunction with Article 55, commits UN members to promoting "universal respect for, and observance of, human rights and fundamental freedoms ..." The International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 lists, in Article 5, civil rights in respect of which discrimination is forbidden. Section (d)(VIII) refers to "the right to freedom of opinion and expression". The preamble to the UNESCO Constitution advocates the free exchange of ideas and knowledge and Article 1 advocates the promotion of the free flow of ideas by word and picture. The UNESCO Resolution of 1948 recommends to Members that they should recognize the right of citizens freely to listen to broadcasts from other countries. (Records of the General Conference of UNESCO, Third Session, Res. 7.2221, Beirut 1948). The UNESCO declaration on the mass media of 28 November 1978, on the free flow and the comprehensive and balanced dissemination of information as a significant factor for international understanding, is also relevant; it lays down in Article II(1): "The exercise of freedom of opinion, expression and information, recognized as an integral part of human rights and fundamental freedoms, is a vital factor in the strengthening of peace and international understanding".

The greater range of radio waves, inherent in their technical characteristics, was exploited from an early stage. In many parts of the Community, cross-frontier reception of other nations' programmes is either already a reality or perfectly feasible. A specifically international radio system was simultaneously built up, whose programmes are aimed directly at foreign audiences (e.g. Deutsche Welle,[1] Deutschlandfunk, Radio France, Radio Wereldomroep, BBC World Service). Nowadays, two-thirds of all states transmit their international programmes in the shortwave band. There is no place on earth where it would be impossible to receive this type of broadcast.

The admissibility of beaming radio across frontiers has been recognized by the legal systems of the free democracies and may to some extent be regarded as international customary law. This also applies to international radio programmes specifically aimed at a foreign audience. Freedom of broadcasting has in this specific area become accepted as customary law.

II. Obstacles

Freedom of expression and information do not of course apply without restriction. International guarantees of human rights contain a number of reservations for national rules, and permit freedom of information and expression to be weighed against other important values. However, the principle of freedom of information is not jeopardized by this, but confirmed. An example is Article 10(2) of the European Convention on Human Rights, according to which the right to freedom of expression and information (Article 10(1)) may be subject to legal restrictions which "are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

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1 Whose programmes arerequired "to provide foreign audiences with a comprehensive picture of the political, cultural and economic life of Germany and to present to them the German attitude on important questions of national and international affairs". Law on the creation of Federal Broadcasting Authorities, 29.11.1960, Bundesgesetzblatt I p. 862, Article 1(1) second sentence.

III. Policy for safeguarding freedom in the field of communications

This brief overview of the international legal situation shows how fundamental is the decision taken by the Western democracies to promote free transmission of information as an expression of political freedoms. They have on many occasions, in the United Nations and in its ancillary organizations, opposed efforts to introduce, in the field of cross-frontier exchange of information, the principle of prior agreement of receiving states and to replace free exchange of information by the principle of control over such exchanges within a new World Order for Information and Communication.

All the Community Member States refused to approve the United Nations Resolution of 10 December 1982, which, in its annex entitled "Guiding principles for the use of artificial satellites for international direct television broadcasting" contains amongst other things the requirement that states must seek the prior agreement of countries in which broadcasts might possibly be received before broadcasting any television programmes direct (Sections 13 and 14).[1]

Requirements of this nature clash with the basic principles of the European democracies. Freedom of information is a prerequisite to the exercise of the right of citizens to elect their parliament. Only citizens who can obtain information freely are in a position to assume responsibility for their democratic rights and duties. In all the Member States, broadcasting enjoys a wide degree of independence from Government. There is no state responsibility for the content of individual programmes and this is actively discouraged.

In sum it may be observed that the Member States have committed themselves, both politically and - with specific reservations - legally, to guaranteeing the free cross-frontier exchange of information.

This commitment by the Member States tallies with the obligations of Community law enshrined in the EEC Treaty to create the legal preconditions for Community-wide broadcasting (see Part Five).

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[1] Reprinted in the interim report, loc. cit., pp. 75-78.

B. THE NEW TECHNOLOGIES IN THE SERVICE OF EUROPEAN INTEGRATION

Cross-frontier radio and television broadcasting would make a significant contribution to European unification. According to the preamble to the EEC Treaty the intention is "to lay the foundations of an ever closer union among the peoples of Europe", while Article 2 states that the Community's task is "to promote ... closer relations between the States belonging to it". Television will play an important part in developing and nurturing awareness of the rich variety of Europe's common cultural and historical heritage. The dissemination of information across national borders can do much to help the peoples of Europe to recognize the common destiny they share in many areas.

It is also essential to improve coverage of events in the other Member States if the citizens of Europe are to play their full part - in particular as voters in elections for the European Parliament - in building the Community. A greater role for the citizens in the decision-making process of the European institutions will stimulate interest in Community affairs. This requires awareness on a much wider geographical scale. Accordingly, the European Parliament called for a supranational approach to the dissemination of information: "European unification will only be achieved if Europeans want it. Europeans will only want it if there is such a thing as a European identity. A European identity will only develop if Europeans are adequately informed. At present, information via the mass media is controlled at national level".[1]

In its Resolution of 12 March 1982 the European Parliament stressed the need for the Community to encourage and participate in plans by the national television companies and the European Broadcasting Union to establish a European television channel.[2] The Commission stated its readiness to do so in its interim report "Realities and tendencies in European television - perspectives and options".[3]

The fact that cross-frontier television broadcasting offers an opportunity for helping to develop a European identity is an aspect of the new broadcasting technology which also holds some attraction for the Member States. The aim is to use the possibility of direct television transmission via satellite in order to produce and broadcast a new kind of programme with a European focus. In Germany the ZDF has given thought to the possibility of a European satellite channel.[4] In France plans are being developed for cooperation with neighbouring countries on a joint channel for the French-speaking areas. Radio Luxembourg's satellite plans envisage a channel tailored to European requirements.

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[1] European Parliament, Report on behalf of the Committee on Youth, Culture, Education, Information and Sport on radio and television broadcasting in the European Community, rapporteur W. Hahn, document No 1-1013/81 of 23 February 1982 (PE 73.271/fin.), pp. 9, 11 and 12.

[2] OJ C 87, 5.4.1982, p. 110 and p. 111.

[3] Interim report, loc. cit.; see especially p. 27, section 36.

[4] ZDF-Schriftenreihe, Heft 25, Mainz 1981.

However, new programmes specifically designed for European interests are not the only contribution; the broadcasting of national programmes across national borders can do just as much to promote European integration:

- the range of sources for information about the other Member States of the Community and their peoples is thereby dramatically increased;

- access to programmes from other Member States provides a common background of information which offers far better chances of mutual understanding, trust and rapprochement;

- with more information available, different sources can be compared; this will sharpen people's judgment and help them to make a more objective assessment of the situation in the Member States and hence in the Community.

It would be a great advantage for the millions of workers and self-employed persons who have made use of the freedom of movement guaranteed by the EEC Treaty to be able to receive programmes from their home countries in the Member States where they are working.

Cross-frontier broadcasting of European as well as national programmes will also give a boost to those bodies in the Community which endeavour to further the progress of European unification, by providing them with a wealth of information, arguments and new impulses.

C. THE NEW TECHNOLOGIES IN THE SERVICE OF CULTURAL EXCHANGE

All the Member States of the Community welcome and promote cultural exchanges between their peoples both for the stimulating effect they have on the creativity of artists and thinkers and for the sake of developing a wider audience.

Television, like radio, would become a means of conveying information about political, social and cultural events from one country to another and thus a source of cultural enrichment. Added to the impressions gained from travel and other activities, this would provide citizens from neighbouring countries with a far more rounded and clearer picture.

Cooperation between the broadcasting organizations in the Community, both bilateral and within existing international bodies such as the European Broadcasting Union (EBU, widely known as "Eurovision") which at present mainly involves programme exchanges, would be supplemented by something much more immediate: a direct "exchange" of programmes in the Community. With wider coverage areas, viewers would have direct access to programmes broadcast in neighbouring countries. However, the advantage of being able to receive the original programmes direct is offset by the problem of language, as the scope for language aids under such a system is still very limited.[1]

To begin with, however, the main objective will be to make programmes aimed at national audiences available to people in the other Member States. At a later stage television could follow the example of radio, producing programmes intended to convey life and events in one country for audiences in the other Member States.

Transmission of domestic television programmes across national borders also offers the interested public new opportunities for learning about the cinema and other cultural productions in the audio-visual field in other Member States.

This applies in particular to productions which are not marketed via the large international distributors (film workshop broadcasts). There are many examples to show that creativity is heightened by contact with different cultures.

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[1] Possible technical solutions include multichannel sound and simultaneous transmission of subtitles in several languages via teletext. Such arrangements would be facilitated by a single set of standards for direct broadcasting by satellite in Europe.

These advantages are not merely theoretical. The Nordic countries are already working on the practical details of using direct satellite broadcasting for supranational programme exchange. At the WARC in 1977 they applied for and were granted a number of satellite channels to cover the entire Nordic region. A joint satellite project (Nordsat) was agreed. In the preamble to the draft treaty governing cross-frontier transmissions by satellite particular emphasis is placed on the cultural opportunities offered by intensified programme exchange:

"Conscious of the vital need to maintain and strengthen the cultural proximity of the Nordic peoples, anxious to promote mutual interest and knowledge between the neighbouring Nordic countries in order to acquire a better understanding of the individual character of each country, intent on promoting these objectives by the transmission of radio and television programmes from individual countries throughout the Nordic region and thereby at the same time allowing ethnic and cultural minorities greater opportunity to enjoy cultural productions and information in their own languages, desiring to offer the inhabitants of the region a greater and broader range for programmes on a pan-Nordic basis and to strengthen cooperation between the Nordic broadcasting companies in order to provide a platform of programme production that will extend beyond the resources of the individual countries, realizing the value of Nordic programme exchange via satellite as a counterbalance against the growing range and extent of radio and television broadcasts by other countries across national and language frontiers ... the Governments of Denmark, Finland, Iceland, Norway and Sweden have agreed as follows.[1]"

The Council of Europe, which regards the promotion of culture in Europe as a priority, has carried out a detailed study of the cultural effects of direct television broadcasting by satellite (DBS). In a report

[1] Nordic Council of Ministers, Nordic Radio and Television via Satellite - Final Report, Stockholm 1979 (the emphasis is the Commission's).

adopted by the Committee of Ministers[1] it notes that DBS will offer viewers a greater number of channels to choose from than ground transmissions. In addition, a wider European audience would be given the opportunity of watching foreign television broadcasts and even specifically European programmes. This could help understanding between peoples, deepen their knowledge of each other's culture and development and contribute towards a more widespread European identity. Europe must therefore exploit the opportunity offered by the new transmission techniques for increasing the range of programmes available in order to exchange broadcasts on a pan-European basis. Provision of a greater variety of programmes cannot, in its view, be limited to national possibilities.[2] This is particularly true as regards the Member States of the European Community.

Cultural exchanges worldwide are the particular concern of UNESCO. The final report of the World Conference on Cultural Policies, held from 26 July to 6 August 1982, contains a section on international cultural cooperation, which begins as follows: "Creative human activity and the full development of the individual and society depend upon the widest possible dissemination of ideas and knowledge by way of cultural exchanges and contacts."[3]

The Commission itself recently reiterated the value of cultural exchanges for promoting culture in the Community and stressed that "widening the audience" must be accompanied by other measures.[4] These include ensuring that the benefit gained by the holders of authors' and performers' rights from the commercial exploitation of their work via satellite and cable television broadcasts is commensurate with the increasing audience potential. They must - if they cannot already do so - be enabled to adapt their marketing practice to changing consumer patterns. This Green Paper contains proposals along these lines (Part 6, C).

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[1] Council of Europe, Steering Committee on the Mass Media (CDMM), Committee of Experts on Media Policy (MM-PO), Final activity report on the possibility of reaching agreement on a legal instrument relating to direct broadcasting by satellite DBS, Strasbourg, 7.10.1982, Document MM-PO (82) 24.

[2] Loc. cit., 30-31.

[3] Unesco, World Conference on Cultural Policies, Mexico City, 26 July - 6 August 1982, Final Report, Paris, November 1982, p. 45, Section 43; even more explicit are recommendations No 136 on the dissemination and exchange of cultural information (p. 146) and No 142 on cultural agreements and cultural exchanges (p. 151).

[4] Stronger Community Action in the Cultural Sector, Supplement 6/82 - Bull. EC. pp. 12 and 13.

Frequent warnings are heard about the dangers of the cultural domination of one country by another in the cinema, although this is not a problem between Member States. As for the production of television programmes within the Community, no individual Member States are predominant. Statistics on the films broadcast on television in the Member States show that the proportion of films from other Member States is regrettably small (Annex 3). Greater cooperation between the European broadcasting authorities is desirable and is being pursued in various ways.

However, most of the films shown come from one single non-member country - the USA. As a result there is already a certain uniformity in the range of films screened on television in the Community. Programmes such as "Dallas" are carried by almost every television channel in the Member States. The creation of a common market for television production is thus one essential step if the dominance of the big American media corporations is to be counterbalanced. This is yet another area where the establishment of a Community-wide market will allow European firms to improve their competitiveness.

D. THE SOCIAL CONSEQUENCES

An important question for the Community is what effect the opening up of internal frontiers made possible by Community-wide broadcasting will have on viewers and on the content of broadcasts in the future.

I. Effects on viewers

Some of the dangers attributed to the "new media" are simply irrelevant to an increase in the number of programmes achieved by relaying foreign programmes. People will not be overwhelmed with information or stimuli simply by having the opportunity to watch or listen to radio or television broadcasts from other Member States rather than their domestic programmes.

Moreover, contrary to the common fear regarding the "media revolution", the provision of cross-frontier broadcasting is unlikely to produce an increase in viewing and listening. Neither in Belgium nor in the Netherlands, where cable television offering nine to sixteen foreign channels is widespread, has the average daily viewing time risen. Indeed, long-term surveys of viewing habits in those countries have shown that average viewing settles down at just over two hours per day, even where the number of channels actually available has increased.[1] The alleged "addictive fascination" of television does not come into play in the case of foreign programmes simply because, for most viewers, watching them requires a greater intellectual effort. Consequently, fears that a greater choice of channels could lead to "personality disorders" are unjustified.

Looking at the average picture does not, however, tell us anything about the dangers for certain specific categories of persons - such as children and young people. In fact, the above findings apply to them in an even greater measure because they, especially, will be unable to follow programmes from abroad because of the language barrier. Their interest in foreign language broadcasts will tend to develop only as they progress through school and come to learn foreign languages - in other words, when their maturity and experience have grown.

For other groups - foreigners, for example - cross-frontier broadcasting will be a positive advantage, offering them for the first time a chance to maintain closer contact with and share directly in the life of their home country.

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[1] Daniel Poesmans, Verkabelung und Fernsehverhalten in Flandern, Media Perspektiven 1981, pp. 240 and 243.

Assuming that the availability of foreign channels is hardly going to affect the average amount of viewing time, it follows that the number of programme choices made by viewers - whether positive or negative - will increase. Viewers and listeners are likely to learn to use greater judgment and to be more selective.

What criteria and direction such selectivity will follow requires further study. Any forecast involves more or less plausible conjecture. One type of attitude is for the viewer to select programmes which corroborate and confirm his own opinions. This is quite compatible with a differentiation of opinion through awareness of additional arguments. Whether or not the overall effect is to strengthen existing opinions and prejudices depends primarily on the type of programme available: crudely stereotyped programmes presenting sweeping judgments in line with majority sentiment heighten the negative effects, while programmes presenting different facets of the arguments tend to heighten the positive effects. Another attitude, widely welcomed, but which depends very much on the quality of the programmes available, treats the media critically, as a source of information and culture (cognitive growth). The contrary (escapist) attitude is to seek in the media easy answers and surrogate solutions to problems and relief from stress. Finally, selectivity can be directed towards social objectives, treating the media as the frame and fabric of interpersonal communication. None the less, a number of social factors such as parental example, family unity, style of upbringing, play a determining role.

The growth in broadcasting may also significantly affect the availability and dissemination of knowledge, even if other factors - such as home, school, social status and interpersonal relations - predominate initially.

II. Effects on programme content

The increase in the number of channels available to media users as a result of Community-wide broadcasting may have both positive and negative effects (increased variety as against poorer quality and less scope for financing individual programmes).

The effects on programme content and quality are closely linked with the scale and nature of the available sources of finance. For example, in the case of an oligopolistic market structure the supplier might endeavour to find the lowest common denominator: programmes which would not be anyone's first choice, but which people will prefer to watch rather than to switch off, are duplicated until the audience which can be captured by a more specialist programme is greater than could be attained by re-duplicating the most popular type of programme

(i.e. that with the lowest common denominator). In the case of "pay TV" this tendency towards duplication and the production of programmes with the lowest common denominator is less strong because the fact that there is a charge for programmes provides programme producers with a more accurate picture of audience preferences and thus encourages the production of special interest programmes.

Community-wide broadcasting is unlikely to have such consequences, as it does not directly affect the way in which existing channels are financed. But channels with differing forms of finance will increasingly be competing for the same audience. The co-existence of two types of television organization - the one financed from licence fees and the other financed on a commercial basis, both equally bound to provide a public service - has proved its worth in the United Kingdom over many years. A further increase in the choice available is currently taking place there, and past experience shows that there are no grounds for fears of a drop in the high quality of programmes.

PART THREE

ECONOMIC ASPECTS

Action on broadcasting is needed for two reasons. One is the Community's brief to create a common market for this important branch of the economy (A.I). The other is the desire to facilitate cross-frontier broadcasting in the Community (A.II) and to exploit its integrating effect.

As a cursory review of costs and financing possibilities for broadcasting shows (B), the use of new transmission techniques such as direct satellite and cable will further enhance the economic significance of broading. The infrastructure costs of introducing these new transmission techniques will, however, be met only in part and indirectly by the broadcasting organizations. Production costs differ significantly depending on the type of programme. Among the financing possibilities, subscription programmes and advertising promise substantial rewards that can be fully realized only through the introduction of Community-wide broadcasting. New financing possibilities must also be examined, however. The advantages of cross-frontier DBS cannot have their full impact unless there is a uniform European standard.

From an economic angle, establishment of a common market for broadcasting does, however, have implications that go far beyond the broadcasting sphere. As an advertising medium, broadcasting organizations help to stimulate sales of goods and services in many branches of the economy. The cross-frontier broadcasting of advertising promotes cost savings and increases in efficiency (D). These economic aspects must not be overlooked if, from a cultural and social point of view, the role of broadcasting as a medium providing information, expression of opinions, education and entertainment is to be preserved.

Moreover, as the technical infrastructure necessary for the new transmission techniques is being developed, financial resources to the tune of some 100 000 million ECU are being channelled into specific activities simply in order to create efficient service-integrated cable networks. These activities include cable technology, communications technology, entertainment electronics, component technology including micro-electronics, electrical trades and the space industry (C).

The transmission of broadcast programmes is only one of several functions performed by modern integrated communication networks. Where the production and marketing of goods and services are concerned, such networks also play a key role in maintaining the competitiveness of the European economy on international markets. Moves towards integration, which go hand-in-hand with an increasingly marked division of labour, heighten the need for a cross-frontier exchange of information within the Community. Efficient communication networks, which are the nervous systems of modern industrialized societies, enable firms to reduce production, organization and communication costs and, in so doing, lead to rationalization and higher productivity.

Financing these communication networks, which are essential to the economy as a whole, cannot simply be a matter for business users but should also be tailored to the requirements and purchasing power of private households, which will be prepared to invest in the new techniques only if the variety and attraction of the new means of communication available provide them with an incentive to do so. Here too, we see just how necessary Community measures to liberalize broadcasting are.

Lastly, the keener competition within the common market will trigger adjustment processes in broadcasting and in the competing media and will lead to a greater degree of supply specialization. For example, advertising aimed at encouraging leisure activities ("hobby advertising") will provide television with new sources of revenue, especially as a larger share of private income is expected to be spent on such activities in the longer term (E).

A. BROADCASTING

I. The broadcasting organizations as a force in the economy

Broadcasting organizations perform an important role in the Community economy as a whole. They are active on the market as an economic force and, as employers, provide a large number of jobs. In all, over 100 000 people from a wide range of specialist fields and covering a broad spectrum of skills (economists, technicians, artists, journalists, craftsmen, etc.) are employed on a permanent basis by broadcasting organizations in the Community. Details are given in Annex 4 at the end of this Green Paper. In addition, many more people are employed in a temporary capacity or on a fee-receiving basis, and without them broadcasting would not be possible.

The broadcasting organizations publish annual accounts, usually drawn up in accordance with company law or analogous rules.

In Belgium, there are two large independent broadcasting bodies, Belgische Radio en Televisie (BRT) and Radio-télévision belge de la Communauté culturelle française (RTBF), and one smaller independent body, Belgische Rundfunk und Fernsehzentrum für deutschsprachige Sendungen (BRF). In 1981, they had an aggregate turnover of some BFR 9 250 million. The RTBF balance sheet at 31 December 1981 showed a total of BFR 5 330 million and that of the BRF one of around BFR 100 million. The 1981 revenue and expenditure account for Danmarks Radio showed a total of some DKR 1 200 million for television and one of DKR 133 million for radio (Radiofond). In Germany, the corresponding figures on the revenue and expenditure accounts for ARD and ZDF were some DM 3 900 million and some DM 1 200 million respectively for 1981. The total budget for the French broadcasting organizations in 1982 was fixed by the National Assembly at more than FF 7 800 million. In Greece, expenditure by ERT-1 in 1982 was given as just under DR 6 000 million (the figures for ERT-2 are not available). In Ireland, expenditure by RTE totalled around IRL 50 million in 1981. In Italy, RAI announced expenditure of LIT 1 143 146 million for 1981. A large private broadcasting sector exists alongside RAI. In Luxembourg, the CLT (Compagnie Luxembougeoise de Télédiffusion) recorded a turnover of LFR 8 280 million in 1982 and showed a profit of some LFR 971 million in 1980. The broadcasting authorities in the Netherlands were able to call on revenue totalling HFL 768 million for their domestic programmes in 1982. In the United Kingdom, revenue accruing to the BBC amounted to UKL 602 million in 1982, while the ITV companies recorded a turnover of UKL 680 million. The aggregate turnover of broadcasting organizations in the Community is around 7 500 million ECU. A summary table with national currencies converted in ECU is given in Annex 5 at the end of the Green Paper.

The broadcasting organizations obtain their finance primarily from licence fees and/or advertising. The radio and television licence fees payable in each country are shown in Annex 6. Licence fees generate about 4 200 million ECU for 30 television and radio organizations in the Community, while the other broadcasting organizations rely on commercial advertising. However, as an advertising medium, the latter compete with broadcasting organizations that, in addition, can count on revenue from licence fees. In 1981, commercial advertising brought in some 3 300 million ECU in the Community as a whole. Details of expenditure on television advertising in the various European countries and the share of such expenditure in total advertising expenditure are given in Annex 7.

Broadcasting organizations act in the market as potential buyers of goods (e.g. land, buildings, broadcasting premises and equipment, and office equipment), services (e.g. independent programme productions, concerts, theatre, ballet and opera performances, and general services) and rights (copyright and performers' rights). They are also suppliers of goods, services (e.g. advertising) and rights (e.g. marketing of television productions recorded on video cassettes, international programme exchanges).

Commercial subsidiaries or dependent public undertakings set up for predominantly business and industrial purposes are extremely powerful and active in a wide variety of fields: transmitting and broadcasting programmes via cable networks,[1] selling advertising time[2] and preparing programme schedules,[3] producing programmes, procuring, acquiring and exploiting films,[4] distributing and marketing film and television

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[1] In France, a public undertaking with industrial and business responsibilities was set up under the Audio-visual Communications Act of 29 July 1982. It is financed in part out of the revenue it receives from programme companies in consideration for the broadcasting services it provides.

[2] In Germany, all the "Land" broadcasting organizations have set up independent advertising companies to sell and to carry out advertising on the air. In some cases, they are even responsable for that part of the programme into which advertising spots are fitted (Westdeutsches Werbefernsehen GmbH). In other countries, this responsibility falls to a central body (Régie française de publicité, Stichting Ether Reclame) that shares out its profits among the broadcasting organizations according to a formula fixed by the government.

[3] In France, the Société nationale de production carries out those of its activities not directly financed out of the licence-fee revenue on a commercial footing. According to Mr B. Labrusse, its chairman and managing director, it is one of the three largest production companies in the world, with 2 500 permanent employees, 500 people employed on an occasional basis and 10 000 self-employed collaborators (artists, authors, etc.) as well as a turnover of FF 1 000 million and just under 2 000 hours of programme production.

[4] In Germany, Degeto-Film GmbH acts in this capacity on behalf of all the "Land" broadcasting organizations.

productions,[1] compiling and publishing magazines containing programme schedules,[2] collecting, storing and exploiting sound, picture and written documents,[3] carrying out R&D into the technical aspects of broadcasting,[4] monitoring and checking broadcasting equipment and premises as well as ascertaining the extent of service areas and adapting broadcasting facilities accordingly,[5] transmitting programmes by cable,[6] organizing training and further training courses for employees[7] and providing them with retirement pensions.[8]

Even more than with actual broadcasting, these activities bring them into competition with other undertakings. They vie with the other media participants: independent authors/artists, the press (newspapers/magazines), the book trade (publishing/retailing), libraries/museums, the theatre, the film industry, manufacturers of audio and video material, and distribution companies.

As an advertising medium, the broadcasting organizations compete with newspapers, magazines, outside advertising, directories, cinema advertising and direct advertising. Of the total of some USD 27 000 million that is spent on advertising in Europe, 12% on

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[1] In France, the Institut national de la communication audiovisuelle is responsible, among other things, for marketing television productions. A new agency, the Société de commercialisation, has been set up to market television productions abroad and to secure for the culture industry in France a larger share of the world market in audio-visual productions as a means of increasing the volume and quality of productions. In the United Kingdom, the total turnover from sales of programmes and records and from a variety of services amounted to UKL 12 million in 1980, and the trend is upwards. Hearst, Britisches Fernsehen, Media Perspektiven 1981, pp. 353 and 365.

[2] In Ireland, the Netherlands and the United Kingdom, to name just three countries, the broadcasting organizations publish magazines listing their programmes. In 1980, the gross revenue from the BBC's extensive publishing activities, including the Radio Times, totalled over UKL 56 million. Hewlett, BBC Data, Media Perspektiven 1981, p. 367.

[3] The Deutsche Rundfunkarchiv has a central filing system, sound archives and historical archives. BBC Data provides the BBC with a centralized and comprehensive information service. It also operates on a commercial basis the facilities necessary to provide this service. Hewlett BBC Data, Media Perspektiven 1981, p. 367.

[4] In Germany, the Institut für Rundfunktechnik in the case of ARD and ZDF.

[5] In Germany, the Rundfunk-Betriebstechnik GmbH, in which seven "Land" broadcasting organizations and ZDF have shares.

[6] RTE Relays contributed IRL 336 784 to the RTE's results in 1981.

[7] In Germany, the Schule für Rundfunktechnik, Nuremberg, and the Zentralstelle Fortbildung Programm ARD/ZDF.

[8] In Germany, the Pensionkasse freier Mitarbeiter, Frankfurt, on behalf of all ARD broadcasting agencies, including RIAS, and on behalf of ZDF.

average goes on television advertising and 3% on radio advertising.[1] For want of accurate statistics, the economic significance of the media in the Community as a whole can only be estimated. It is reckoned that between 1.5% and 2.0% of the Community's gross national product is generated by the media and that some 1% of the labour force is employed in that sector, if both wholesale and retail levels are included.

No fundamental differences in economic behaviour are discernable between private broadcasting organizations and the majority of their counterparts in the public sector. In performing their service in the public interest, public broadcasting organizations operate in the same way as private commercial undertakings.[2]

II. The financing of broadcasting organizations exposed to competition from other Member States

From an economic viewpoint, the dismantling of internal barriers to broadcasting, which permits the cross-frontier transmission of programmes throughout the Community, will entail changes in broadcasting companies' financing arrangements and possibilities. Fears have been expressed that the economic base of some of them will be undermined. Because of its implications for the freedom to express opinions and to receive and impart information and for the unhindered access of social groups to the media, this anxiety has to be taken seriously. However, there is little to suggest that the establishment of a common market in broadcasting provides any justification for such fears.

Cross-frontier broadcasting will have no direct effect on the revenue that flows to broadcasting organizations in the form of licence fees or government grants. As a rule, mere possession of a radio or television receiver ready for use entails payment of the national licence fee. This source of financing is not, therefore, conditional on the actual transmission of programmes, or on audience size. Its effect is to seal off national markets, and this cannot be remedied if only because imposition of an official licence fee is confined to the national territory. Financially speaking, no account is taken of the cross-frontier reality of broadcasting. On the one hand, financial participation by foreign listeners or viewers is not possible even where the programme is relayed by cable and, on the other, there is no provision enabling foreign broadcasters of programmes received within the country or relayed by cable to share in national licence-fee revenue.

By contrast, subscription fees in respect of the transmission of foreign programmes from other Member States could be a new source of finance, on top of the broadcasting organizations' conventional sources of revenue. However, future pay-TV programmes, as planned, for example, by the BBC for one of the direct-satellite channels, will have to compete with foreign as well as with other, domestic cable programmes. In those Member States that are planning

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[1] International Advertising Association, World Advertising Expenditures 1980, pp. 16 and 17.

[2] See, for example, the RTE information sheet, The Finances of Broadcasting, Dublin 1982, p. 1.

to expand the supply of domestic programmes in this way, cross-frontier broadcasting of foreign programmes is seen not as constituting a threat but as providing a welcome, additional stimulus to the rapid introduction on the market of the new transmission techniques.

It is difficult to predict what effects the Community-wide dissemination of television programmes will have on the advertising revenue of individual broadcasting organizations and systems. Given the present differences between Member States in the rules on television advertising, the danger of a shift in the pattern of advertising revenue for reasons other than those dictated by competition is not to be lighly dismissed. If the rules on television advertising in Member States were to be aligned, as proposed by the Commission (Part Six, A), this cause of unnatural and unjustified movements in revenue would be eliminated. What is more, larger reception areas increase audience coverage and pave the way for higher advertising revenue.

Community-wide broadcasting of television programmes provides broadcasting organizations with yet another source of revenue, viz. remuneration from copyright and performers' rights. The exact amounts of such remuneration will have to be negotiated with foreign cable companies. In this connection, agreements were concluded recently on feeding foreign programmes into the Belgian cable networks. Under the agreements, the broadcasting organizations receive a fixed percentage of subscription fees. If programmes were broadcast throughout the Community, revenue from this source would be much higher.

B. NEW TRANSMISSION TECHNIQUES: SATELLITE AND CABLE

The introduction of satellite and cable transmissions will entail substantial new investment and operating costs that will have to be financed wholly or partly by subscribers and other users. The Commission is at present examining the associated questions, particularly with the operators of communications infrastructures, and is drawing up proposals in connection with the development of a Community telecommunications policy.[1]

I. Costs

1. Direct broadcasting by satellite

With a direct satellite system, both the operator and the individual recipient incur costs. The foreseeable costs of building, launching and operating a direct television satellite depend primarily on its size, which in turn determines its capacity. All available estimates of those costs are subject to a considerable measure of uncertainty. Because of the wide variety of government support measures, development costs are not passed on in full. In individual cases, substantial rebates are available for repeat orders.

Differing interest and inflation rates and technical specifications make comparisons difficult.

In the United Kingdom, a Home Office report[2] puts the total cost of building, equipping, launching and operating a DBS system over a ten-year period at between UKL 14 million and UKL 16 million per channel and per year for a two-channel system and between UKL 10 million and UKL 11 million for the Olympus L-sat five-channel system. In Germany, the broadcasting organizations estimate the capital cost of operating on a permanent basis a five-channel satellite-broadcasting system, including the two launches needed and the terrestial facilities for steering the satellite and for transmitting the programmes, depending on whether interest payments and redemption in respect of this investment are spread over ten years or longer, at some DM 30 million per channel and per year.[3]

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[1] Commission of the European Communities, Communication from the Commission to the Council on telecommunications, lines of action, document COM(83)573 final of 29.9.1983.

[2] Home Office, Direct Broadcasting by Satellite, London 1981, p. 23.

[3] Report by the "Arbeitsgruppe Satellitenrundfunk" set up by the officials responsible for broadcasting in the Länder, Media Perspektiven 1982, p. 776 (783).

The cost of the receiving equipment has to be borne by the individual receiver. At present, it is reckoned to be in the region of 400 ECU, including the necessary electronics. This cost will be one of the factors determining the speed with which direct broadcasting by satellite is introduced. Most estimates assume that, by the end of the century, around 50% of subscribers will be able to receive direct-satellite transmissions either direct or via cable.

2. Cable broadcasting

The transmission of programmes by cable requires more investment by the operator than does satellite broadcasting. At the moment, actual cabling costs are known only approximately. The differences between current estimates can be attributed in part to the different assumptions made. Indeed, the specifications imposed for cable networks are a major factor in determining the amount of technical work involved and the network design (capacity, return channel, tree-and-branch or switched-star network). The future cost of optical fibre cable, which, starting around 1985, will be used in all Member States for regional transmissions at least, is not yet known.

The estimates compiled in the Member States do, however, provide a useful starting point. According to one set of calculations, the laying of a wide-band delivery network incorporating a return channel will cost around DM 2 500 per house.[1] In 1982, the ITAP report still reckoned on an average cost in the range of UKL 200-300,[2] a figure which, viewed under present circumstances, is probably on the low side.[3]

Provided there is an attractive selection of programmes on offer, the demand from television viewers is expected to produce a continuous increase in cable connections. Assuming a commercially attainable cable-network density equal to around half of the television households in the Community, a total of up to 42 million television sets could be on cable.

Subject to all the reservations that have to be made, it follows that the costs of setting up a broadcast distribution network in the Community would work out at just under ECU 50 000 million.

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[1] Expertenkommission Neue Medien - EKM Baden-Württemberg, Abschlußbericht, Bd. I, Stuttgart 1981, p. 92.

[2] Information Technology Advisory Panel (ITAP), Cable Systems, A report, Lond 1982, p. 28.

[3] Rt. Hon. Patrick Jenkin, Secretary of State for Industry, UK, Financial Times Conference Organization, Cable Television and Satellite Broadcasting, London 1983, pp. 1 and 3.

3. Programmes

Programme production costs depend on a variety of factors, the most important being the length and nature of each day's programme, the production method, the proportion of repeat programmes, etc. The following table illustrates the variability in the cost per programme minute of individual programme components:[1]

- Broadcasts with a story-line	DM 7 962
- Entertainment broadcasts without a story-line	DM 8 478
- Music broadcasts	DM 4 454
- Information broadcasts	DM 3 336
- Broadcasts with a variety of items and forms	DM 6 169
- News and current affairs	DM 4 756
- Sport and specialist sports programme (ARD)	DM 2 407
- Weather forecast	DM 914
- Feature films	DM 1 892
- Other	DM 804
- Average cost	DM 4 436

In 1979/80, the average cost per programme minute in the United Kingdom was UKL 373 (BBC) and UKL 540 (ITV). At the moment, major national broadcasting companies produce few high-cost programmes, although it is still felt that savings can be made without quality requirements having to be lowered.

Depending on programme requirements, additional television programmes can be produced at much lower cost. In the United Kingdom, the cost of a direct-satellite programme is put at between UKL 100 million and UKL 10 million while, in Germany, the estimates for a European television programme range between DM 130 million and DM 200 million. The cost of local or regional cable programmes is appreciably lower. The Bayerische Rundfunk, which is responsible for the additional programmes for the Munich pilot cable scheme, estimates that two cable programmes will cost only around DM 60 million. Short-duration cable programmes, running for half an hour each day, actually cost only some ECU 2 million. These figures might, however, prove to be on the low side if, in the short term, the authorization for additional programmes causes surges in demand on the programme production side.

By contrast, cross-frontier broadcasting of national television programmes is a readily available way of offering viewers in the Community an additional choice of programmes. Recourse to existing programmes does not necessitate the creation of any additional programme production capacity or entail any extra programme production costs. Extending service areas makes programme production more profitable. A cursory look at the existing exchange of programmes within Eurovision illustrates the potential this approach offers, with 833 programmes lasting 1 460 hours being fed into the Eurovision programme exchange in 1979. This compares with the 5 109 broadcasts lasting 8 710 hours in all actually produced by the broadcasting organizations belonging to Eurovision.

[1] ARD-Jahrbuch 1983, Hamburg 1983, p. 345.

II. Financing

The question how the cost of satellite transmission and, above all, of cable broadcasting is to be met is a long way from being resolved in any of the Member States. There are several alternative or mutually complementary solutions. The repercussions that the different types of financing have on the extent to which individual sections of the population will have to foot the bill are not only a problem for the media but also an economic problem, since the level of costs determines demand.

The cross-frontier broadcasting of programmes increases revenue derived from advertising and subscription fees, while financing based on official licence fees is not directly affected. It would seem that only now is the financial potential of other economic activities engaged in by broadcasting organizations, e.g. sales of their own productions on video tape, beginning to be exploited.

1. Licence fees

With just under 100 million households possessing sets in the Community, the average licence fee (radio and colour television)[1] of 81.9 ECU, generates a total gross revenue of 5 000 million ECU.[2] The official licence fees payable in the individual Member States are given in Annex 6. At the moment, the television and radio companies in each country (there are 30 in all) share the net national revenue from this source[3] according to a specific formula, normally laid down by parliament.

Part-financing of the new transmission techniques out of the general licence fee, an idea being discussed in a number of Member States,[4] would also fall on those who were unwilling or unable to take advantage of the possibilities on offer. This effect is not avoided by introducing a special supplement (known as "kabelgorschen" in Germany) for all radio and television subscribers. On the other hand, sharing out the financing costs among a larger number of people than the direct beneficiaries would make it possible, at least initially, to increase more rapidly the number of network link-ups by charging attractively low licence fees. All in all, it seems clear that diversion of parts of the general licence fee (including the increases at present under discussion) will not be sufficient to finance the volume of investment mentioned at I (some DM 2 500 per household simply for being connected to the cable network).

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[1] Estimate based on the number of receivers for which the licence fee is payable multiplied by the amount of the licence fee in Member States as at 31 December 1981; European Broadcasting Union (EBU) Review, "Programmes, Administration, Law", No 2, March 1983, pp. 60-63.

[2] After deductions, in particular to cover collection costs.

[3] In the case of the United Kingdom, for example, see Home Office, Direct Broadcasting by Satellite, loc. cit., pp. 66 et seq.

2. Advertising

Annex 8 at the end of the Green Paper gives a survey of the European countries in which there is television and/or radio advertising, broken down into national and regional commercial advertising, and the countries in which broadcast advertising is wholly or partly prohibited.

Radio and television advertising already contributes significantly to the financing of the activities of most broadcasting organizations in the Community. Further details for each Member State are given in Part Four. Annex 9 shows what percentage of the income of the individual European television channels or of the television companies behind them was derived from advertising in 1981.

Commercial advertising brought in some 3 300 million ECU for broadcasting organizations in 1981, or just under half of their total financing needs. The details are given in Annex 10. In the absence of any revenue from advertising, the average licence fee would be 121.57 ECU instead of 81.9 ECU as at present.

Advertisers are demanding that advertising time be extended according to free-market principles, since they reckon that advertising boosts economic growth. This conviction is reflected in the fact that their overall spending on advertising is increasing at an average annual rate of 5%-10%. Details of the advertising turnover and growth in advertising of the individual advertising media in the Member States in the period from 1970 or 1975 to 1981 are given in Annexes 11 and 12. Expenditure in Europe on advertising as a whole in 1982 and on television advertising in 1981 is shown in Annex 7.

Among broadcasting organizations too, there is the view that advertising will be the major source of finance for television in the future. This is an assessment also shared by representatives of public broadcasting organizations.[1] Similar expectations prompted the decision in 1982 to remove the statutory limitations on the share of revenue accruing to French public broadcasting organizations that may be financed by advertising (25%). According to a statement by the French Minister for Communications,[2] the Régie française de publicité was obliged in 1981 to refuse advertising applications worth FF 1 400 million because of this ceiling. FF 800 million to FF 1 000 million of this would probably have been actual purchases of advertising time. This demand had not been transferred to other media: less than 2% of this amount of FF 800 million to FF 1 000 million had gone to the regional daily press. "These figures mean at all events that, as far as television is concerned, there is a potential market which can be exploited for the benefit of the public sector."

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[1] See, for example, Dieter Stolte, General Manager of the ZDF, on the occasion of the 1983 annual meeting of the Zentralausschuss der Werbewirtschaft in Bonn.

[2] In connection with the debate on the new Law in Parliament. Published in "TF 1, Loi sur la communication audiovisuelle", Paris 1981, p. 112.

If, therefore, the amount of television time devoted to advertising is to be extended, the restrictions on television advertising time that are in force in virtually all Member States must be eased. These restrictions have led to artificial shortfalls in the supply of advertising time, with the result that there is substantial excess demand for advertising time in most Member States, and in particular in Germany[1] and France.[2] Accordingly, firms have been unable to spend the considerable resources they have available on their desired advertising objectives.

Spending on television advertising in the Community is currently running at 3 100 million ECU (see Annex 7 for 1981 figures). If it is assumed that the resources available for television advertising in the Community will, in the longer term, reach the level recorded in the United Kingdom in 1980, we have a market potential two or three times greater than at present. At first sight, the additional potential of between 3 500 million ECU and 7 000 million ECU[3] seems huge. However, it must not be forgotten that the United Kingdom is one of the countries in the Community where commercial television has been allowed to develop along free-market lines.

3. Subscriptions (Pay-TV)

Consideration is also being given to the idea that those who benefit from the new transmission techniques should help directly to finance the costs involved. For example, a special financial contribution over and above the licence fee is already levied for connection to the cable network. Regardless of the organizational structure of the cable operator, this special contribution is intended to finance cabling costs. Similar special charges for the right to operate receiving equipment for direct-satellite broadcasts are under discussion in a number of Member States.[4]

Experience in Member States shows that subscribers are prepared to pay more for additional programmes. A rapid review of the differing situations in three Member States will illustrate the incentive effect of broadcasting foreign programmes where cable financing is concerned.

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[1] ARD-Jahrbuch 1982, Hamburg 1982, pp. 57 and 59.

[2] In France, the surplus demand was estimated to be equivalent to over FF 1 000 million even in 1979 (Rozenblum, Die Fernsehwerbung in Frankreich, Media Perspektiven 1981, pp. 131 and 133) and to as much as USD 260 million in 1980 (Pilati/Richeri, "Satellite Broadcasting in the '80's", Lo Spettatore Internazionale, July-September 1982, pp. 179 and 186.

[3] The ITAP report, loc. cit., 21, 3.7, put the potential for extra advertising revenue at UKL 2 000 million a year.

[4] In the United Kingdom, for example, see Home Office, Direct Broadcasting by Satellite, loc. cit., pp. 71 et seq.

In Belgium, the cable television companies meet the total costs of a simple cable distribution network out of an annual subscription fee of some BFR 2 700 for the simultaneous transmission of between thirteen and sixteen domestic and foreign programmes. The UK cable systems carry only four or six television programmes and have to make do with an annual fee of around UKL 15 per subscriber, hardly sufficient for the operation of the network and certainly not sufficient to finance the laying of wide-band networks in the future. In Germany, the Federal Postal Administration was planning to charge, with effect from 1 July 1983, a once-for-all connection fee of DM 400 per household and a basic monthly fee of DM 6 in respect of its cable networks. For programmes fed into a cable distribution system via a microwave link or via satellite and then piped to the receiver, an additional monthly fee of DM 3 is charged.[1] During the start-up phase, this scale of charges will apply in the first place until 1985; it is doubtful whether the charge of DM 3 fully reflects the market price of transmitting foreign programmes.

In addition, efforts being made in Member States to widen the selection of domestic programmes available, in part by granting authorization to other broadcasters, are now taking firmer shape, and this is expected to stimulate the demand for cable link-ups. Additional programmes can be offered either as "programme packets", individual subscription programmes (pay-TV) or parts of programmes (pay-per-view). Subject to certain conditions designed primarily to avoid the dangers highlighted by experience in the United States, a 1983 White Paper in the United Kingdom is supposed to pave the way for all these programme possibilities.[2]

Subscription provides a further source of revenue and does not directly damage the interests of television companies whose financing needs are met out of either licence-fee revenue or advertising revenue. As yet, it is not possible to say with any degree of reliability what the subscription fee will be. In the United States, where, given the peculiarities of the domestic television system as regards both technical and programme quality, experience points to a particularly buoyant demand for additional programmes, the largest cable company, HBO, reckons that, in the case of new housing developments, there will be a consumer price elasticity of between USD 25 and USD 30 per month for a "basic packet" and two or three pay-TV programmes.[3]

In the Community, the basic selection of television programmes available at the moment provides less of an incentive than in the United States to "buy" additional programmes. However, direct satellite programmes are being considered in the Member States as an attractive complement to the terrestrial programmes on offer. Furthermore, in addition to the transmission of television and radio programmes, the cable networks should provide other, new services. Mention should also be made here of the current boom in sales of video cassette systems in the Community, which is to be explained by the large demand for additional programmes.

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[1] [2] Bundesgesetzblatt (BGBl.) I 1983, pp. 713 and 715.

[2] Home Office, Department of Industry, The Development of Cable Systems and Services, London 1983, pp. 47-49.

[3] Robert J. Bedell, Vice-President, Home Box Office, Financial Times Conference Organization, Cable Television and Satellite Broadcasting, London 1983, pp. 40 and 44.

For the United Kingdom, the ITAP report estimates that, at a subscription of UKL 5 monthly, the existing cable systems in Europe could generate additional income for programme producers of UKL 1 500 million annually.[1]

4. State subsidies

State subsidies play a quite considerable role in the financing of new broadcasting techniques. Several Member States finance modern communication networks via satellite and cable at least in part from the State budget. Existing broadcasters, however, do not generally receive State subsidies. In Belgium and the United Kingdom radio and television licence fees go towards the budgets of the linguistic communities or to the general State budget, from which broadcasting companies receive allocations, which in the case of the BBC, for example, amount to the net income from licences (see Part Four, sections D and E). In Germany part of the licence fee is transferred by way of compensation to broadcasting companies, which, in view of their small coverage area, have a relatively low income from licences. For example, the Saarländische Rundfunk finances its budget, currently amounting to some DM 120 million, on the basis of about one-third from licence fees, about one-third from advertising and about one-third from the compensation transfer. The foreign services of broadcasting companies, whether independently organized or not, are financed primarily by State subsidies.

5. Other forms of revenue

Almost all broadcasting companies in the Community have to an increasing extent other forms of revenue. These include profit allocations from commercial subsidiaries, proceeds from the sale of recordings, marketing of rights in respect of their own productions, loans, contributions from members of broadcasting companies with the legal form of an association, proceeds from subscriptions for programme magazines and the like. Further details are given in Part Four.

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[1] ITAP report, loc. cit., p. 21.

C. SIGNIFICANCE AND PROSPECTS OF THE SECTORS AFFECTED

The economic significance of radio and television for the Community does not stop at its immediate media-related activities.

Attractive broadcasting in the Community will pave the way, in terms of the economy as a whole, for even more significant innovations in information and communication techniques. The cross-frontier distribution of broadcasting will provide listeners and viewers in the Community with new channels and programmes, which in turn are a necessary precondition for stimulating private demand to make use of the new transmission techniques. Investment of the order of over 100 000 million ECU in the Community as a whole will be required to establish viable information and communication networks. The main initial beneficiaries will be the whole telecommunications industry,[1] including the cable industries, communication engineering, information technologies and the electronic components industry, and the aerospace industry. The establishment of a viable infrastructure will create a need for new items of consumer electronics equipment, and private and commercial users of the information and communication infrastructures will require new and additional items of consumer electronics and office equipment. The demand for programmes will increase sharply, opening up new marketing possibilities for the originators of creative works and new employment possibilities for performing artists who bring them to us. Lastly, the commercial utilization of the new communication networks will enable firms in the Community to increase their efficiency and cut their costs, as is essential if they are to maintain and improve their international competitiveness.

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[1] The Community is at present preparing a new policy initiative in this area, doc. COM(83) 573 final, loc. cit. and doc. COM(84) 277 final, loc. cit.

D. DISTRIBUTION OF PROGRAMMES THROUGHOUT THE COMMUNITY

The creation of a common market for broadcasting and the cross-frontier distribution of broadcasting services will help to push through the new information and communication techniques needed in terms of the economy as a whole. The cross-frontier transmission of radio and television programmes is one of the prime tasks, but still only one of the tasks, of integrated communication networks. In future, these will not just be for transmitting radio and television programmes and individual communications to end users, but will be used increasingly to convey information between independent companies or between geographically separated parts of the same company. The main point is easy access to external data banks at home and abroad. However, companies will be able to make full use of the anticipated advantages of these networks only if the technical standards and legal conditions for cross-frontier use are laid down from the outset.

Furthermore, this development is also likely to give fresh impetus to the European economy in terms of more sophisticated information and communication technologies. Improved international competitiveness would be the result. Efficient communication networks might be expected to result in cheaper and better products, new goods and services, and new forms of supply which will develop as the communication possibilities between companies and private users improve.

The cabling required for the establishment of an integrated communication network requires, for its financing, the demand and purchasing power of private households. The high investment costs are profitable only if a high subscriber density in the cabled areas permits connection to as many households as possible. Satellite television, too, is economically viable only if it is used by a sufficiently high number of viewers (especially for pay-TV channels). What might induce viewers to part with these funds is the attraction of a very wide range of additional channels, including transmission throughout the Community of national channels. Since the latter requires neither new capacities nor additional expenditure on programme production, it is the best means of increasing the attractiveness of programmes in the short term and hence helping to finance the requisite investments.

The transmission of programmes throughout the Community will certainly have to overcome existing language barriers if it is to be successful. With their increase in capacity the new transmission techniques offer the best way of achieving this. It is possible, for example, to include several different-language soundtracks on a television channel, which the viewer can select alternatively or even, by using headphones, cumulatively. Videotext can also be used to transmit subtitles. The ITAP report to the British Prime Minister states that the potential available in Europe would allow national broadcasting organizations to develop into international ones.[1]

[1] ITAP report, loc. cit., p. 21, 3.7.

Offers of foreign television programmes were, in fact, the main driving force behind the development of cable networks in the Community. At the present time, for example, cable networks throughout Belgium and the Netherlands transmit the programmes of neighbouring countries. Even in 1979 more than one in three television viewers in Flanders opted for foreign programmes. In the Netherlands foreign programme viewing varies between 20 and 25% of total viewing. In other Member States, where viewers have so far only had this possibility in border areas, surveys have shown a considerable interest in additional programmes from abroad. Some 40% of the population in Germany are familiar with cable and satellite television, and about 14% have shown great interest in these developments. Havas estimates that in France one in four Frenchmen would even be prepared to pay for additional channels. In Switzerland as many as 64% of those interested in, or connected to, cable television count the larger selection of channels as the main advantage.

The establishment of the common market for broadcasting would counterbalance the free movement of goods and services in the Community. Being physical products, newspapers, magazines, books, records, tape cassettes, video discs and video cassettes are subject to the provisions governing the free movement of goods in the Community. Once they are duly marketed in one Member State they become part of the free movement of goods in the Community. Accordingly, audiovisual products sold on video cassette are equally accessible to all media users in the Community.

The difference between goods and services is becoming less and less significant in the information and communications sector. Greater accessibility to a rapidly growing supply of stored information is replacing the physical flow of information in many areas. To tie up with the Community's objectives, the freedom of movement, already achieved in goods traffic with printed media and audiovisual media must also be attained in the functionally comparable services sector. The requisite directives must take account of the peculiarities of this sector and of the legitimate interests of users.

Community-wide distribution of broadcasts also contributes to the harmonious development of economic affairs and to economic expansion in the Community. Most of the Community's television channels carry advertising for goods and services. Radio and television advertising is an indispensable instrument of the sales policy of Community companies, especially as an aid to the introduction of new products.

The cross-frontier transmission of broadcast advertising promotes the development of the common market in two ways. The target becomes a Community or at any rate a cross-frontier target instead of a national one, and the advertisers have the opportunity of reaching viewers and listeners throughout the Community, or at any rate in several Member States, with a single advertising spot. This provides one of the conditions for standard international advertising strategies and will reduce costs and increase efficiency.[1]

Furthermore, as the number of programmes transmitted increases, so too does the possibility of using this medium as an advertising medium.[2] Depending on their specific requirements, companies will increasingly be able to choose between the various channels for their advertising. This will result in a hitherto unknown differentiation of advertising, which will help increase the sales potential of the Community economy. Whether or not these chances are actually taken, however, will depend on the approximation of the main legal and administrative provisions in the Member States to which broadcast advertising is subject (see below, Part Six, A).

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[1] Saatchi and Saatchi Compton, one of the leading advertising agencies in the United Kingdom, stresses in its annual report for 1982 (pp. 10 et seq.) the increasing possibility of standard international advertising campaigns provided by the growing convergence of European ways of life and markets.

[2] Television advertising time is restricted in most Member States. In several of them, therefore, there is excess demand for advertising time.

E. INTERACTION OF DIFFERENT MASS MEDIA

Although this Green Paper has set out to examine the effects of Community law on radio and television at a time when new broadcating techniques are emerging and to prepare the way for Community solutions, such an exercise is not possible without looking at the interaction of radio and television with the other media. Radio, television, newspapers, periodicals, books, records, video cassettes, video discs, films and any new services in the future must be regarded as components of a mass communications system.

Most people have recourse to several of these media - just how many of them and how frequently depends on the time available but above all on the age and social standing of the user. What is more, each individual puts his own programme together according to his preferences and the features peculiar to the different media. Newspapers and television are predominant in the field of news and the formation of opinions, whereas in other fields of information - such as science, technology, history, philosophy and psychology - people prefer to consult books or periodicals. Entertainment requirements are satisfied by books, followed by television, films and magazines. Since they have such different characteristics the individual media complement one another to a certain extent. However, they are just as much in competition with one another as are the suppliers. Even in times of technological innovation, competition to win the user's favour on a constantly expanding communications market should not cause existing media to regress or even die out. Technological innovation will, however, lead to processes of adaptation.

The different demands made on the individual media by the users have led to fundamental differences in the content of the information provided. Periodicals, journals and books provide processed information, contexts and background material. The screen's strong point (including new services) is topical events, speedy availability and the capacity for dialogue. In practical terms, however, it is assumed that the user is constantly making clear decisions about what he is actually looking for, whereas the reader perusing a periodical can come across something interesting virtually by accident (browsing effect). The printed word has the edge on technical media in that it can be available anywhere at any time. Daily newspapers provide readily available information about day-to-day events and the user can choose from the comprehensive range according to his personal priorities. On the other hand, books usually provide information and text of lasting value and interest. The form and design of the book give it a longer life.

The traditional media will find new openings on the market by adjusting to the new electronic media. One thinks here of radio and television programme guides, the "book of the (television) film" or the book to accompany a given broadcast (for instance for teaching purposes or for special-interest programmes). The new text transmission systems using television screens can complement the work done in the publishing house. Books on topical subjects can be updated more quickly using teletext. The user can take out a subscription to a given service and use the return channel to order any more comprehensive material (texts of laws, tables, etc.). The first electronic bilingual dictionary in the form of a pocket calculator was developed and presented to the public by a publishing house in cooperation with an electronics company. Publishers believe that there is scope for expanding their traditional occupations into the realms of cable and satellite television and video. Of course there will be limitations, caused by the differences in the media, referred to above, and in user habits but above all by the higher costs attached to the technological media by reason of the higher technology deployed. In contrast, books will remain cheaper for the time being.

Despite stronger competition from radio and television the other media are growing. Television has penetrated the preserves of other media and is influencing their future development but it has been unable to replace any of the traditional media. The number of newspapers sold has risen further in the last ten years, though the number of publishing houses has declined somewhat. Seen overall, the number of periodicals sold has also risen, as has the production and sale of books. Sales in the sound-recording industry have made impressive progress. The number of licensed radio sets has also increased, though peak listening time has shifted from evenings to daytime under the influence of television. Figures to illustrate this trend, taking Germany as an exemple, are given in Annex 13 at the end of this Green Paper.

The development in the film industry is variable. While production is still on the increase - not least because of demand from television[1] - the number of cinemagoers has gone down (see Annex 13). It has been necessary to re-adjust. Many cinemas have adapted to this development by drastically reducing the size of the auditorium and offering greater variety. The film industry is reacting in two ways. From the artistic viewpoint, it is treating subjects that are taboo on television. From the economic viewpoint, it is obtaining a better return on films by expanding sales via television and video recordings.[2] Meanwhile, in the United States, where satellite and cable television has made considerably

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[1] Greater variety of programmes will lead to a further increase in demand. What measures - if any - should be taken to see that increased demand does not merely lead to increased imports of productions from outside the Community is not a question to be discussed here.

[2] The high share of up to 90% of the financing for a film provided by the cinema is now falling and being displaced by revenue from television and video cassettes. In the medium and long terms the latter is regarded as the most interesting financial proposition.

more progress, there have again been record attendances in cinemas.[1] Increased supply from the media would have good sales opportunities if economic developments allowed the individual more leisure time and private households were able and willing to spend more money on leisure and information. It can be seen from surveys that, in such circumstances, there would probably be changes in users' habits, provided that what the media had to offer was attractive.

Publicity content and presentation are not the only matters for rivalry and adjustments; these phenomena result also from the media's role as an advertiser. The majority of radio and television companies in the Community are financed in part or in whole by advertising revenue (Annex 9). In many Member States there are private advertising agencies offering radio and television advertising (see Part Four), so that they are in competition with newspapers, periodicals and posters, and with advertising in cinemas, books and other media.

The share of radio and television advertising in total advertising turnover in Europe is still rather small (15%) compared with the 55% accounted for by printed matter (1979).[2] In the United States radio and television advertising accounted for 41.7% of total advertising turnover in 1981 (Annex 11, page 10), while in Belgium (via RTL) it accounted for 10%, in Denmark 0%, in Germany 16.8%, in France 13.5% (1980), in Greece 56% (1980), in Italy 36.5%, in the Netherlands 8.9% and in the United Kingdom 30.8% (Annex 11, pages 1-9).

Obviously the introduction of a new advertising medium does alter the percentage of advertising expenditure being spent on existing media. Statistics on the distribution of advertising expenditure in the media should be considered with this fact in mind (Annex 11). However, the statistics on press advertising revenue show that the introduction of television advertising in the 1950's did not reduce the total advertising expenditure for the press.[3] Annex 14 gives the figures for the United Kingdom. Even taking into account inflation, press revenue from advertising has in fact continually increased,[4] see Annexes 12, 14, 15 and 16. Britain is particularly interesting in this respect in that local radio advertising was introduced in 1976[5] in direct competition to the regional press with no ill effects[5] (Annex 14).

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[1] The number of cinemagoers rose to 1 100 million in 1982 - over 9% more than in the previous year. Zentralausschuss der Werbewirtschaft, Service No 109, February 1983, 33.

[2] International Advertising Association, loc. cit. 16, 17.

[3] The European Association of Advertising Agencies (EAAA), New Communications Developments, A manual, Brussels, November 1983, p. 21, Tables 1 and 3 for Finland and the United Kingdom, the latter being included as Annex 14 to this Green Paper.

[4] EAAA manual loc. cit., p. 21.

[5] EAAA manual loc. cit., p. 21.

The statistics also show that the introduction of new advertising opportunities leads to a broadening of the market as a whole and thus acts as a stimulus for those advertising media already active on the market. For example, total advertising turnover in the United Kingdom rose most steeply in the fifties with the introduction of television advertising. Although after only five years, in 1960, the new medium accounted for 22% of total advertising turnover and the press share sank from 87.7% to 70.9%, the earnings of the press had risen in absolute and in real terms.[1] The same phenomenon was recorded in Germany in 1969, when the daily advertising time on television was increased by half,[2] and in 1981, when Norddeutschen Rundfunks started advertising on the air.[2] A similar pattern can be seen in the case of Italy (Annex 16, Table 1).

Thus, though fears have repeatedly been expressed that allowing advertising on radio and television or reducing time limits imposed on it would result in a sharp decline in advertising revenue for the press, this has not happened. Will this situation remain unchanged? In a questionnaire to the European Advertising Tripartite (EAT)[3] on the introduction of satellite broadcasting, the Council of Europe asked if the EAT considered the broadcasting of advertisements by satellite would affect the media balance in Europe. From the statistics available, EAT concluded in its reply of March 1982 that whereas other media might initially experience some shortfall in revenue, it was unlikely that the press would suffer any long-term downturn in advertising revenue. Indeed the opposite might be likely.[4]

One of the main reasons for this assumption and for past experience as regards advertising revenue earned by the press is considered to be the complementarity of the media as advertising media.

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[1] Report of the Inquiry into Cable Expansion and Broadcasting Policy, "Hunt Report", London 1982, 13, point 39.

[2] Arbeitskreis Werbefernsehen der deutschen Wirtschaft, Markenartikel 1983, p. 84, Markenverband, Werbefernsehen und Tageszeitungen, Wiesbaden, November 1978, pp. 5-6.

[3] The following organizations are represented within the EAT: the International Union of Advertisers Associations (IUAA), the European Association of Advertising Agencies (EAAA), the EEC Community of Associations of Newspaper Publishers, the Federation of Associations of Periodical Publishers in the EEC (FAEP), the European Group of Television Advertising (EGTA) and the Advertising Information Group (AIG).

[4] Taken from the EAAA manual, loc. cit., p. 21, see also p. 10.

In fact the advertising media differ greatly in their scope, in the public they are addressing, degree of dispersion loss, effect and content.

The one feature of direct satellite television is that it can reach a public over a very large geographical area. This calls for ideas on advertising at least on a national scale but more often on a scale that transcends frontiers.

The characteristics of cable television as an advertising medium cannot be so clearly defined. Where it is a question of transmitting national programmes simultaneously across the borders into other Member States then cable television is similar to satellite television.

Local and specialized programmes for minority interest groups provide new opportunities for narrowing down the target groups from the point of view of geographical spread and content. The main difference between television advertising and advertising using printed matter remains the fact that on television a product's use and purpose can be demonstrated using a moving image, sound and time. By contrast, printed advertising is based on a message communicated through a text and a non-moving image. Whereas television advertising reaches the viewer in his own home at a predetermined time, print is not tied to a given place and is therefore more flexible.

For these reasons, it is improbably that cross-frontier satellite and cable television will cut the economic ground from beneath the press or even traditional television programmes.

No estimate so far made of possible income from advertising in a programme broadcast direct by satellite exceeds the annual average growth of the advertising market. The Home Office study does not quote any figures but expresses doubt whether business circles have sufficient interest in advertising in DBS programmes for this source of financing to be adequate, at least to start with.[1] It is considered that between UKL 10m and UKL 100m or more will be required annually for a programme of fifty hours a week, depending on content.[2]

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[1] Home Office, Direct Broadcasting by Satellite, loc. cit. 74, point 13.36.
[2] Ibid. 68, point 13.10.

It is not possible to produce reliable forecasts of number, content and viewing time for direct satellite broadcasts in the Community. On the other hand, it is certain that not all programmes will be wholly, or even partially, financed from advertising. It has not yet been decided in the Member States what role, if any, advertising should play in the financing of DBS. In France and Germany, at least in the preliminary phase, only the existing programmes are to be broadcast via direct satellite channels. Although it is possible that the advertising contained in these programmes will also be broadcast by satellite, there is no intention to call for additional fees for such transmission. The cost of running DBS will sometimes be financed by licence fees, which will probably involve putting them up in some cases. Finally, other forms of financing are being envisaged; the BBC, for example, is considering pay-TV.[1]

The situation regarding cross-frontier cable distribution of television programmes is more complicated. Whether and to what extent the simultaneous and unabridged distribution of channels from other Member States, including the advertising they contain, results in an increase in radio and television advertising charges depends on the coverage which the advertising can thus achieve. For example, RTL's charges for radio and television advertising reflect the fact that its programmes are distributed in Belgium by cable. By contrast, the charges of the French and German broadcasting organizations do not take account of the fact that their programmes are also received in parts of Belgium by cable. The example of Belgium, where commercial advertising by the broadcasting organizations is still prohibited, shows that some shift may occur in orders for advertising from one Member State to another, provided of course that the relevant channel is of sufficient interest to viewers in the country in question, i.e. has a significant audience.

Where such shifts are caused by differing restrictions on television advertising, there is an evident need to harmonize the provisions concerned. Such artificial incentives for shifting business away to other Member States, thus distorting competition in the advertising and broadcasting industries, prevent the establishment of the common market for broadcast advertising and broadcasting organizations. If conditions similar to those of an internal market are to be created within the Community, advertisers must also be able, in their own country as well as elsewhere, to choose whatever broadcast they regard as the most suitable vehicle for their particular advertisement.

In view of the different roles of the media as advertising media, as described above, neither the simultaneous, unabridged cable distribution of foreign radio and television programmes nor the direct broadcasting of television programmes by satellite would appear to pose any threat to advertising revenue as the economic base of the press.

[1] ITAP Report, loc. cit. 22, 4.1

However, within individual Member States, local cable TV could come to compete with the local daily press for advertising revenue, because their coverage is largely the same. But even here there is little likelihood of anyone being put out of business so long as the distribution of local advertising is linked to the distribution of local programmes, since the potential scope of such reporting from the local area is rather limited. Limiting the amount of time available for advertising could also help to ensure that ruinous competition does not develop between the local press and local television. Furthermore, here too we find the differences to which reference has already been made between electronic and printed media. The processes of adjustment may also lead to publishers having a hand in local television, since, up to now, it has been newspapers that have had the tasks of processing local information for publication, but this task must also be carried out in the same way for local television. We are confronted here with the question of monopoly and competition policy - which also arises when considering publishers' participation in regional and inter-regional radio and television programmes - in relation to the limits on the concentration of economic power in the particularly sensitive area of freedom and pluralism of opinion.

COMMISSION OF THE EUROPEAN COMMUNITIES

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TELEVISION WITHOUT FRONTIERS

GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON MARKET FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE

(Communication from the Commission to the Council)

Part Four

Pages 63-104

PART FOUR:

LEGAL ASPECTS

The national regulations relevant to the applicability and the application of the EEC Treaty are summarized below; the emphasis is on television. An attempt has been made to make each legal system transparent, in order to obtain an overall picture of the Community's ten broadcasting systems and to enable the laws to be compared, which must be done before they can be brought closer together (the subject of Part Six). The Commission has already published an introductory outline in its Interim Report.[1]

A. Luxembourg

In Luxembourg, the broadcasting authority is a proft-making public limited company - Compagnie Luxembourgeoise de Télédiffusion (CLT) - which is incorporated in accordance with Luxembourg law and carries on business under the name of Radio-Télé-Luxembourg (RTL). The LFR 1 200 million ordinary capital is held chiefly by French private and public interests and Belgian private interests, and to a lesser extent by small shareholders.

RTL's activity is based on a licence which is required by private individuals under an Act of 19 December 1929.[2] Pursuant to this Act RTL has since 1930 concluded nine licence contracts with the Government (each time it has extended its activity). The conditions on which the licences were granted are in each case stipulated in a memorandum (Section 2, second subparagraph), which forms part of each contract. Inter alia, the contract guarantees the licensee company a broadcasting monopoly throughout the Grand Duchy. RTL also owns the necessary technical apparatus. A government auditor ('commissaire') is responsible for ensuring observance of the memorandum of conditions and protecting the State's interests.

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[1] Interim Report, loc. cit., pp. 161-191.

[2] Section 1, first subparagraph of the Gesetz betreffend die im Grossherzogtum bestehenden oder zu errichtenden Rundfunksendestationen (Act concerning broadcasting stations existing or to be established in the Grand Duchy), Memorial (Official Gazette) No 66 of 24 December 1929, p. 1110 (1111).

Under the memorandum, advertising is allowed within the limits determined by the Government. So far the Government has not determined limits. Some 95% of RTL's revenue comes from selling broadcasting time to advertisers through specialized subsidiary companies. The rest comes from investment and other income. The fees which listeners and viewers used to have to pay the Government (which were not passed on to RTL) were abolished in 1973. RTL pays the State two parafiscal levies for its licences and its monopoly.

RTL transmits radio programmes in French, German, Dutch and English, and a daily radio programme in Luxembourgish (letzebuergesch) on UHF channel 18. Television programmes, including news bulletins, are broadcast in Luxembourgish only for about 75 minutes in the early afternoon. RTL transmits a full programme in French and, under the title of RTL-Plus, has been transmitting a programme in German since 2 January 1984. The German media group Bertelsmann AG has signed a declaration of intent to finance RTL-Plus to the extent of 40%.

On 2 May 1984 the responsible Luxembourg and French ministers concluded an outline agreement which would allow RTL to broadcast two television programmes using the projected TDF1 and 2 satellites. The price is thought to be in the region of FF 75 to 100 million per channel per year. Details of the concession and of a memorandum of conditions for RTL have to be worked out before a treaty between the two states can be ratified by their parliaments. From 1986 on RTL is to broadcast a French-language programme and a German-language programme. The German language programme would be run jointly with Bertelsmann. A French partner is to be found for the French language service. That programme would comply with the rules on advertising and the protection of film rights which apply to French broadcasters.

The Government is contemplating concluding a concession agreement with the Societe Luxembourgeoise des Satellites (SLS). The company would thereby be granted the exclusive right to use sixteen frequencies on Luxembourg telecommunications satellites (thus not a satellite intended for direct reception by the public) for the purposes of television.

There are no special provisions for receiving broadcasts from the air and retransmitting them by cable ("passive" cable broadcasting), nor for the direct transmission of RTL's own programmes by cable ("active" cable broadcasting). The latter does not so far exist in Luxembourg. In 1958 the local authorities started to grant licences for passive cable broadcasting to private national and foreign profit-making undertakings (e.g. the Belgian company Coditel). The memorandum of conditions stipulates inter alia that RTL programmes must be relayed. Belgian, German and French programmes are also fed into the system. Licence fees are as a rule not payable.

B. Italy

In Italy the law has reserved a dual monopoly for the State: first, the installation and operation of apparatus for the wireless or cable transmission of radio and television, and second, the transmission of programmes of every kind by means of such apparatus.[1]

The law has, however, excluded two areas from this State monopoly and has made them subject to a licensing system (autorizzazione) which is also open to private individuals (Sections 2 and 45 of the Act whose title is given below): the first is the installation and operation of private apparatus for the wireless reception and retransmission of foreign and national radio and television programmes; the second is the installation and operation of local apparatus for the cable distribution of the operator's own sound and television programmes. Two Constitutional Court judgments removed a third area from the State monopoly and made it subject to the licensing system: the installation and operation of local apparatus for the wireless transmission of the operator's own sound and television programmes.[2]

The law justifies this limited State monopoly by the fact that at national level the activities described above are "an essential public service of pre-eminent general interest" within the meaning of Section 43 of the Constitution (first sentence of the first paragraph of Section 1 of the Act mentioned). Section 3 empowers the government "to provide for the public service of radio and television by any technical means by a grant of licence (atto di concessione) to a limited company in which all the shares are owned by official bodies". The grant also entitles the licensee company to call itself "a company of national interest" within the meaning of Section 2461 of the Civil Code (Section 3, second paragraph).

Under the 1975 Act the public limited company Radiotelevisione Italiana (RAI) was again licensed in the same year: since 1924 that company had been granted a series of licences on the basis of earlier Acts. The Istituto per la Ricostruzione Industriale (IRI), a State holding company, holds 99.55% of the 20 million RAI shares, of more than LIT 2 000 each (Section 47). RAI is therefore a public undertaking. 0.45% of the shares are owned by the Società Italiana degli Autori e Editori.

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[1] Section 1, first paragraph, second sentence, Sections 2 and 45 of Act No 103 of 14 April 1975 on new rules concerning radio and television broadcasting (Nuove norme in materia di diffusione radiofonica e televisiva)

[2] Official Gazette of the Italian Republic No 102 of 17 April 1975, page 2539

[2] Constitutional Court (Corte costituzionale) Judgment No 202 of 28 July 1976, Raccolta ufficiale 1976 p. 1267, and Judgment No 148 of 21 July 1981, Raccolta ufficiale 1981, page 1379.

The licence is granted for six years and is renewable for up to six years (Section 14, first paragraph, first sentence). The most recent licence contract of 10 August 1981 again grants RAI the installation and transmission monopoly for broadcasting and for cable transmissions at national level and for the larger regions - except, as stated, for the relaying by wireless of its own and foreign programmes (Section 12, first paragraph, first sentence in conjunction with Section 2). The Act does not, however, recognize a monopoly for access to broadcasting and for programme production: RAI must reserve at least 5% of total television broadcasting time and 3% of radio time in its regional and national transmissions for each of the important political, social, cultural, religious and ethnic groups (Section 6).

The Act contains detailed rules on the organization of the licensee public limited company and its tasks (Sections 8 to 13). It also describes the economic objectives and activities which under the licence RAI is entitled and bound to carry out. Priority must be given to "the production of programmes and news broadcasts and a balanced development of the organization's production capacities" (Section 13, first paragraph). Efficiency and good management are to be achieved by reorganization and decentralization (Section 13, second paragraph to thirteenth paragraph). The licensee company directly, or associated companies which it controls or wholly owns, must also effect the distribution of its own production and that of its associated companies (by means of specific publishing and bookselling activities, records, audio-visual material, etc.,) and commercial activities in general - in particular radio and television advertising (Section 13, fourteenth paragraph).

RAI has the right to engage in numerous and extensive business activities itself, to establish subsidiary companies and to transfer gainful activities to them. Earlier licence contracts between the Minister for Posts and Telecommunications and RAI had already stated that advertising must be produced either by RAI itself or through the interposition of another company. Accordingly, television advertising has since 1972 been contracted out to the profit-making public limited company Società Pubblicità Radiofonica e Televisiva (SIPRA), which is completely controlled by RAI. Certain technical activities associated with advertising are contracted out to a profit-making public limited company, the Società Anonima Commerciale Iniziative Spettacoli (SACIS), which is also controlled by RAI. Advertising may not exceed 5% of transmission time on either radio or television (Section 21, second paragraph).

The public broadcasting authority - RAI - is financed from radio and television "subscription fees", from the income from radio and television advertising and from other income permitted by the law (Sections 15, first paragraph and 21, first paragraph). The subscription fee is also payable by owners of equipment capable of receiving cable or foreign transmissions (Section 15, second paragraph). The subscription can be terminated (Section 17). RAI collects the subscription fees itself (Section 18). Advertising revenue accounted for 21% of RAI's income in 1981. RAI has no profit-making objective in the sense of trying to make a profit, but it does operate against payment.

A Parliamentary Committee is responsible for the general guidance and supervision of broadcasting services (Section 1, third paragraph). It comprises 40 Members of Parliament from the two Chambers and forms subcommittees such as the one which examines and decides on applications for transmission time (Section 1, fifth and sixth paragraphs). Its tasks and powers are important, namely with regard to access to broadcasting, programmes (guidance, planning, distribution of transmission time, supervision), advertising (guidelines and fixing of annual revenue ceiling), with regard to the managing bodies within the licensee company and its budget (Sections 4, 8 first and seventh paragraphs, 10, second phrase, 12, third paragraph and 21, third and fourth paragraphs).

In principle, under the 1975 Act, any national or company of a Member State may have access to local cable broadcasting (Section 26, second and third paragraphs), or more precisely to the installation and operation of networks and apparatus for the transmission of sound and television via cable and the distribution of programmes through such networks and apparatus to a single commune or to geographical areas comprising several communes with a maximum of 150'000 inhabitants (Section 24, first paragraph). Anyone wishing to engage in these activities requires two permits which must be issued subject to compliance with the conditions laid down in the Act: a licence from the Ministry for Posts and Telecommunications for the network and apparatus (Sections 25 and 26) and a programme distribution licence from the regional authority (Sections 25 and 30). In granting the licence the regional authority must ensure that three rules are observed: first, advertising, which must be reserved for local publicity, must not exceed 5% of total transmission time; second, local networks may not link up with other networks, including foreign ones, for simultaneous transmission, and lastly, the proportion of programmes purchased, hired or exchanged may not exceed the proportion of programmes produced by the operators themselves (Section 30, fifth paragraph).

The Interministerial Committee for Prices sets the level of the fees payable by users of the local cable network (Section 29). The licensee pays the Ministry for Posts and Telecommunications an annual tax for the grant of the licence (Section 33). It is also permitted to operate with a view to making a profit.

According to information from the Minister of Posts and Telecommunications, in May 1981 there were 972 private local wireless transmitters, of which 562 also broadcast television programmes. At the end of 1983, 158 of these private television companies belonged to four networks, each of which took the form of a group or an "interest grouping": CANALE 5 - RETE 10 - ITALIA 1 (31 transmitters), RETE QUATTRO (21 transmitters), EURO TV - TV PORT (59 transmitters), STP/RV (47 transmitters).[1] The transmitters of each network are not linked by a ring system, but simply transmit the same programmes (chiefly by using the same video cassette), though sometimes at different times, as the law permits. In this way the networks have attained considerable regional and national importance.

[1] The above information is taken from: Rauen, Platz für zwei Networks: Medienkonzentration in Italien, Media Perspektiven 1984, 161 (162-165).

In principle, any national or company of a Member State, whose main place of activity is in Italy, may retransmit foreign radio and television programmes: they are entitled and obliged first to apply to the Ministry for Posts and Telecommunications for a licence (Sections 38 and 39(1). More precisely, the licence entitles them to install and operate apparatus to receive and retransmit simultaneously and in full, in the national territory, radio and television programmes broadcast by the public broadcasting services of another State or by private organizations authorized by the law of that State (Section 38, first paragraph). A licence "obliges the licensee to remove from foreign programmes everything in the nature of advertising, in whatever form" (Section 40, first paragraph). Licences are granted for five years and are renewable; a tax for the grant of the licence is payable to the State (Section 41, second to fourth paragraphs).

Lastly, private individuals may also apply to the Minister for Posts and Telecommunications for a licence to install and operate apparatus to receive RAI television programmes and retransmit them simultaneously and in full (Section 43).

C. Netherlands

Broadcasting in the Netherlands requires government authorization, which is granted by way of the distribution and allocation of broadcasting time pursuant to the Broadcasting Act[1] (Section 62(1)). Under that Act, the Minister for Cultural Affairs, Recreation and Social Welfare is obliged to allocate broadcasting time to the broadcasting organizations (omroeporganisaties, Section 13(1)) and to the "candidate" organizations (aspirant-omroeporganisaties, Section 14(1)) that satisfy the conditions of the law, to the Dutch Broadcasting Foundation (Nederlandse Omroep Stichting - NOS, Section 15(2)(i), Section 39(1)), to political parties and groupings which in the most recent elections have gained at least one seat in the Upper Chamber of Parliament (Section 18), and to the Foundation for Broadcast Advertising (Section 20).

In addition the Minister may allocate broadcasting time to church associations (kerkgenootschappen) for religious broadcasts (Section 16), to associations (genootschappen) with an ideological basis for broadcasts of a spiritual (geestelijke) nature (Section 17), to institutions other than those previously specified (instellingen, the general term used in the Act), which satisfy the conditions of the Act - particularly where they satisfy a cultural requirement in the general interest previously not adequately catered for - (Section 19), and regional broadcasting institutions (omroepinstellingen), which satisfy the conditions of the Act (Section 47).

The last two and first two types of broadcasting institutions must be legal persons with unlimited legal capacity (Section 13(2)(1)(e), Section 14(2)(19)(1)(e), Section 47(3)(1)(e)). They must prove that their object is not to make a profit "in so far as this is not necessary to fulfilment of the broadcasting function", or to contribute to profit-making by third parties (Section 13(2)(5)(e), Section 14(2), Section 19(2)(e), Section 47(3)(5)(e)). The first two types of broadcasting institutions must produce and offer a complete programme (Section 13(2)(3)(e), Section 14(2), Section 35(2)). They must be representative of a certain social, cultural, denominational or ideological trend in the population and satisfy such requirements to such an extent that their broadcasts may be regarded as in the general interest (Section 13(2)(4)(e)). These broadcasting organizations and "candidate" organizations must raise contributions from their members, a term which includes, by virtue of a legal fiction, the subscribers to their respective programme magazines; the minimum contributions are fixed by the government (Section 13(2)(7)(e), section 14(2)). The broadcasting organizations must have a membership of at least 150 000 (Section 13(2)(8)(e), the "candidate" organizations at least 60 000 (Section 14(2)).

The division of broadcasting time between the organizations depends on their membership. Broadcasting time is shared between categories A (at least 450 000 members), category B (between 300 000 and 449 999 members) and category C (150 000 to 299 999 members) in the ratio 5 : 3 : 1 (Section 27(2) and (3)).

[1] Omroepwet of 1 March 1967, Staatsblad 1967, No 176, p. 591, as since amended.

The broadcasting times allocated to the remaining institutions are then subtracted therefrom (Section 27(1)): "candidate" organizations one hour on television per week, NOS at least 15 hours on television, a maximum of 40% of the entire broadcasting time fixed by the Minister, the Foundation for Broadcast Advertising at least seven hours on the radio and three hours on television per week, parties and other institutions together at least 10% of the entire broadcasting time established by the Minister (Sections 28 to 32).

There are now eight broadcasting organizations in the Netherlands: five category A (AVRO, TROS, KRO, NCRV, VARA), one category B (VOO) and two category C (VPRO, EO). The majority of them are societies, the remainder private-law foundations. In addition there are some 30 institutions (groupings) entitled to broadcast particular programmes, whose broadcasting time is strictly limited.

The organizations' broadcasts on television appear on both Dutch channels: Netherlands 1 and Netherlands 2. The creation of a third channel is under discussion. The societies and foundations have some set evenings for broadcasting and others that vary. The A societies alternate on channel 1. Each A society has a set evening on channel 2 which changes every year. The B and C societies broadcast on one of the two channels at specific times. The limited company NV Nederlandse Omroepzender Maatschappij (NOZEMA) is responsible for setting up and running transmitting stations. The State (posts and telecommunications administration) holds 60% of its shares and the NOS 40%.

The latter produces a ninth television programme (particularly news), which is broadcast daily on both channels and on certain evenings and/or days. The NOS is a public-law foundation, set up by the Broadcasting Act (Section 39(1)). Half the members of the Board of Governors (bestuur), responsible for running the Foundation, are appointed by the private broadcasting organizations, one quarter by representatives of cultural and social organizations and one quarter by the Minister for Cultural Affairs (Section 41). In addition, there is a management board (raad van beheer) which deals with the Foundation's day-to-day activities and implements the decisions of the Board of Governors (Section 43), a television programme board (one third of the members are appointed by the broadcasting organizations, one third by representatives of cultural organizations, one third by the Minister for Cultural Affairs, Section 44), and a television programme coordinating committee (Section 45). The Minister for Cultural Affairs is required to approve the Foundation's rules (Section 40(1)).

NOS deals primarily with cooperation between the broadcasting organizations (Section 39(1)). In addition, it is responsible for safeguarding the common interests of all the institutions and for programme coordination (Section 39(2)(a), (c)). It is entrusted with the production and broadcasting of a programme common to all the institutions (Section 36, Section 39(2)(b)) and also has to establish and maintain studios, facilities (e.g. orchestras), services and equipment for programme production by all the institutions (Section 39(2)(e),(f)). The broadcasting organizations are obliged to make use of these facilities (Section 25). Furthermore, NOS has to make programmes available for foreign countries (Section 39(2)(j)).

The Foundation for Broadcast Advertising (Stichting Ether Reclame - STER) is exclusively responsible for the production and broadcasting of the advertising of third parties. It is a public-law foundation, set up by the Broadcasting Act (Section 50(1)).

The responsibility for appointing and dismissing the six-member Board of Governors (bestuur) lies with the Minister for Cultural Affairs (Section 50(5), (6)). Both he and the Minister for Economic Affairs may delegate observers to the management board (Section 50(7)). The Minister for Cultural Affairs lays down the Foundation's rules (Section 50(8)). An advertising council (Reclameraad) set up under the Act lays down rules on the content of the Foundation's advertising broadcasts, supervises implementation of these rules and advises on other matters connected with broadcast advertising (Section 49(1)), particularly rates. These are set by the Foundation's Board of Governors on a yearly basis, at least six months in advance (Section 50a(1), (2)). The Minister for Cultural Affairs may set aside this decision wholly or in part and set the rates himself (Section 50a(4)).

Some 25% of financing for the Dutch radio and television broadcasting system comes from advertising revenue and approximately 75% comes from licensing fees levied directly by the State and contributions from the members of the private associations and foundations and from subscriptions to their programme magazines.

There is a legal connection between membership of a broadcasting organization and the obligation to pay a contribution (Section 13(1)(7)(e)). Anyone subscribing to a programme magazine is automatically regarded as being a member of the broadcasting organization which publishes it and holds copyright therein (Section 22), unless he expressly declares the contrary. This explains the large membership of a number of the organizations.

The services of these private societies and foundations are therefore rendered against payment. This also applies to the broadcasts by NOS, STER and the other institutions which are allocated broadcasting time, which together with these organizations receive a share of the fees and the advertising revenue. The Minister for Cultural Affairs is responsible for the distribution of these revenues (Sections 58 to 60a). Furthermore, the private-law societies and foundations may make a profit, provided that they are concerned with fulfilment of their broadcasting functions. They take an active part in economic life also by the production and distribution of programmes and programme magazines. With its studios, orchestras and so on, which it maintains for itself and the other institutions, NOS is an important service undertaking.

The Broadcasting Act also covers cable radio and television. It regulates firstly the transmission (doorgifte) of national programme broadcasts by cable rediffusion systems. This must be performed in full, simultaneously and without interruption (Section 48(1)).The cable rediffusion systems covered by the law include the reception facilities and cable networks that cover more than the area of a municipality.[1] The numerous central and community aerials do not therefore, fall within the scope of the Broadcasting Act. They merely

[1] Section 2(1)(k) of the Broadcasting Act in conjunction with the provision of the Telegraph and Telephone Act 1904 cited therein, Staatsblad No 7; Section 3(2) of the Order of the Minister for Transport and Inland Waterways 27 July 1970, Staatscourant No 144, version of the Order of 6 March 1974, Staatscourant No 48.

require a licence (machtiging) from the Director-General of PTT,[1] whereas the former require a licence from the Minister for Posts under the Telegraph and Telephone Act. Similarly, the over 200 large internal cable broadcasting systems (huisomroepen, above all in hospitals) do not fall within the scope of the Broadcasting Act.

Secondly, the Act regulates the transmission (doorgifte) via the designated reception stations and cable networks of the programmes broadcast by foreign stations. In agreement with the Minister for PTT the Minister for Cultural Affairs may designate the foreign broadcasting stations whose broadcasts are to be transmitted in full or in part by one or more cable networks (Section 48(2)(a)).

Thirdly, the Act authorizes the Minister for Cultural Affairs to provide opportunities for the institutions entitled to broadcast (the national, small and regional institutions within the meaning of Sections 13, 19 and 47) to transmit (overbrengen) their programmes via cable (Section 48(2)(b)).

This provision does not cover local institutions. Fourthly, however, paragraph 5 of this Section empowers the Minister for Cultural Affairs to draw up rules with regard to the use of cable networks for purposes other than the transmission of the programmes designated in paragraphs 1 and 2. Paragraph 5 has been interpreted by the Minister as entitling him to control the initial cable transmission (overbrengen) by local institutions of their own programmes. He has therefore issued an Order,[2] which authorizes such "active" cable broadcasting purely as an experiment and reserves it for certain institutions which he alone designates. They must have legal personality, be of a cultural nature and representative of their area, and may neither seek to make profit nor accept advertising.

On the basis of Article 48(5) the Minister for Cultural Affairs has recently made an order[3] whereby the relaying (overbrengen) by cable within the country of television programmes transmitted from abroad by means of a telecommunications satellite (and thus not a satellite intended for direct reception by the public) is permitted only if (i) the programmes contain no advertisements especially directed at the Dutch public, (ii) the transmission by satellite is made by or on behalf of an institution which distributes the programmes by means of a radio transmitter or a cable system in the country where it is established and (iii) the relay occurs at the same time as the original broadcast, without interruption and so far as possible without abridgement.

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[1] Section 4 of the Order.

[2] Order of 24 December 1971, Staatscourant No 251.

[3] Order of 15 September 1983, Staatscourant No 190 of 30.9.1983, p. 8, which entered into force on 2.10.1983, Article II.

The relay within the country of foreign programmes broadcast by means of direct satellites is and remains free[1] even if they contain advertisements especially directed at the Dutch public.

Whether they are so directed is considered to depend primarily on the following criteria:[2] whether the advertisement is in the Dutch language although it emanates from a distributor established abroad; whether the prices are expressed in Dutch currency; whether addresses of points of sale in the Netherlands are mentioned; whether the advertising is for products obtainable only in the Netherlands.

[1] Explanatory note to the Order, loc. cit.

[2] Explanatory note to the Order, loc. cit.

D. Belgium

The Flemish, French and German cultural communities are responsible for radio and television broadcasting in Belgium. However, the broadcasting of government communications and advertising have remained national concerns.[1] Advertising is prohibited,[2] but the authorities do not enforce this ban in regard to the advertising broadcast from other Member States and transmitted via cable.

Broadcasting in Belgium is organized as a public service (service public, openbare dienst), although the constitution does not rule out private ventures. Three institutions set up by law are responsible for this service: Radio Télévision belge de la Communauté culturelle française (RTBF),[3] Belgische Radio en Televisie, Nederlandse Uitzendingen (BRT)[4] and Belgische Rundfunk - und Fernsehzentrum für deutschsprachige Sendungen (BRF).[5]

However, the law does not grant a monopoly to the three institutions. BRT and (when the relevant rules are issued) RTBF and BRF are obliged to grant broadcasting time and to provide staff and technical support for the programmes of those societies and foundations which fulfil the conditions of the law, and are hence approved by the King subject to a legal limitation on their number.[6] They must be private-law, non-profitmaking societies or foundations in the public interest, whose exclusive object is to broadcast programmes with commentaries and points of view based on representative social, economic, cultural, ideological or philosophical trends.

Four television programmes in all are broadcast by RTBF and BRT on two channels: RTBF 1 and 2 (Télé 2) and BRT 1 and 2. BRF broadcasts a radio programme.

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[1] Sections 59 bis and 59 ter of the Constitution; Section 4(6) of the Special Act on Institutional Reforms of 8 August 1980, Moniteur belge, 15.8.1980, p. 9434.

[2] Section 28(3) of the Organic Law on the Institutions of Belgian Radio and Television Broadcasting of 18 May 1960, Moniteur belge, 21.5.1960, p. 3836.

[3] Decree having the force of law of the Council of the French Cultural Community of 12 December 1977, Moniteur belge, 14.1.1978, p. 365, Section 1(1), Section 2(1).

[4] Decree having the force of law of the Cultural Council of the Dutch Cultural Community of 28 December 1979, Belgisch Staatsblad, 25.1.1980, p. 1171, Section 1(1), Section 2(1).

[5] Section 7(1) of the Act of 18 February 1977 laying down certain provisions on the public service of radio and television broadcasting, Moniteur belge, 2.3.1977, p. 2491.

[6] Sections 24 to 30 of the abovementioned Flemish Decree; Section 26 of the abovementioned Walloon Decree; Section 9 of the abovementioned Act of 18 February 1977 (regarding BRF).

BRT, RTBF and BRF are public corporations (openbare instellingen, établissements publics) with legal personality.[1] Each institution draws up its own programmes.[2] These three public-law corporations are each governed by a Board of Directors appointed for a certain period by the appropriate cultural community, a Standing Committee and a General Manager or Director. The appropriate Minister for Cultural Affairs is responsible for supervising the BRF.[3] BRT comes under the Minister for Dutch Cultural Affairs.[4] The appropriate Minister for Cultural Affairs may attend the meeting of the Board of Directors as an observer.[5] The General Manager is appointed by the King or the Minister on a proposal from the Board of Directors.[6] The finances of BRT, RTBF and BRF are supervised by the State.[7]

The corporations' income comes from funds made available to it by the appropriate Cultural Council, loans which the corporation may raise upon authorization by Order, proceeds from the sale of publications and their own sound and film recordings, proceeds from the sale and hire of productions and fees for all types of services.[8] In financing their tasks as public undertakings the corporations may therefore take part in business life and seek to make a profit. Both BRT and RTBF may maintain a reserve fund of up to BF 500 million, while RTBF may also maintain a renewals and amortization fund.[9] The first-mentioned source of funds, from the budget of the respective Cultural Council, is financed from the licences (a form of tax), which the State imposes every year through the telephone and telegraph service on the owners of radio and television sets. The corporations therefore operate against payment. In 1981 RTBF's share of budget income amounted to 89.1%.

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[1] Section 1(1) of the Decrees; Section 7(1) of the 1977 Act.

[2] Section 2(2) of the Decree and Section 1(2) of the Order having force of a Decree by the German Cultural Council of 4 July 1977, Moniteur belge, 17.11.1977, p. 13630.

[3] Section 7(4) of the abovementioned Act of 18 February 1977.

[4] Section 1(1) of the abovementioned Flemish Decree.

[5] Section 12 of the abovementioned Flemish Decree; Section 11 of the abovementioned Walloon Decree; Section 13 of the abovementioned German Order.

[6] Section 13(2) of the abovementioned Flemish Decree; Section 17(1) of the abovementioned Walloon Decree.

[7] Section 18 of the Flemish Decree, Section 21 of the Walloon Decree and Section 7(5) of the Act of 18 February 1977, which refer to the Act of 16 March 1954 on the supervision of certain corporations of public interest, in the version of the Royal Decree of 18 December 1957, Moniteur belge, 25.12.1957.

[8] Section 22 of the Flemish Decree; Section 20 of the Walloon Decree; Section 41 of the German Order; Section 10(1) of the Act of 18 February 1977.

[9] Section 22 of the Walloon Decree; Section 22 of the Flemish Decree.

The corporations may perform all activities connected with their tasks or which ensure or facilitate their accomplishment.[1] These activities comprise the production, broadcasting and distribution of programmes, the setting-up, maintenance and use of the technical installations required to broadcast television programmes (including making them available to the BRF against payment),[2] cable and satellite transmissions,[3] conclusion of agreements with persons under public or private law both in Belgium and abroad (in particular for joint productions),[4] the use of broadcasting stations located outside Belgium,[5] the purchase, sale and creation of rights in rem over property and technical installations in Belgium and abroad,[6] and the expropriation of property in the public interest.[7] The RTBF corporation may set up and maintain regional production centres and related stations.[8] It is clear from these provisions that the three corporations are major service undertakings closely involved in business life, which broadcast their programmes against payment.

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[1] Section 4(1) of the Walloon Decree; Section 6(1) of the German Order; Section 4(1) of the Flemish Decree.

[2] Section 5 of the Flemish Decree; Section 4(1) of the German Order; Section 8 of the abovementioned Act of 18 February 1977.

[3] Section 3(4), Section 4(3) of the Walloon Decree; Section 5 of the German Order.

[4] Section 4(2) of the Flemish Decree; Section 4(2) of the Walloon Decree; Section 6(2) of the German Order.

[5] Section 3(3) of the Walloon Decree; Section 3(2) of the Flemish Decree.

[6] Section 3(1) of the Walloon Decree; Section 3(1) and (3) of the Flemish Decree; Section 4 of the German Order.

[7] Section 3(2) of the Walloon Decree; Section 3(4) of the Flemish Decree; Section 3 of the German Order.

[8] Section 12 of the Walloon Decree.

The reception of radio and television broadcasts and their cable transmission into the dwellings of third parties is governed by national law. The State has not assigned these activities to or reserved them for a public service, but merely made them dependent upon an authorization.[1] Any national of a Member State established in Belgium is entitled to apply for an authorization.[2] The authorization, issued by the Minister responsible for telegraph and telephone services, is valid for eighteen years and may then be extended on a nine-year basis.[3] It may cover part of a municipality, a whole municipality or a group of municipalities. The reception facilities may, however, be set up outside this area.[4]

All cable television networks must transmit all the Belgian corporations' broadcasts simultaneously and in full.[5] The distribution companies may also transmit broadcasts from foreign countries which are authorized there.[6] However, the transmission of advertising in such broadcasts is prohibited.[7] There is an overall ban on radio and television advertising in Belgium (see the beginning of this section), but the cable networks do not comply with Section 21 and it is not enforced by the authorities. The cable companies therefore transmit all the programmes which can be received from France, Germany, Luxembourg, the Netherlands and the United Kingdom, including the advertisements.

The Minister responsible for telegraph and telephone services fixes the maximum rates for connections to the cable network and the subscription.[8] The distribution companies therefore operate against payment. The system of charges imposed on those using the final reception apparatus connected to the network is similar to the arrangements previously outlined for the collection of radio and television licence fees.[9]

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[1] Section 2 of the Royal Decree concerning the distribution networks for the transmission of radio broadcasts to the dwellings of third parties of 24 December 1966, Moniteur belge, 24.1.1967, p. 609.

[2] This appears from Section 4(1) of the abovementioned Royal Decree in conjunction with the EEC Treaty, namely Articles 7, 52 and 58.

[3] Section 6 of the Royal Decree.

[4] Section 7 of the Royal Decree.

[5] Section 20 of the Royal Decree.

[6] Section 21(1) of the Royal Decree.

[7] Section 21(2)(1) of the Royal Decree.

[8] Section 16(1) of the Royal Decree.

[9] Section 32 of the Royal Decree.

About half the cable networks are operated by profit-making companies governed by private law. The remainder are public undertakings, mainly in the form of "intercommunals", i.e. private-law associations of municipalities (and/or associations) authorized by the State and having an object in the public interest, which are organized in one of the forms permitted by company law.[1]

"Active" cable television may so far be authorized only on a trial basis in the French-speaking area for social/cultural programmes of local interest.[2]

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[1] Act concerning the association of municipalities for a purpose in the public interest of 1 March 1922, Moniteur belge, 16.3.1922, in the version amended by the Royal Decrees of 1933 and 1936.

[2] Royal Decree of 4 May 1976 amending the abovementioned Royal Decree of 24 December 1966, Moniteur belge, 18.6.1976, p. 8275.

E. United Kingdom

In the United Kingdom broadcasting may be carried on only under a licence from the Home Secretary.[1] The British Broadcasting Corporation (BBC)[2] and the Independent Broadcasting Authority (IBA)[3] at present hold such a licence and concession agreement with the Home Secretary which are valid until 1996. The BBC was established by Royal Charter in 1926 for a fixed period which has been constantly renewed[4] and the IBA (a statutory corporation) was established by statute[5] in 1954.[6] Both are thus public law institutions known as corporations or bodies corporate.[7] Both are required to carry on their broadcasting services "as a public service for disseminating information, education and entertainment".[8]

These corporations consist of members[9] who in the case of the BBC are known as governors.[10] They are regarded as trustees of the public interest and are responsible for the corporation which they constitute. The members, the chairman and the deputy chairman are appointed in the case of the BBC by the Queen in Council[11] and in the case of the IBA by the Home Secretary[12] on the basis of their experience, qualifications and personal qualities. They are appointed for a fixed period. The members - at present twelve in the case of each corporation[13] - are also known as the Board of Governors.

In addition to and independent of the IBA there is a further public law corporation, the Broadcasting Complaints Commission, the functions which are obvious from its title.[14]

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[1] Section 1 Wireless Telegraphy Act 1949, 12, 13 and 14 Geo. 6 c. 54; Section 3(7) Broadcasting Act 1981, 1981 c. 68.
[2] Clause 3 Licence and Agreement of 2 April 1981 (Cmnd. 8233).
[3] Clause 1 IBA Licence of 22 December 1981 (Cmnd. 8467).
[4] The present Charter expires in 1996 (Clause 21).
[5] The IBA is to carry out its functions until 1996 or 2001 (Sections 2(1) and 5 Broadcasting Act 1981).
[6] Paragraph 4(1) of Schedule 1 to the Broadcasting Act 1981.
[7] Clause 1(1) of the current Royal Charter of the BBC of 7 July 1981, Cmnd. 8313; Section 1(1) Broadcasting Act 1981.
[8] Section 2(2)(a) Broadcasting Act 1981. Clause 3(a) of the BBC Charter 1981 also refers to "public services".
[9] Clause 1(2) BBC Charter 1981; Section 1(2) Broadcasting Act 1981.
[10] Clause 1(2) BBC Charter 1981.
[11] Clause 5(1) and (2) BBC Charter 1981.
[12] Section 1(2) and Paragraph 1 of Schedule 1 to the Broadcasting Act 1981.
[13] Clause 5(1)(2) BBC Charter 1981; Section 1(2) and (3) Broadcasting Act 1981.
[14] Section 53-60 Broadcasting Act 1981.

The BBC and the IBA are administered by their members, who are advised by numerous councils, committees and panels, some of which are prescribed by statute and others created by the institutions themselves. In 1982 they numbered more than 50 in the case of the BBC and 49 in the case of the IBA. They are concerned both with policy and programmes in general and with particular regions and subjects.[1] Each corporation is empowered to employ such staff as it may "consider necessary for the efficient performance of its functions and transaction of its business".[2] The corporations fix remuneration and conditions of employment, negotiate on them with the staff associations and conclude wage agreements.[3] The staff of each corporation is headed by its appointed Director-General.

Both corporations have the power to do all such things as appear to them necessary or conducive to the attainment of their objectives or the proper performance of their functions.[4] In performing their duties as broadcasting authorities they have in particular the following powers and obligations: to establish and use stations for wireless telegraphy[5] and in the case of the BBC also for satellite broadcasting;[6] in the case of the BBC to establish, acquire and use equipment for the transmission and reception of signals by wire or cable;[7] in the case of the IBA to arrange for the distribution of its programmes by cable companies;[8] to acquire, use and sell property of all kinds (land, buildings, easements, apparatus, machinery, plant and stock-in-trade);[9] to organize and subsidize concerts and other entertainments;[10] to collect news and information in any appropriate manner, to establish news agencies and subscribe to them;[11] to acquire copyrights, trade marks and trade names and to acquire and grant licences;[12] to make, acquire, lease and sell films, records, tapes, cassettes, etc., and ancillary material and apparatus;[13] to acquire patents and licences for inventions;[14] to form companies or acquire shares in companies and provide financial assistance to companies;[15] to invest its moneys and deal with

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[1] Clauses 8-11 BBC Charter 1981; Sections 16-18 Broadcasting Act 1981.
[2] Clause 12(1) BBC Charter 1981; similarly Section 12(1) Broadcasting Act 1981.
[3] Clause 12(2) and Clause 13 BBC Charter 1981; Section 44 Broadcasting Act 1981.
[4] Clause 1(1) and Clause 3(z) BBC Charter 1981; Sections 3(1), 12(1) Broadcasting Act 1981, Paragraph 4(1) of Schedule 1 Broadcasting Act 1981.
[5] Clause 3(c) BBC Charter 1981; Section 3(1)(a) Broadcasting Act 1981.
[6] Clause 3(h) BBC Charter 1981.
[7] Clause 3(d) BBC Charter 1981.
[8] Section 3(1)(c) Broadcasting Act 1981.
[9] Clause 3(g), (t) and (x) BBC Charter 1981; Section 12(2) in fine, Broadcasting Act 1981.
[10] Clause 3(m) BBC Charter 1981.
[11] Clause 3(n) BBC Charter 1981.
[12] Clause 3(o) BBC Charter 1981.
[13] Clause 3(p) BBC Charter 1981.
[14] Clause 3(q) BBC Charter 1981.
[15] Clause 3(u) BBC Charter 1981; Section 12(2) Broadcasting Act 1981.

them;[1] to take up loans and mortgages;[2] to conclude other agreements[3] or otherwise carry on business.[4]

The principal obligation of the BBC is the making and transmission of radio and television programmes.[5] The principal obligation of the IBA is the provision of broadcasting services of high quality additional to those of the BBC,[6] primarily through supervision and transmission of radio and television programmes made by private companies[7] and secondly by broadcasting an additional television programme of its own making.[8]

The BBC and the IBA broadcast their television programmes on two channels each: BBC 1, BBC 2, ITV and Fourth Channel.[9] They also arrange by means of contracts for the distribution of their broadcasts by the private cable companies. The BBC also makes its own programmes. As employer, as producer, purchaser and distributor of programmes, as builder, maintainer and user of its transmitters, as proprietor, investor and borrower, it performs a wide range of economic and business activities. It is not merely a legal but also an economic entity. It is thus an undertaking which participates in economic life both as a supplier and as a user of services. As a legal person under public law, it is a public undertaking.

The IBA carries on similar activities, but as regards the making of programmes only in relation to the Fourth Channel. For certain production activities it must, and for others it may, make use of a subsidiary company.[10] Thus at the end of 1980 a wholly-owned subsidiary was formed, Channel Four Television Company Limited. It is financed by the IBA from subscriptions from the programme contractors of IBA (see below). In return they have the right to sell advertising time on the new Channel Four programme.

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[1] Clause 3(v) BBC Charter 1981.
[2] Clause 3(w) BBC Charter 1981; Paragraph 4(1) of Schedule 1 to the Broadcasting Act 1981.
[3] Clause 3(y) BBC Charter 1981; Sections 2(3), 3(2) in fine, and 12(1) Broadcasting Act 1981.
[4] Section 3(3) Broadcasting Act 1981.
[5] Clause 3(a) BBC Charter 1981 and Clause 13(1), (2), (5) BBC Licence and Agreement 1981.
[6] Section 2(1) Broadcasting Act 1981.
[7] Section 2(3) Broadcasting Act 1981.
[8] Section 10(1) Broadcasting Act 1981.
[9] In Wales the functions of the IBA are partly carried out by the Welsh Fourth Channel Authority, Sections 46-52 Broadcasting Act 1981.
[10] Section 12(1) and (2) Broadcasting Act 1981.

For its ITV channel the IBA is not as a general rule permitted to make programmes itself.[1] It must obtain them from programme contractors.[2] These are natural or legal persons who, on the basis of contracts with the IBA and in return for payment for the services rendered by the IBA, have the right and the obligation to provide programmes or parts thereof for broadcasting by the IBA, which may include advertising.[3] The IBA thus provides its services - particularly the broadcasting of the programmes made for it - in return for payment.

The IBA must do all it can to ensure "that there is adequate competition to supply programmes between a number of programme contractors .....".[4] Accordingly, the IBA has concluded contracts, the most recent dating from 1982, with 15 makers of television programmes who are independent of each other; these include two new firms who have replaced former contractors. These are all limited companies operating in the private sector with a view to profit. Five of them are fairly large and produce nationally distributed programmes (central companies) in addition to regional programmes for the area in which they are established (two of them are in London). The other ten companies are substantially smaller and make programmes for their own regions (regional companies).

It is expressly provided by statute that nationals of the other Member States may be considered for appointment as contractors with the IBA, as also may bodies corporate formed in accordance with the law of another Member State and having their registered or head office or principal place of business within the Community.[5]

News broadcasts are supplied to the IBA not by any of the 15 programme companies but by a subsidiary company jointly owned by all of them, Independent Television News (ITN). This is a limited company on whose board of directors each of the 15 shareholders is represented.[6]

The IBA's new national breakfast programme, "Breakfast Television", has been entrusted to a further programme company, TV-AM Limited.

As well as establishing and operating the transmitters the IBA itself has three principal functions: firstly the choice of the programme contractors,

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[1] For exceptions, see Section 3(2) Broadcasting Act 1981.
[2] Section 2(3) Broadcasting Act 1981.
[3] Section 2(3) Broadcasting Act 1981.
[4] Section 20(2)(b) Broadcasting Act 1981.
[5] Section 20(2)(a) and (6)(a)(i) and (b)(i) Broadcasting Act 1981, which correspond with Article 58 EEC Treaty.
[6] This system is one of the options provided by Section 22 Broadcasting Act 1981.

secondly the supervision of the programmes from planning[1] to implementation[2] - as regards composition, content and quality, balance and variety, day and time of transmission,[3] respect for decency and public order,[4] impartiality in relation to political questions or industrial disputes[5] - and thirdly the supervision of advertisements.[6]

Both the BBC and the IBA are responsible for the programmes they broadcast. Only when they infringe a right laid down in their licences, charter or statute are they subject to the supervision of the courts.[7] The powers of the Government are limited to prescribing the transmission times,[8] requiring the broadcasting of Government announcements,[9] requiring technical work to be carried out or the establishment of additional stations,[10] preventing exclusive agreements in favour of the BBC or IBA for the broadcasting of events of national interest[11] and requiring cooperation between the IBA and the BBC in the use of transmitters.[12]

The two corporations are financed in different ways: the IBA by advertising revenues from the private sector (commercial television), the BBC from a public tax on television sets.

The BBC is prohibited from broadcasting advertisements for payment without the consent of the Home Secretary.[13] Its internal services are therefore financed primarily by grants made by Parliament out of the Home Office budget.[14]

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[1] Section 6 Broadcasting Act 1981.
[2] Section 5 Broadcasting Act 1981.
[3] Section 2(1) and (2) Broadcasting Act 1981.
[4] Section 4(1)(a) Broadcasting Act 1981.
[5] Section 4(1)(f) Broadcasting Act 1981.
[6] Section 8(3), Schedule 2 and Section 9 Broadcasting Act 1981.
[7] Attorney-General (ex relator McWhirter) v. IBA /1973/ Q.B. 629 (652).
[8] Section 28 Broadcasting Act 1981; Clause 14 BBC Licence and Agreement 1981.
[9] Section 29(1) to (4) Broadcasting Act 1981; Clause 14 BBC Charter 1981.
[10] Section 29(5) Broadcasting Act 1981; Clause 3(i) BBC Charter 1981, Clauses 4, 5, 9 BBC Licence and Agreement 1981.
[11] Section 30 Broadcasting Act 1981.
[12] Section 31 Broadcasting Act 1981; Clause 3(j) BBC Charter 1981, Clause 6 BBC Charter 1981.
[13] Clause 12 BBC Licence and Agreement 1981; Clause 16(1)(b) BBC Charter 1981.
[14] Clause 16(1)(a) BBC Charter 1981.

These correspond to the net revenue from television licences.[1] The Home Secretary is empowered to fix the charge for these licences, which is collected by the Post Office on his behalf. The amount of revenue entered in the Home Office budget after deduction of the costs of collection is allocated to the BBC, which thus provides its services - the broadcasting of its programmes - for payment. The BBC has some additional income (1% - 2%) from the sale of publications and from the sale of films and programmes abroad. The external services of the BBC are financed from grants in aid made out of the budget.[2] The BBC is obliged to apply all its revenue solely to the furtherance of its objectives.[3] None of its revenue may be distributed as profit among its members.[4]

The IBA finances its expenditure and reserve fund from the contractually agreed payments made by programme contractors.[5] Its revenues come from the sale of broadcasting time for television advertising. Any surpluses of the IBA are dealt with in accordance with the direction of the Home Secretary.[6] Thus, the corporation, just like its sister the BBC, is not carried on for profit but provides its services - especially the broadcasting of programmes - in return for payment. The programmes broadcast by the IBA may, as already mentioned, include advertising.[7] With the income derived from the sale of the available broadcasting time to advertisers and advertising agents, the programme companies finance themselves, the IBA and a tax ("Exchequer Levy") imposed on their profits from the sale of advertising time. This levy amounts in the case of television programmes to two-thirds and in the case of radio programmes to 40% of their profits, in so far as those profits exceed 250 000 UKL or 2% of their advertising revenues.[8] In this way the State received in the financial year 1981/82 a revenue of 57 512 767 UKL. The Home Secretary may, with the consent of Parliament, increase or reduce the rates of this tax on advertising profits and alter its basis of assessment.[9]

The transmission of broadcasts by cable, like wireless broadcasting, requires a licence from the Home Secretary. Among the conditions of such licences is that television and radio programmes are relayed in their entirety and that generally speaking as many programmes are relayed as is technically possible.

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[1]
[2] Clause 16 BBC Licence and Agreement 1981.
[3] Clause 17 BBC Licence and Agreement 1981.
[4] Clause 1, first sentence, in fine, BBC Charter 1981.
[5] Clause 16(3) BBC Charter 1981.
[6] Section 32(1) and (2), 36 Broadcasting Act 1981.
[7] Section 37 Broadcasting Act 1981.
[8] Section 2(3), 13 Broadcasting Act 1981.
[9] Section 32(3) and (4) Broadcasting Act 1981.
Section 32(8) and (9) Broadcasting Act 1981.

Foreign television programmes may be relayed only with the consent of the Home Secretary. The IBA has the power, by means of appropriate agreements with the public body known as British Telecommunications and with private individuals and public bodies which maintain broadcast relay stations, to arrange for the programmes it has transmitted to be relayed.[1]

Up to 1983 there were only occasional cases in which cable television companies were permitted to carry on "active" cable television, i.e. the transmission of their own programmes. For these pilot projects an experimental licence is granted, for which again a charge is made. Advertising is permitted on these programmes.

On 1 December 1983 a Bill was published setting out framework rules for the development of new cable services and the setting up of a "Cable Authority" with powers to permit and regulate cable services.[2] In the same month the Government granted eleven privately financed consortia, out of 37 applicants, provisional authorization to set up and operate new cable systems, each with about 30 channels, on which their own programmes would be transmitted as well as those of the BBC and ITV.

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[1] Section 3(1)(c) Broadcasting Act 1981.

[2] Cable and Broadcasting (H.L.) A Bill, (83) A 49/1, London 30.11.1983.

F. Ireland

In Ireland broadcasting may be carried on only under licence from the Minister for Posts and Telegraphs.[1] Such a licence is held only by the Broadcasting Authority, known as Radio Telefís Eireann (RET).[2] The authority was created by statute[3] and is thus a public law institution.[4] Its legal form is that of a body corporate. Its function is to "establish and maintain a national television and sound broadcasting service".[5]

The body corporate known as RTE consists of not less than seven and not more than nine members appointed by the Government for a fixed term,[6] who are responsible for its activities.[7] The Government appoints a chairman from among the members.

The authority is responsible for its own administration. Its chief executive officer is the Director-General;[8] both he and the staff are appointed by the authority. Appointment and removal of the Director-General requires the consent of the Minister.[9] With his consent RTE may also appoint advisory committees and advisers.[10] There is also a Broadcasting Complaints Committee independent of RTE.[11]

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[1] Sections 3 and 5, Wireless Telegraphy Act 1926, 1926, No 45.
[2] Section 3 Broadcasting Authority (Amendment) Act 1966, 1966, No 7.
[3] Section 3(1) Broadcasting Authority Act 1960, 1960, No 10.
[4] Section 3(2) Broadcasting Authority Act 1960.
[5] Section 16 Broadcasting Authority Act 1960.
[6] Section 4(1) Broadcasting Authority Act 1960.
[7] Section 7(1) Broadcasting Authority Act 1960.
[8] Section 11, 12(1) Broadcasting Authority Act 1960.
[9] Section 13(4) Broadcasting Authority Act 1960.
[10] Section 5 Broadcasting Authority (Amendment) Act 1976, 1976, No 37.
[11] Section 4 Broadcasting Authority (Amendment) Act 1976.

RTE has all the powers necessary for or incidental to the abovementioned functions.[1] In particular it may establish, maintain and operate broadcasting stations, arrange for the distribution of programmes by means of relay stations, originate programmes and procure programmes from any source, make contracts and other arrangements incidental or conducive to its objects, acquire and make use of copyrights, patents and licences, collect news and information and subscribe to news services, organize, provide and subsidize concerts and other entertainments in connection with the broadcasting service, prepare, publish and distribute, with the consent of the Minister,[2] relevant printed matter or recorded aural and visual material.[3] It may acquire land (even compulsorily) and dispose of it,[4] exercise borrowing powers with the consent of the Minister[5] and invest its funds.[6]

RTE may also broadcast advertisements, reject any advertisement offered and fix charges and conditions for such broadcasts.[7] With the consent of the Minister it fixes the amount of time each day to be devoted to the broadcasting of advertisements and the maximum period of advertising permit in each hour.[8]

RTE broadcasts two television programme: RTE 1 and RTE 2. As already explained, it carries on numerous economic and business activities. It is not merely a legal but also an economic entity. It is thus an undertaking which participates in economic life both as a supplier and as a user of services. As a legal person under public law, it is a public undertaking.

In 1981 RTE was financed to the extent of 48% from advertising revenue and 42% from grants made by Parliament out of the budget of the Minister for Posts and Telegraphs. These grants correspond to the net revenue received by the Minister from broadcasting licence fees.[9] RTE may be empowered by the Minister to grant these licences and collect the fees for them.[10] RTE is thus not a profit-making body but performs its services - broadcasting of its programmes, including advertisements - for payment.

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[1] Section 16(1) Broadcasting Authority Act 1960.
[2] Section 16(2) Broadcasting Authority Act 1960, Section 5 Broadcasting Authority (Amendment) Act 1966, Section 12 Broadcasting Authority (Amendment) Act 1976.
[3] Sections 3(2), 30 Broadcasting Authority Act 1960.
[4] Section 27 Broadcasting Authority Act 1960, Sections 10, 15 Broadcasting Authority (Amendment) Act 1976.
[5] Section 29 Broadcasting Authority Act 1960.
[6] Section 20(1) and (2) Broadcasting Authority Act 1960.
[7] Section 14(2) Broadcasting Authority (Amendment) Act 1976.
[8] Section 8 Broadcasting Authority (Amendment) Act 1976.
[9] Section 34(d) and Part I of Third Schedule, Broadcasting Authority Act 1960.

The reception of radio and television programmes by wireless installations and their transmission by cable to the homes of third parties is not allotted or restricted to particular bodies but merely made subject to a licence.[1] Anyone may apply to set up, maintain and operate such a cable service.[2] The Minister for Posts and Telegraphs, who is responsible for the issue of such licences, has complete discretion whether to grant or to refuse a licence.[3] It remains in force so long as it is not withdrawn.[4] The Minister decides on the area to be served and the site of the receiving installation.[5] One person may receive several licences.[6]

Every licence holder must transmit the national television programmes of RTE at the same time as they are broadcast.[7] He may in addition transmit the other (foreign) programmes mentioned in the licence.[8] The licence does not entitle him to infringe any copyright in the programmes transmitted.[9]

Licence holders are entitled to charge a fee for their service.[10] In order to compensate RTE for its loss of advertising revenue, licence holders have to pay a fee corresponding to 15% of their revenues (unless they transmit only RTE programmes).[11] The licence fee is payable to the Ministry for Posts and Telegraphs.[12] A subsidy corresponding to the net revenue from this fee is granted annually by Parliament from the State budget and paid to RTE.

Cable licences have been granted to a number of private cable companies and to RTE. In 1982 there were 21 cable networks, of which the three largest were in Dublin. They are in the east and the north of the Republic, where British television programmes can be picked up.

"Active" cable television has so far been allowed only on an experimental and local basis.

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[1] Wireless Telegraphy (Wired Broadcast Relay Licence) Regulation 1974, Statutory Instrument No 67 of 1974 (Prl. 3754).
[2] Section 4 Regulations 1974.
[3] Section 5 Regulations 1974.
[4] Sections 7, 8 Regulations 1974.
[5] Section 6(1) Regulations and paragraph 1 of the Schedule thereto.
[6] This follows from Section 9(3) Regulations 1974.
[7] Paragraph 3(a) of the Schedule to the Regulations 1974.
[8] Paragraph 3(b) of the Schedule.
[9] Section 17 Regulations 1974.
[10] Section 10(a) Regulations 1974.
[11] Section 9(1) and (2) Regulations 1974.
[12] Section 9(5) Regulations 1974.

G. France

The 1982 Act[1] declares that audio-visual communication shall be free (Article 1, first paragraph). It defines audio-visual communication as the making available to the public of sound, images, documents, data or messages of any kind, whether over the air (i.e. by radio link) or by cable (Article 1, second paragraph), including user-interrogated services (Article 77). Article 2 goes on to state that citizens have the right to free, pluralistic audio-visual communications.

To safeguard these rights the latest Act breaks the three monopolies which the public sector held under the earlier legislation - on broadcasting (i.e. on use of the frequency band), on the installation of transmitters and relay stations and on programming - and replaces them by a system where the State licenses the private or public agencies concerned (Articles 4, 7, 8, 9 and 77 to 87). In principle all operators, except private local radio stations (Article 81), are entitled to raise up to 80% of their funds from advertising revenue (Article 84).

The long-established public radio and television service remains (Article 5), but has been radically reformed, decentralized and relaxed. Now, however, other public or private broadcasting companies are also free to operate alongside the public radio and television service in the three areas mentioned above. No licence is now required to broadcast television programmes to the public at large (as opposed to a limited audience) by radio link, but a public service concession agreement must be concluded with the Government in order to do so (Article 79, contrat de concession de service public).

Article 85 allows an exemption from these rules in respect of broadcasting licences for persons operating stations under an international agreement to which France is party.

First, this clause legalizes the position of Radio Monte Carlo (RMC) broadcasts from stations on French territory. A French State holding company - Sofirad (Société financière de radiodiffusion) - owns 83.34% of Radio Monte Carlo.

Second, it makes it possible to grant other foreign broadcasting companies wishing to use transmitters and relay stations on French territory licences deviating from the requirements laid down in Articles 79 to 84 of the French Act (examples include RTL, Europe 1 - Images et Son, where Sofirad holds 34.19% of the shares and 45.79% of the voting rights, Sud-Radio, of which Sofirad owns 99.99% and neighbourhood radio stations).

Third, the exemption clause in Article 85 empowers the authorities to authorize cable networks to retransmit programmes picked up in France from other countries, whether direct or via satellite, without imposing conditions which the cable companies cannot possibly satisfy since the programmes were made in another country (where perhaps different advertising laws apply, for example) or which would add considerably to the cost of retransmission or make retransmission impossible (for instance, by requiring companies to blank out parts of the programme or advertisements).

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[1] Loi No 82-652 sur la communication audiovisuelle of 29 July 1982, Journal officiel de la République française, 30 July 1982, p. 2431.

On the other hand the licensing system introduced by the French Act does not apply to stations sited in another country, covered by that country's law and broadcasting on frequencies allocated in the international plan and hence approved by the French Government.[1]

The public radio and television service need not necessarily be run solely by public institutions. Instead, Article 5 stipulates that it must be run "in particular" by the two public corporations and by the series of companies provided for in the Act (Article 5). It therefore follows that the service can also be catered for by concluding concession agreements with other public or private agencies (Article 79).

The main task of the public radio and television service is to serve the general public, partly by providing a variety of information, entertainment and culture but also partly by making a contribution towards producing and disseminating literary or artistic works and towards the development of audio-visual communication in line with user demand and with the changes brought about by new technologies (Article 5). Rules governing the content, length and methods of advertising and the level of advertising revenue are laid down in the companies' general conditions of service (cahiers de charges) year by year (Article 66). Advertising is therefore allowed in principle.

Télédiffusion de France (TDF) - a public industrial/commercial corporation which is completely free to administer its own affairs and finances - is responsible for broadcasting radio and television programmes and for all related problems concerning the planning, installation, utilization and maintenance of all the audio-visual communications networks (Article 34). TDF is a public corporation set up by the Act. It is run by a 16-member Administrative Board made up of two Members of Parliament, one representative of the High Authority for Audio-visual Communication (see below), six representatives of the State, four representatives of the national programme companies and three TDF staff representatives (Article 35).

TDF is funded primarily by payments made by the programme companies for its services and by a small proportion of the revenue from the parafiscal charge which the State levies on TV-owners in return for their right to use a set (redevance pour droit d'usage, assise sur les appareils récepteurs de télévision, Articles 36 and 62). Thus it does not seek to make profits, but pays its suppliers, charges its customers and makes a contribution to the economy in the form of its technical work and its standardization and research activities.

The main television companies set up, or about to be set up, by government decree based on the Act are the three national television companies set up by Articles 38 and 40 - télévision française 1 (TF 1), Antenne 2 (A 2) and France-Régions 3 (FR 3) - the twelve regional television companies (Article 51), the television

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[1] See the comments made by the French Minister for Communications during the reading of the bill before the French Parliament, as published in "TF 1, Loi sur la communication audiovisuelle", Paris, 1982, p. 24. See also p. 137.

production company (Article 45) and the marketing company set up by Article 58. RFP-TF 1, RFP-A 2 and RFP-F3 - the three subsidiaries of the Régie française de publicité (RFP) - are responsible for attracting advertising and for making commercials. 51% of the capital of the RFP is held by the State, and the remaining 49% shared by Sofirad (13.5%) and representatives of the advertising industry, the press and consumers.

All these companies are limited by shares. They are governed by company law, apart from those of its rules incompatible with their unique structure and their public service function (Article 75). This role and its economic impact was described earlier. Turning to the structure of the companies, the State is the sole shareholder in the programme companies (Article 44). The national programme companies are the majority shareholder in the three regional television companies founded to date (Article 53), which are therefore subsidiaries of the national programme companies. Under Article 45 the State has a majority holding in the production company, with 51.68% of the registered shares; TF 1 and A 2 hold 22% each and FR 3 the other 4%. Only the State (which holds 23.33% of the shares) and private companies in which the State owns the majority of the capital (Sofirad holds 33.33%) and the national agencies and corporations provided for by the abovementioned Act are entitled to hold shares in the marketing company (Article 59).

All the limited companies referred to above are, therefore, public corporations. This clearly emerges from the decrees setting them up, which state that the rules concerning State control over public corporations apply.[1] Each of the national programme companies is run by a 12-member board consisting of two (three in the case of FR 3) representatives of the State in its capacity as sole shareholder, four (FR 3 : one) representatives of the High Authority, two (FR 3 : one) representatives of the Institut national de la communication audiovisuelle (INCA) - which, like the TDF, is also a public industrial/commercial corporation set up by the Act (Article 47) - plus two members of Parliament, two staff representatives and, in the case of FR 3, three administrators from the steering committee (Articles 39 and 41 respectively).

All the abovementioned companies are funded by an annual payment made by the Government, with the consent of Parliament (this consists of part of the revenue from the parafiscal charge and from the advertising revenue) and by sundry revenue from their own activities (Articles 61 to 64). The 1983 Finance Act set aside FF 11 718 thousand million for the broadcasting stations and companies already set up, some 49.5% or FF 5.8 thousand million of it from the revenue from the parafiscal charge and the remaining 50.5% or FF 5.9 thousand million from advertising and sundry revenue. Advertising is expected to generate 61% of the funds for TF 1, 53% of those for A 2 and 13% for FR 3.

None of the companies mentioned is profit-making in the conventional company law sense of generating profits for shareholders, though they all pursue commercial aims (amongst other objectives) and contribute to the economy (Article 5 and above). For instance Articles 38, second paragraph, 40, second paragraph and 51, third paragraph, expressly assign the programme companies and the regional companies the task of producing radio and TV works and

[1] Journal officiel de la République française, 18 September 1982, p. 2811 and 2812; Journal officiel de la République française, 26 April 1983, p. 1286.

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[1] Journal officiel de la République française, 18 September 1982, p. 2811 and 2812; Journal officiel de la République française, 26 April 1983, p. 1286.

During 1984 viewers through France are to be offered a fourth programme ("quatrième chaine") on subscription. It will be devoted to entertainment and consist primarily of films. At the beginning of 1984 a concession agreement was concluded between the Secretary of State responsible for communications technology and Agence Havas SA, a company in which the French State holds a 52% share. The agreement consists of a contract and a memorandum of conditions. The contract provides for the setting up of a limited company under private law as holder of the concession. The company is called Canal Plus. Agence Havas SA is required to take at least a 35% share in the capital of Canal Plus. This agreement amounts to a concession to provide a public service (concession de service public) under Article 79 of the Act of 1982. It has been granted for 12 years and is renewable. After five years the functioning of the concession is to be reviewed; the State can then re-purchase it.

Canal Plus is not financed from licence fees or advertising revenue (except by sponsors) but by its subscribers (télévision payante) and from payments for the sponsorship of broadcasts (parrainage d'émissions). By way of compensation for the lack of revenue from licences and advertising Canal Plus has been granted a clause in the agreement making it the most favoured medium (clause de media le plus favorisé). Canal Plus thus always enjoys the most favourable situation enjoyed by any of its future competitors as regards the conditions for using the concession, for planning, obtaining and marketing programmes (particularly as regards its relationship with the film industry) and for the transmission of broadcasts (by all means, e.g. via cable networks). Canal Plus has to spend a quarter of its income on obtaining films for its programmes.

H. Federal Republic of Germany

According to the decisions of the Federal Constitutional Court, in Germany broadcasting is a public service, which means that it must be governed by law and that the arrangements made must satisfy specific requirements stemming from the Court's interpretation of the freedom of broadcasting protected by the Basic Law.

The Länder are responsible for arrangements for broadcasting services inside Germany. Each of the eleven Länder - acting alone or with others - has adopted an Act or inter-State contract assigning responsibility for broadcasting on its territory to a non-profit-making public corporation. Some of these corporations have been assigned exclusive responsibility,[1] others not;[2] generally the question of monopolies has not been discussed.[3] The majority of the Länder intend however to abrogate the de jure or de facto monopoly position of these corporations and to license private broadcasters (or suppliers of programmes) in addition to the respective existing regional public corporation. Draft laws to this effect exist so far in Baden-Württemberg (1982), Bavaria (1984), Lower Saxony (1982), the Saarland (1984) and Schleswig-Holstein (1983). This option was open in the Saarland between 1964 and 1981.[4]

Few of these Acts or inter-State contracts explicitly include cable transmissions amongst the corporations' activities.[5] Only one expressly lists direct broadcasting satellites amongst the transmission methods.[6]

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[1] Section 4 of the inter-State contract of 27 August 1951 on Südwestfunk, as amended by the inter-State contract of 29 February 1952 between Baden-Württemberg and Rheinland-Pfalz, published in the Rheinland-Pfalz Gesetz- und Verordnungsblatt, p. 71; Section 2(2) of the statutes of Südwestfunk, Bundesanzeiger 1975 No 24, p. 7; Section 1(3) of the Act of 18 June 1979 on Radio Bremen, Gesetzblatt Bremen, p. 245.

[2] Section 37 of the Act of 2 December 1964 on broadcasting in the Saarland (Gesetz über die Veranstaltung von Rundfunksendungen im Saarland), as published in the Amtsblatt Saar of 1 August 1968, p. 558; Section 38 of the inter-State contract of 20 August 1980 between Hamburg, Lower Saxony and Schleswig-Holstein on Norddeutschen Rundfunk, as published in the Niedersächsisches Gesetz- und Verordnungsblatt, p. 482.

[3] Many points are still disputed.

[4] Sections 38 to 46 of the Act for the Saarland, op. cit.; on 16 June 1981 the Federal Constitional Court ruled that these Sections were contrary to the Constitution and therefore annulled them, Entscheidungen des Bundesverfassungsgerichts, 57, 295.

[5] Section 3(3) of the contract on Südwestfunk, op. cit.; Section 2(2) of the statutes of Südwestfunk, op. cit.; Section 3(1) of the Act of 25 May 1954 on Westdeutscher Rundfunk, Cologne, as published in Gesetze- und Verordnungen Nordrhein-Westfalens, p. 151; Section 1(2) of the Act of the Land of Bremen, op. cit.; Section 38(2) of the NDR contract, op. cit.

[6] Section 38(2) of the NDR contract.

In all there are nine regional stations in Germany: Bayerischer Rundfunk (BR), Hessischer Rundfunk (HR), Norddeutscher Rundfunk (NDR), Radio Bremen (RB), Saarländischer Rundfunk (SR), Sender Freies Berlin (SFB), Süddeutscher Rundfunk (SDR), Südwestfunk (SWF) and Westdeutscher Rundfunk (WDR) in Cologne. The eleven Länder have also set up a tenth nationwide channel - Zweites Deutsches Fernsehen (ZDF) under an inter-State contract.

These broadcasting companies are neither a branch of the State administration nor independent authorities. Instead as public corporations they enjoy a legal status which safeguards their legal autonomy, economic independence and freedom of programming. Each of the stations is entitled to run its own affairs. They provide a public service but are protected from any interference by the State. But they are subject to limited supervision by the government of the Land or Länder in which they operate to ensure that they abide by the relevant legislation. The Boards which govern the stations manage and deploy the production facilities and the revenue and expenditure, which is separate from and independent of the budgets of the Länder. The Broadcasting Board and Administrative Board include representatives of all the leading shades of political opinion, religious and philosophical beliefs and sectors of society.

There are three television channels. Channel One is a joint venture run by the nine Land stations and broadcasts nationwide. It broadcasts a mix of programmes from the individual Land stations, the selection being coordinated by the Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland or ARD (Association of public broadcasting corporations in the Federal Republic of Germany). Channel Two is Zweites Deutsches Fernsehen (ZDF) and likewise broadcasts nationwide. Finally, Channel Three broadcasts five different regional programmes, one of which is shown in each of the six TV regions in Germany. Three of the TV regions are served by one Land station, the other three by more than one. Channel One also transmits ten regional programmes from the Land stations between 1800 hours and 2000 hours. In the mornings a single joint ARD/ZDF programme schedule is shown nationwide.

Construction and operation of broadcasting stations falls into the "telecommunications" category, for which the federal authorities are responsible. The Deutsche Bundespost holds a monopoly on telecommunications.[1] However, it is authorized to entrust other bodies with the task of constructing and operating broadcasting stations.[2] As a result, Channel One is broadcast from the broadcasting companies' own transmitters and Channels Two and Three from the PTT's. The Bundespost receives fees for its services and thereby contributes to the economy.

As public-service utilities, the broadcasting corporations are not profit-earning in the conventional company law sense. None the less they are expected to run their affairs along commercial or economic lines, to generate earnings or surplus funds to finance their own expenditure or for cultural purposes[3] and to further technical and economic development in broadcasting.[4] Radio and TV licence fees are the main source of funds for the Land broadcasting stations (they accounted for between 31.6% and 75.2% of their funds in 1981), with advertising second (on between 15.9% and 29.5% in 1981) and other revenue from, for example, revenue equalization payments between stations, programme sales, lease of premises and plant and returns on investment third. ZDF receives 30% of the TV licence fees. In 1981 these provided 53.5% of its funds, with 36% of the remainder drawn from advertising, 4.4% from sundry revenue and the final 6.1% from ZDF's reserves. In 1982 advertising generated roughly 40% of ZDF's funds and over 30% of ARD's.

Licence fees are collected by a fee collection centre - part of a public management company which may not act as a separate legal entity but is run jointly under the administrative arrangements concluded between the Land broadcasting companies and the ZDF. Since, as described above, the corporations charge for all their broadcasts they are also engaged in an economic activity with commercial purposes (i.e. to finance the corporation) and make an important contribution to the economy.

Added to these tasks, for which the corporations make charges and some of which are run on commercial lines, the broadcasting companies also perform other important profit-making commercial functions. They are

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[1] Section 1 of the Telecommunications Act (Gesetz über Fernmeldeanlagen) of 24 January 1982, Reichsgesetzblatt I, p. 8.

[2] Section 2 of the abovementioned Act.

[3] See, for example, Section 15 of the Act of 10 August 1948 on Bayerischer Rundfunk as published in the notification of 26 September 1973, Gesetz- und Verordnungsblatt Bayern, p. 563; Section 16(3) of the Act of the Land of Bremen; Sections 30(1) and 31(1) of the NDR contract; Section 40(2) of the statutes of Südwestfunk; Section 23 of the WDR Act; Sections 23(3) and 24 of the inter-State contract of 6 June 1961 between all the Länder setting up the public corporation "Zweites Deutsches Fernsehen" (ZDF), Gesetz- und Verordnungsblatt Rheinland-Pfalz, p. 179.

[4] See, for example, Section 10(1) of the Bavarian Act.

entitled to conduct all business in line with their objectives and in their field.[1] Amongst other things they are empowered to make their programmes of all kinds in their own production studios, to order programmes from third parties (and in particular from private companies), to buy programmes, to exchange programmes with other broadcasting companies in Germany and elsewhere and to make programmes for other broadcasting corporations.[2] They are also authorized to found, to buy or to hold shares in profit-earning private corporations to help them fulfil their legal obligations.[3] They have exercised this right on numerous occasions to help them produce, buy and market programmes. They have also founded private limited companies capable of acting as a separate legal entity to attract advertising and to make the commercials and the filler programmes broadcast with them. Both the profits earned and losses incurred by these companies as they perform the tasks assigned in their statutes fall on the broadcasting corporations.

Another method - as yet in its infancy - is cable transmission of TV and radio programmes which could be picked up only by high-capacity individual aerial systems or switched through to the cable centre by radio or by wideband optical fibre links. In 1982 the Bundespost started to lay wideband cable networks in Ludwigshafen and Munich ready for the two trials with interactive and passive cable TV and telephone services planned under the Ludwigshafen[4] and Munich pilot projects on cable communications. Rheinland-Pfalz has adopted an Act setting up a public corporation called the "Institute for Cable Telecommunications" (Anstalt für Kabelkommunikation) to coordinate and monitor the trial. It commenced transmissions on 1 January 1984. A number of private limited companies are supplying programmes. The same applies to the limited company responsible for the pilot project on cable communications in Munich (Münchner Pilot-Gesellschaft für Kabel-Kommunikation mit beschränkter Haftung), which has been transmitting since 1 April 1984 and whose shareholders include a consortium of newspaper and magazine publishers, film-makers, Bayerischer Rundfunk, ZDF, the City of Munich and the State of Bavaria. Two other cable trials are in preparation - one in Berlin, the other in Dortmund.[5]

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[1] Expressly provided for in Section 1(2) of the statutes of Süddeutscher Rundfunk, Stuttgart, as annexed to the Baden-Württemberg Broadcasting Act (Rundfunkgesetz) of 21 November 1950, published in the Regierungsblatt Württemberg-Baden, p. 1.

[2] Expressly provided for in Section 22(2) of the ZDF contract; Section 18(3) subparagraph 6 of the NDR contract.

[3] Expressly provided for in Section 22(a) of the WDR contract; Section 13(2)(a) of the Bremen Act; Sections 29(7) and 34 of the NDR contract.

[4] Rheinland-Pfalz Act of 4 December 1980 on trials with a wideband cable network (Landesgesetz über einen Versuch mit Breitbandkabel), Gesetz- und Verordnungsblatt Rheinland Pfalz, p. 229.

[5] North Rhine-Westphalia Act of 14 December 1983 on the implementation of a pilot project with wideband cable (Gesetz über die Durchführung eines Modellversuchs mit Breitbandkabel). Media Perspektiven 1983, 886.

I. Denmark

In Denmark, Danmarks Radio enjoys a monopoly by virtue of an Act of Parliament: "Danmarks Radio has the sole right to broadcast sound radio and television programmes for the general public."[1]

"Danmarks Radio shall broadcast radio and television programmes covering news, information, entertainment and culture for the public at large" (Section 7). Advertising is not expressly forbidden, but is not in fact broadcast.

Responsibility for the installation and operation of transmitters to broadcast programmes by Danmarks Radio lies with the post and telecommunications authority (Section 4).

Danmarks Radio (DR) was established under an earlier Act and is thus a public institution, being "an independent public corporation" (Section 6) with legal personality.[2]

It is administered by a Radio Council (radioråd, Section 6), which comprises about twenty-four members: two are appointed by the Minister for Cultural Affairs, one by the Minister for Public Works, two by the permanent staff of Danmarks Radio, twelve by Parliament to represent viewers and listeners, and one by each of the parties represented on the Finance Committee of Parliament (Section 8(1)). The Minister for Cultural Affairs appoints the Chairman and his Deputy from among the members (Section 8(4)).

The Radio Council is responsible for Danmarks Radio and must ensure that the provisions of the Broadcasting Act concerning the institution's activities are respected (Item 1 of Section 9(1)). It sets out general guidelines for the institution's activity within the framework laid down by the Act (Item 2 of Section 9(1)) and has the final decision on programmes (Section 9(2)). Its decisions as regards complaints about programmes can be challenged by an appeal to a three-man Radio Adjudication Commission appointed by the Minister for Cultural Affairs (Sections 16 and 17), which can order Danmarks Radio to make corrections (Section 18). The Radio Council also draws up the budget (Section 9(3)) and recommends the establishment chart to the Minister for Cultural Affairs (Section 9(5)). It also sets up a Programme Committee and an Administrative Committee (Section 10). The day-to-day management of DR is in the hands of a Director-General, who is appointed by the Minister for Cultural Affairs on the recommendation of the Radio Council (Section 13).

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[1] Section 1 of the Radio and Television Broadcasting Act (1973) (Lov nr 421 af 15 Juni 1973, om radio- og fjernsynsvirksomhed), Karnov's lovsamling, p. 3143.

[2] This is implied by Section 23(1), under which DR is liable for certain damages.

Danmarks Radio carries out all activities necessary for the performance of its task. It broadcasts television programmes on a single channel; it produces programmes of all kinds; it gathers news and information; it enters into contracts with other parties; it maintains buildings, studios, an orchestra and choir, and eight regional offices. It is thus engaged in a number of economic or economically significant activities. As well as being a legal entity, Danmarks Radio is an economic unit, a business enterprise involved in economic life as both a supplier and consumer of services. However, being a public institution, it has the character of a publicly owned enterprise.

Its activities are largely financed (89%) from radio and television licence fees (see Section 6). The amount of the fees is fixed by the Minister for Cultural Affairs on a recommendation from the Radio Council, after approval by the Finance Committee of Parliament (Section 14(1)). The fees are collected by Danmarks Radio and paid into a special fund (the Broadcasting Fund) which is managed by the Radio Council (Section 14(2)). It is not a profit-making enterprise, but it does charge for its services.

Danmarks Radio also has the right to distribute radio and television programmes via cable (Section 2(1)). However, the Broadcasting Act does not exclude other parties under public or private law from these activities on a trial basis.[1] Under the Act the Minister for Public Works (Transport and Communications) has the power to adopt rules on the installation and operation of communal aerials and other cable networks for the distribution of radio and television programmes to private homes, to require that a licence be obtained for this purpose from the post and telecommunications authority, to fix the licence fees for the installation of such systems and to grant technical approval.[2]

Over 10 000 private associations (mainly home owners) and public bodies (especially municipalities) hold a licence to install and operate communal aerials and other local cable networks. These cable associations may relay only programmes broadcast by Danmarks Radio or by foreign stations.[3] Programmes must be carried without any changes - i.e. including advertising in the case of foreign broadcasts - and must be relayed simultaneously with the original broadcast.[4] The associations are financed from contributions by their members.

The Minister for Cultural Affairs may authorze "participatory" local cable television on a trial basis[5] and has done so in a number of cases.

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[1] Section 2(2) as amended by the Act of 27 May 1981.

[2] Section 5 as amended by the 1981 Act.

[3] Section 3(1). Section 3 allows for special licences, and this option has been used frequently.

[4] Section 3(2).

[5] Section 1(2) as amended by the 1981 Act.

On 7 February 1984 the Minister for Cultural Affairs introduced into the Folketing a bill to amend the Radio and Television Broadcasting Act (abrogation of the monopoly of Danmarks Radio for the transmission of television programmes, distribution of radio and television programmes by means of community aerials, etc.).[1]

The explanatory memorandum to the bill states: "The main purpose of the bill is to provide the legal basis for an abrogation of the exclusive right of Danmarks Radio to transmit television programmes and at the same time to create the legal basis on which other undertakings can carry on television broadcasting independently Danmarks Radio. The bill also contains provisions for creating the legal basis for increased access to the retransmission of foreign radio and television programmes by means of Danish community aerials."[2] This refers to the further transmission by microwave link or cable of those foreign programmes which for geographical reasons cannot be received by individual equipment. It includes also those foreign programmes received by the Post Office by means of telecommunications satellities.[3]

[1] Lovforslag No L 42, Folketinget 1983-84 (2. samling) Blad no 43.

[2] Loc. cit. p. 3.

[3] Loc. cit. p. 8.

K. Greece

By contrast with Article 14 of the Greek Constitution of 1975, which guarantees the freedom of the press, Article 15 places broadcasting (radio and television, including cable transmission) "under the immediate control of the State". The aim is to provide "the objective transmission, on equal terms, of information and news reports as well as works of literature and art; the qualitative level of programmes shall be assured in consideration of their social mission and the cultural development of the country". The State's responsibility does not cover the actual broadcasting itself, but only its supervision; it is therefore for Parliament to decide what form broadcasting should take, in other words whether it should be carried out by one or more public and/or private organizations.

Two bodies have been established by law: Elliniki Radiophonia Tileorassis (ERT - Greek Radio and Television) was set up in 1975[1] and Elliniki Radiophonia Tileorassis (ERT 2) in 1982[2] - at which time ERT was renamed ERT 1.[3] They each operate one television channel. ERT 2 is the universal successor of YENED (Information Service of the Greek Armed Forces).[4]

Article 4(1) of the 1975 Act stipulates that "no legal or natural person other than ERT and YENED, as long as YENED and ERT have not been merged, has the right to broadcast sound and images of any kind by way of radio and television transmissions". The merger was due to be enacted in 1978 "provided the necessary economic, technical and organizational prerequisites were satisfied" (Article 4(4)). As a first stage, YENED was transformed to ERT 2 in 1982 (Article 15(1)(1) of the Act of 1982).

The monopoly (or duopoly) granted to ERT 1 and 2 under the Act also covers wireless and cable transmission of programmes. No other persons have a right to claim broadcasting time or to produce programmes. Programme production is the responsibility of the two organizations themselves or must be carried out on their instructions and under their supervision. Recently a number of private companies have been awarded contracts to produce programmes.

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[1] Act No 230/1975 of 3 December 1975 concerning the establishment of the "Greek Radio and Television Company", Government Gazette, I, p. 272.

[2] Chapter C of Act No 1288/1982 of 1 October 1982 concerning the responsibilities of the Ministry attached to the Prime Minister's Office and of YENED and other provisions, Government Gazette, I, p. 120.

[3] First sentence of Section 15(1)(2) of Act No 1288/1982.

[4] Section 15(1) of Act No 1288/1982.

ERT 1 is a "public corporation " (Article 2(2) of the 1975 Act) whose aims are to organize, operate and develop broadcasting (Article 1(1)). It is not, therefore, a commercial enterprise. Its legal form is that of a joint stock company (Section 2(1)). Its capital is owned by the State which holds the single registered share. ERT 1 enjoys "complete economic and administrative independence and operates in the public interest along private sector lines under State supervision" (Section 2(1)). Its accounts are thus not subject to scrutiny by the Court of Auditors and it is governed by company law, except where the provisions are incompatible with its status as a public enterprise (Section 2(2)). The 1975 Act provides for articles of association to be drawn up for ERT 1, with approval to be granted by the President of the Republic by way of decree (Article 2(3)), but this has not yet happened.

ERT 1 may undertake any activity necessary for or conducive to the achievement of its given objectives. In particular it may engage staff, install and operate transmission facilities and studios, produce and transmit programmes of all kinds, including television films, enter into contracts (e.g. for the transmission of cinema films), found subsidiaries, acquire and sell property rights and publish a radio and television magazine.

The corporation is supervized by the Press and Information Secretariat, a Department of the Ministry attached to the Prime Minister's Office (Section 2(4)). The Minister can intervene in the affairs of ERT 1 in three cases: he may, if he considers it necessary, order a review of management by way of a presidential order (Section 5(1)(a)); he has the right to call for any information he may require about its operations and activities (Section 5(1)(b)); in very exceptional circumstances he may issue written instructions that a transmission should be cancelled in part or in full (Section 5(1)(c)). ERT 1 is also obliged under the Act to transmit Government announcements upon request (Section 5(2)).

ERT 1 is managed by a Board of Directors (Sections 10 and 11). The Board has seven members, who are appointed for three years by the Cabinet from among respected personalities able to be of service to the corporation. Except where otherwise laid down by law, the Board has the same duties as in any other limited company. In particular it decides on the production and planning of programmes, which must be "democratic in spirit, of a high cultural standard, humanistic and objective" and which must "reflect the current situation in Greece" (Section 3(1)). The Board regularly draws up a development plan for ERT 1, which it submits to the Minister attached to the Prime Minister's Office for his approval, and informs the General Assembly (Section 11(4)). Day-to-day management is in the hands of a Director-General (Section 12(3)), who is appointed for three years by the Board of Directors and whose contract is approved by the Minister (Section 12(4)).

The General Assembly consists of 20 members (Section 13(1)): the Director of the Bank of Greece (Chairman); the President of the Academy of Athens; the Rectors of the universities of Athens and Thessaloniki and the Technical University; the President of the Council of State; six members (who may not be members of Parliament) appointed by the President of Parliament on a proposal of the Prime Minister and the Leader of the Opposition (three each); the General Secretaries of the Ministries of Economic Affairs, Foreign Affairs, Finance, Culture and Science, Education and Religion, and Transport and of the Ministry attached to the Prime Minister's Office and the Director of the Information Service of the Armed Forces.

The responsibilities of the General Assembly (Article 14) include: approval of the annual statement of accounts; granting a discharge to the Board of Directors in accordance with the Company Act; the appointment of the auditors and approval of their annual report; delivering an opinion on the removal of a member of the Board of Directors from office or on the advisability of taking up a loan not covered by the corporation's own revenue or on any other question put to it by the Minister of the Presidency of the Government. The General Assembly also states its views on the enterprise's policy, programmes and results and sets them out in a report to the Government.

ERT 1 is financed from two main sources (Section 8): a broadcasting fee and revenue from advertising. The fee is payable by every natural person who resides in Greece and by every legal person carrying out an activity in the country. The rate is fixed by the Council of Ministers and the fee is collected by the Public Electricity Authority. It is a flat-rate charge, determined according to the amount of the fee-payer's electricity bill, irrespective of whether he owns a radio and/or television set. The other main source of revenue comes from the transmission of advertising. If necessary, ERT 1 may also be granted funds from the national budget. Thus, although it is a non-profit making body, ERT 1 charges for its services.

Revenue from fees in 1982 amounted to DR 2 154 million, while advertising yielded DR 617 706 000 - 22.3% of the combined total. Sales of the radio and television magazine published by ERT 1 brought in a further DR 97 million.

The Second Greek Radio and Television organization (ERT 2) is "an independent public body under the Ministry of the Presidency of the Government" (Section 15(1)(1) of the 1982 Act). It is managed by a five-member board appointed by the Minister of the Presidency (Section 15(2)). The organization and the operation of ERT 2, the tasks and responsibilities of its constituent bodies, and staff matters are decided by the Minister of the Presidency (Section 15(5)).

The legal status of ERT 2 can be altered on a proposal from the Minister of the Presidency by order of the President of the Republic. The same applies to its objectives, tasks, organization, its staff breakdown and other aspects of its operation (Section 15(6)).

By means of a Presidential order on a proposal from the Minister of the Presidency rules can also be laid down for the establishment of a unit for the processing and production of any object, item, or service in connection with broadcasting. Responsibility for such production is to be entrusted to a publicly owned enterprise - either already existing or still to be established - under private law (Section 20(1)).

ERT 2 is financed in the same way as YENED used to be, i.e. from the national budget and from advertising revenue. In 1982 the latter was somewhat higher than for ERT 1. Thus ERT 2 also charges for its services.

The monopoly granted to ERT 1 and 2 under the Act also covers the rediffusion of radio and television broadcasts via cable. However, no specific provisions exist and no cable networks have yet been established in Greece.

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TELEVISION WITHOUT FRONTIERS

GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON MARKET FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE

(Communication from the Commission to the Council)

Part Five

Pages 105-208

PART FIVE

FREEDOM TO PROVIDE SERVICES

A. Free movement in broadcasting

I. "Services" (Paragraphs 1 and 2 of Article 60)

The EEC Treaty does not just cover goods but also services. It devotes a whole chapter, Chapter 3, to "Services", from Article 59 to 66 of Part Two of the Treaty entitled "Foundations of the Community".

Paragraph 1 of Article 60 of the Treaty defines the concept of "services" as follows: "services shall be considered to be "services" within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons".

Two questions have to be answered in the light of this definition: is broadcasting a good or a service? If it is a service, is it a service provided for remuneration?

1. Good or service?

In the Sacchi case, the latter argued[1] that a television signal was a good, both as a form of energy (similar to electrical energy) and as the product of intellectual activity (intangible asset). It had monetary value and could be the object of trade. Transmission of advertisements was an accessory to the broadcast products and promoted their marketing.

However a broadcast is not a material, tangible asset but a set of activities. As a result it is not a product but the provision of services. It also does not comprise any transaction or movement involving goods.

The Court came to the same conclusion:[2] "In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services." For this reason, after having accepted that the service was remunerated, the Court rules that:[3] "The transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services. However,

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[1] 155/73 [1974] 409, at 421 to 425.
[2] Sacchi at 428, ground 6.
[3] Sacchi at 432, operative part, para. 1.

trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals is subject to the rules relating to freedom of movement for goods."

In the Debauve case, the Court confirmed its opinion and added:[1] "There is no reason to treat the transmission of such signals /television broadcasts/ by cable television any differently."

The same is true for the transmission of television signals via satellite. It is not the means of transmission which is important, but its aim which is to provide a service.

2. Service for remuneration

Paragraph 1 of Article 60 defines services as follows: "Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration". Paragraph 2 goes on to clarify this as follows: "Services" shall in particular include: (a) activities of an industrial character, (b) activities of a commercial character, (c) activities of craftsmen, (d) activities of the professions." These four types of activity are therefore examples of services which are normally provided for remuneration.

It follows from the word "in particular" that there are activities other than those of an industrial or commercial character, provided by craftsmen or by the professions which are normally for remuneration and that the EEC Treaty also wishes to include them. The Danish, Dutch, English, French and Italian versions of paragraph 2 stress this fact by adding to the term "in particular" the following verbs "omfatter", "omvatten", "include", "comprennent", and "comprendono", whereas the German version using the verb "gelten" is open to several interpretations. The broad or main concept is therefore that "services are normally provided for remuneration". The Treaty thereby wishes to include all activities performed on an independent basis for remuneration regardless of whether or not they are considered for the purposes of the law of one or more Member States and/or Community law as of an industrial or commercial character, provided by craftsmen or the professions.

One can therefore disregard whether and to what extent broadcasting should be viewed as an activity of an industrial or commercial character and/or as an activity of the professions. However, the express inclusion of the latter type of activity has a dual significance. Firstly, that this type of activity should also be viewed as a service performed for remuneration, in which the aim is indeed to obtain income but not however to make the largest possible profit. The concept of remuneration does not necessarily also include the notion of profit or any like intention.

Secondly, the emphasizing of the activities of the professions shows that the EEC Treaty does not just want to cover economic activities but also independent activities of all types of professions, which notably means those in the health, legal counselling, education, arts and science, the press and broadcasting spheres. This also includes journalism and cultural activities. Therefore, persons exercising these activities should enjoy freedom to provide their services (together with the freedom of establishment or, if they are employed, freedom of movement).

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[1] Case 52/79 /1980/ 833, at 855, ground 8.

Pursuant to paragraph 1 of Article 60 the sphere to which the services performed belong - whether for all broadcasts or a specific broadcast - is unimportant, as is the purpose for which they are provided. As for paragraph 2 of Article 52, it is unimportant whether this purpose or field is of a commercial, social, cultural or other character or whether it covers all these areas, whether the content of a broadcast is informative, editorial, educative, entertaining or for advertising purposes. The only decisive factor is whether broadcasting activity is normally provided as a service for remuneration.

A service is provided for remuneration when it is paid for. According to paragraph 1 of Article 60 it is of no significance whether the recipient of the service pays the provider of the service directly, or indirectly through a third party or whether a third party pays for the service and in return receives a further service for that payment. There is no need for there to be any legal relationship between the provider and recipient of the service. Even in economic terms there is no need for a relationship of service and counter-service to exist between them.

Paragraph 1 of Article 60 does not deal with what form the payment should take, i.e. in fulfilment of a contract, as a contribution by a member of an association, as a fee, as a levy assimilated to a tax, as a transfer from public funds corresponding to the levies or fees raised on the recipients of the service. Remuneration can therefore in this sense be public in character, based on public law, or private and based on private law. It may be provided for a private, profit-making service or activity or for one that is public and based on public law.

Finally, according to the provisions of paragraph 1 of Article 60, it is sufficient for the service to be "normally" provided for remuneration. Therefore, exceptions, such as the exemption or non-coverage of specific categories of recipients of the service or lump sum payment of the remuneration, do not in any way affect the inclusion of services under the requirement for free movement.

In order to ascertain whether broadcasting is provided for remuneration within the meaning of paragraph 1 of Article 60, reference must be made to national provisions. The following is a summary of those provisions, further details may be found in Part Four.

In Luxembourg and, with respect to the IBA, in the United Kingdom, broadcasting is first and foremost paid for with the proceeds from the granting of broadcasting time to the advertising industry (Part Four, A and E). In the Netherlands, approximately 75% of broadcasts are provided in return for broadcasting fees levied by the State and contributions by members of private associations and organizations and approximately 25% are financed by advertising revenue (C). In Italy, RAI broadcasts are mainly provided in return for subscription fees levied by the organization itself and in addition paid for with revenue from the granting of airtime for advertising. Cable broadcasting is similarly provided for remuneration (B). In Greece, ERT 1 provides its broadcasts mainly in return for fees and the company is also financed, for approximately 20%, by revenue from advertising (K). The German "Land" broadcasting authorities' primary means of remuneration is the levying of broadcasting fees on their audience. Their second means of financing their broadcasting activities is via advertising (more than 30% for ARD, and approximately 40% for ZDF, see H above).

In Denmark, DR's broadcasts are provided in return for a tax levied on the use of radio and television sets (I). The BBC's television programmes in Britain are paid for with funds from the national

budget. These funds correspond to the countervalue of the fees collected by the Post Office from owners of television sets in order to license their use (E). In Ireland, approximately 50% of the RTE's broadcasts are financed in a similar way as the BBC's and the other 50% from advertising revenue. Cable television is also provided for remuneration (F). In France less than 50% of television broadcasting is paid for by the transfer and dividing up of the funds obtained from the tax levied by the State on owners of television sets for the right to use them and more than 50% is financed from television advertising (G). In Belgium, 90% of broadcasting is provided in return for funds from the budgets of the three linguistic communities, the source for which is the fees levied by a State administration (RTT) on the receiving apparatus. The remaining 10% comes from the various commercial activities of the broadcasting authorities. Cable broadcasts are provided in return for subscription fees (D).

This all goes to show that television programmes are remunerated in all Member States. They are provided, either directly or indirectly, in return for payments made by citizens, accepting the services supplied by the broadcasting organization(s) and receiving broadcasts using the appropriate apparatus, or in return for payments from the advertisers, or in return for both types of remuneration. Paragraph 1 of Article 60 does not concern itself with who pays the remuneration, whether it is the end-user (broadcast audience), the broadcasting organizations themselves, the sponsors of programmes (e.g. an advertising company) or the relayers of broadcasts (e.g. a cable company), or a combination of several of the above. It is also unimportant whether all the recipients pay or only those who receive the service in the country in which it is provided. It is therefore of no consequence for example if the broadcasting audience is not confined to receiving broadcasts for which it pays fees. It is sufficient that the service is "normally" provided for remuneration.

Even in Member States in which the broadcasting fee takes the form of a licence fee or tax on the use of reception apparatus, this represents in actual fact a legally based service provided by the recipients of broadcasts to the broadcasting authorities, in remuneration for the broadcasts. The concept of remuneration for the purposes of paragraph 1 of Article 60 includes all types of revenue from broadcasting. It therefore includes State revenue from fees or taxes on viewers and listeners and private income from subscriptions or individual payments or from the granting of airtime for advertising. Whether the programme is actually heard and/or seen by the recipient, has as little effect on the fact that the fee or tax is in the nature of a remuneration as it would for a private subscription. Similarly, the fact that the fees or taxes are in the main determined by the State, that this decision is not devoid of political considerations and that they are very frequently brought together into a lump sum, does not preclude them from constituting remuneration for the broadcasts provided.

For all these reasons broadcasts are services or activities provided for remuneration and thus services within the meaning of the EEC Treaty. The Court reached the same conclusion in the Sacchi case:[1] "In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services. Although it is not ruled out that services normally provided for remuneration may come under the provisions relating to free movement of goods, such is however the case, as appears from Article 60, only in so far as they are governed by

[1] Case 155/73 [1974] 409, at 427 ground 6, (emphasis added).

such provisions. It follows that the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to services."

II. Establishment of the provider of the service in a Member State other than that in which the recipient is established (Article 59(1))

Article 59 calls for the abolition of "restrictions on freedom to provide services within the Community ... in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". Whereas the definition of a service given in paragraphs 1 and 2 of Article 60 does not contain any transfrontier component - neither with regard to the service or activity or the remuneration - and consequently covers all services in the Community regardless of whether they are provided and received in one and the same or in differing Member States, paragraph 1 of Article 59 forbids restrictions only on internal or transfrontier services covered by Article 60 which involve the provider of a service who is established in a Member State other than that of the recipient.

Therefore, restrictions on broadcasts, both the provider and recipient of which are established in the same Member State, do not come under Article 59. At least a small proportion of potential recipients of broadcasts must be established in another Member State. It must therefore be possible to receive the broadcasts there.

In the event of broadcasting over the air waves, this is often the case. This primarily applies to areas along intra-Community borders, i.e. between Belgium and Luxembourg and the Netherlands, between the latter and Germany and France, between Germany and France, France and Italy, Denmark and Germany and Ireland and the United Kingdom. Planned satellite broadcasting will considerably extend the transfrontier dissemination areas (see Part 1, Section III B).

On the other hand difficulties are caused when it comes to deciding whether programmes broadcast from another country and then relayed by cable internally are covered by Articles 59 and 60. The customary and most common case in practice is that of programmes being broadcast over the airwaves by a broadcasting company in another Member State being picked up by a cable company with the aid of a special antenna, amplified and simultaneously relayed unaltered in their entirety by cable to the cable company's subscribers. The question is whether this procedure can be viewed as a whole and is thus covered by paragraph 1 of Article 59 and paragraphs 1 and 2 of Article 60, or whether it should be broken up into different services, each of which must meet the requirements of both sets of provisions, in order for the liberalizing requirements of Article 59 to be applicable to the whole case.

1. Relay by transmitter and relay via cable as two separate services

This latter argument was put forward by several participants in Debauve[1] and Coditel/Ciné Vog.[2] The relevant service performed by the foreign broadcasting organization is the broadcasting of the programme. This comes to an end at the limits of the natural reception zone of the transmitter. This service remains totally unaffected by any of the restrictions on the additional service provided by the national cable company. This is because the service of the original broadcasting organization can be provided only to the extent made possible by technical constraints. The cable company's service consists of picking up the broadcasts and relaying them to its indigenous viewers. Since the viewers were situated outside the natural reception zone of the foreign broadcaster, the fact that the foreign transmitter was insufficiently powerful to reach them made this a new service.

The relationship between the national cable company and national cable subscribers amounted to the provision of a service for remuneration (Article 60(1)). The provider and recipient of the service were, however, established in the same Member State and therefore the provisions of paragraph 1 of Article 59 did not apply.

The requirement for establishment in two different Member States (Article 59(1)) did exist in the relationship between the foreign broadcasting organization and the national cable company. However, there was neither a legal nor commercial relationship between the provider and recipient of this service. One-way services could be considered as services within the meaning of Article 59. But the provider of the service would then have to apply a user-specific treatment, viz. his broadcast would have to achieve the aim of appealing to viewers on the other side of the frontier. This is not the case here. In addition and above all, no service is provided for remuneration between the broadcasting organization and the cable company and therefore paragraph 1 of Article 60 does not apply.

Where programmes of an advertising nature were involved, services within the meaning of Articles 59 and 60 were provided in the relationship between the foreign broadcasting organization (provider of the service) and the national sponsor of the advertisements (recipient of the service). In this case services between persons in differing Member States were being performed for remuneration.

2. Relay by transmitter and relay via cable as a single service

The first argument, according to which the relationship between the foreign broadcasting organization and the national cable subscribers constituted for the purposes of the Treaty a single service, was put forward by other participants in both of these cases.[3] According to them Article 59 did not confine itself only to services between persons established in differing Member States. The purpose of Article 59 was the freedom to provide services even across intra-Community borders, not just freedom for providers of services

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[1] Case 52/79 [1980] 833, 838 to 848.
[2] Case 62/79 [1980] 881, 886 to 889.
[3] Debauve and Coditel/Ciné Vog.

to carry on their activities. This only actually came into application if the foreign broadcasts were also intended for national viewers. Any national restrictions on the broadcasting activities of foreign broadcasters were covered by Article 59. These provisions also covered any national restrictions on the activities of foreign sponsors of advertisements by foreign broadcasters. In addition the wording of Article 59 meant that a restriction on the activities of the provider of a service established in another Member State did not necessarily have to be involved. It was sufficient for the restriction to have an effect "on" a national of one of the Member States established in another Member State. It was sufficient for the substance of the service - the foreign broadcast - to originate from another Member State.

The Court contented itself with stating that:[1] "It should be observed that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State. Whether that is the case depends on findings of fact which are for the national court to establish."

The Commission restated the following opinion:[2] "Television signals broadcast by bodies exercising a non-gratuitous economic activity constitute the provision of services within the meaning of Article 59 of the Treaty where those signals are transmitted and picked up in the form of radio waves outside the territorial limits of the country where the broadcasting station is situated, there being no need for remuneration to be paid directly to the provider of the service by the recipients (cable television distributors and television viewers) located outside those limits."

(a) Provider, recipient, remuneration

The grounds for the above opinion are as follows.[3] Following the judgment in the Sacchi case[4] no doubt remains that a television broadcast is a service for the purposes of Article 59 and paragraph 1 of Article 60. In the case in question the relevant service is the television communication (programme) provided by the broadcasting organization. The recipients of the service are first and foremost those in the country of the broadcasting organization, which is therefore established in the same country as its viewers. In this respect paragraph 1 of Article 59 does not apply. The viewers do however provide remuneration. Paragraph 1 of Article 60 is therefore fulfilled. This is because there is no requirement in this paragraph for the service to be transfrontier. A service is being provided for remuneration. Secondly, there are recipients of the service who are cable viewers established in another Member State. This means that the requirements of Article 59 are met. They also provide remuneration, but to the cable company. In this respect, therefore, paragraph 1 of Article 60 does not apply. However, it is sufficient, within the meaning of paragraph 1 of Article 60, for the provider of the television broadcast - the foreign broadcasting organization - "normally" to be remunerated for its service, in this case by

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[1] [2] Debauve, 52/79 [1980] 833, at 855, ground 9.
[3] Coditel/Ciné Vog, 62/79 [1980] 881, at 890.
[4] See part of the Commission's observations in Coditel/Ciné Vog at 889.
155/73 [1974] 409, at 428, ground 6.

the viewers established in its own country. Thirdly, the national cable company is also the recipient of the foreign broadcast. In this respect it comes under the provisions of Article 59. However, the cable company often makes no payment to the broadcasting organization. But then paragraph 1 of Article 60 does not require transfrontier remuneration nor remuneration from each recipient of the service. It is sufficient for payments to be made by viewers in the country in which the broadcasting organization is located.

In the words of Mr Advocate-General Warner:[1] "The purpose of the definition of "services" in that Article is to identify the kinds of services to which the Treaty applies and in particular to exclude those that are normally provided gratuitously. Television broadcasting is financed in different ways ... /some/ .... out of fees /some out of/ advertising revenue; and /some/ .... partly /from/ the one and partly /from/ the other. The question here is whether television broadcasting as such is a service of a kind to which the Treaty applies. The method of financing particular broadcasting organizations or particular broadcasts cannot be relevant to the answer to that question. The decisive fact is that television broadcasting is normally paid for, i.e. remunerated, in one way or another. The conclusion must therefore be that it is a service of a kind to which the Treaty applies, no matter from whom in any particular case payment may come or may not come." It is therefore irrelevant whether the fact that the service crosses a frontier is remunerated, what is relevant is whether the broadcasting organization concerned is basically remunerated for its broadcasting service.

(b) The basic nature of broadcasting

In conclusion, the basic nature of television (and radio) broadcasting argues in favour of considering the relationship between a foreign broadcasting organization and national cable viewers as a service within the meaning of Articles 59 and 60. Whilst normally services are provided and received at one and the same place - the provider visits the recipient or vice versa - or at all events in two specified locations, that of the provider of the service and that of the recipient (for example in insurance by correspondence or telephone advisory services), broadcasting is by definition not bilateral and localized, but of a multilateral nature, covering large surfaces and travelling over wide areas.

It does not have one single, but many recipients. These receive the broadcast irrespective of whether it is intended for them. A broadcast may be picked up regardless of the intentions of the broadcasting organization. The fact that broadcasts may be received over a wide area is not an unavoidable side effect but a natural and technically inevitable offshoot of broadcasting, particularly with satellite broadcasting.

Broadcasting from ground-based or airborne transmitters is, for these reasons, to be considered as being provided for any person who is able to pick it up, either directly through an individual aerial or community antenna, or indirectly via a central antenna and cable company network.

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[1] Opinion of Mr Advocate-General Warner delivered on 13 December 1979 in Debauve /1980/ 860, at 876.

In addition broadcasting is not local but regional in nature. A broadcast, as a result of the very techniques used to propagate it, has a natural reception zone. When broadcasting is via ground-based transmitters, this zone is small but with satellites it is significantly larger. Since a broadcast is propagated through the air, it cannot follow country frontiers for both technical reasons and because of natural laws. The signals spill over frontiers. By its very nature, therefore, broadcasting is a transfrontier activity.

Its international nature is a major factor in overcoming obstacles to the freedom to provide services or broadcasts between Member States which is one of the main aims of the Community (Article 3(c)). This aim of Community activity ought not to be forgotten when interpreting Articles 59 and 60: reception of broadcasts on the other side of a frontier on an aerial and relaying them over cable does not alter the international nature of the service, nor interrupt it, but on the contrary reinforce it. The cable network represents an extension of the receiving aerial and therefore remains an accessory to it. It is used to relay one and the same original broadcast without alteration. In so far as the cable network company does not diffuse its own programmes, but only provides a technical service, the legal position is unaffected. This continues to apply for as long as cable relay is only a substitute for normal reception with a domestic TV aerial.

For all the above reasons the whole process of broadcasting by a foreign broadcasting organization to a national viewer comes under Articles 59 and 60 and should be regarded as a liberalizing service within the meaning of the Treaty.

3. Transmission by microwave link, long-distance cable or telecommunications satellite and relay through cable as a single service

What was said in the last paragraph also applies where the cable operator receives with his equipment the wireless broadcast intended for the public, not in the form of signals broadcast via a ground-based or airborne transmitter, but as signals broadcast via a terrestrial microwave link, a telecommunications satellite or a long-distance cable.

The cable operator makes use of such technical means mainly in cases where it is only in this way that he can receive (either at all or in the necessary quality) the broadcasting organization's programme at the place where his receiving equipment is situated, i.e. in cases where the receiving equipment is beyond the range of the signals broadcast by the relevant broadcaster. However, the cable operator also receives off-air by aerial the signals directed to him by microwave link or telecommunications satellite. Only in the case of long-distance cable does he not receive them off-air by aerial.

A slightly different type of arrangement, but one which must also be included under this heading, involves those not uncommon cases in which the aerial of the cable operator's receiving equipment is set up at a (considerable) distance from his cable network and the signals are transmitted from there to the cable network by long-distance cable or off-air by microwave link.

From the point of view of Community law, it makes no difference how the cable operator receives the broadcast and relays it to his subcribers. It is not a question of concepts, distinctions and value judgments laid down in broadcasting and telcommunications law. Under Articles 59 and 62, protection is afforded to the free cross-frontier movement of the broadcast as such, once it is broadcast and its reception is technically possible on the other side of the internal frontier. The decisive factor is the origin of the broadcast in one Member State and its reception in another. How the signals cross the internal frontier within the Community or are fed into the cable system in the country of reception is irrelevant.

Whether the broadcast is brought from the broadcaster to the cable distributor via transmitter and/or by long-distance cable, microwave link or point-to-point satellite and distributed through the cable network to the recipients, it is not a different broadcast or one that has been changed along the way, but one and the same service which has merely been transported in a different manner. Its free movement from provider to recipient is protected by Community law irrespective of how it is conveyed.

Articles 59 and 62 both guarantee freedom to provide services to the extent that such provision is possible on the basis of the technological state of the art, that is to say, in this context, to the extent that broadcasts from other Member States have become receivable by one or more means of transmission.

For these reasons, it does not matter for the purposes of Community law whether the final recipients live in the broadcaster's service area or at least within his "natural" reception area, that is to say whether they can receive the broadcast off-air with an individual aerial, whether weak or powerful. If any such criterion were applied, it would mean relegating cable transmission to the level of a substitute for individual reception and robbing it of its main function, which is to make the broadcasts accessible to additional groups of recipients living at some distance away. Articles 59 and 62 provide as comprehensive territorial and personal protection as is technically possible for the free cross-frontier provision of broadcasting services and accordingly they also protect the individual right of the provider of the broadcasting service to provide it for all recipients who can be reached using the technology available.

4. Consent to the cable relay of copyright domestic programmes abroad as a further service

The situation existing at the time of the Debauve and Coditel/Ciné Vog cases, in which there were no proper legal relationships between the non-Belgian broadcasting organizations on the one hand and the Belgian cable companies on the other (see the third paragraph of (1) above) has changed since 1 July 1983. Now, the Belgian cable companies pay eight German, British, French, Luxembourg and Dutch broadcasting organizations remuneration for their consent to the relay of the copyright programmes broadcast outside Belgium and picked up in Belgium. This relationship between a foreign broadcasting organization and a domestic cable company, this granting of performing rights for remuneration, involves a further service within the meaning of the first paragraph of Article 59 and the first paragraph (and subparagraph (b) of the second paragraph) of Article 60, one which is additional to the service dealt with under (2).

The new facts are as follows. After it was finally established that the distribution of foreign programmes in Belgium through cable networks raises questions of copyright, the Union Professionnelle de la Radio et de la Télédistribution (RTD, association of Belgian cable companies) on the one hand and the holders of the copyright and performers' rights (SABAM;[1] the broadcasting organizations BRT, RTBF, NOS, TF 1, A 2, FR 3, ARD, ZDF, RTL and BBC; BELFITEL[2] and AGICOA[3]) on the other concluded an agreement on 29 September 1983 on a fixed remuneration for the rights to distribute by cable 14 foreign programmes (Nederland 1 and 2, TF 1, A 2, FR 3, ARD (three channels), ZDF, RTL, BBC 1 and BBC 2 and ITCA (two channels))[4] and the four Belgian channels. Under the agreement, the Belgian cable companies must pay a remuneration calculated in accordance with the number of subscribers and the amount of the subscription fee (see Part Four, section D in fine). The holders of the rights or the undertakings representing them grant the rights to which they are respectively entitled to the cable companies for the purposes of cable distribution. In so far as they are not entitled to the rights necessary for this purpose, they undertake to relieve the cable companies of any financial liabilities.

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[1] The Belgian collecting society Belgische Vereniging der Auteurs, Componisten en Uitgevers/Société belge des auteurs, compositeurs et éditeurs.

[2] BELFITEL is the full name of a Belgian company registered as a "Société civile à forme coopérative pour la gestion collective des droits de télédistribution".

[3] International Association for the Collective Management of Cable Distribution of Motion Pictures and Filmed Television Programmes.

[4] ITCA stands for Independent Television Companies Association.

B. Restrictions discriminating against non-nationals (Articles 59(1) and 62)

Article 62 states: "Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty /1 January 1958, or 1 January 1973 for Denmark, Ireland and the United Kingdom, and 1 January 1980 for Greece/." What is meant by restrictions under this standstill obligation?

With regard to restrictions in existence before the Treaty entered into force, Article 59(1) stipulates: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period /until 31 December 1969/ in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." The question once more is what is meant by restrictions?

According to Court of Justice decisions and unanimous academic opinion the term "restrictions" covers first of all any kind of discrimination against "the freedom to provide services within the Community in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom these services are intended" (Article 59(1)). The service provided by the non-national must not be discriminated against in respect of the service provided nationally.

In the Debauve case, the Court of Justice defined this principle, initially without reference to broadcasting, in the following terms:[1] "The strict requirements of that provision /Article 59(1)/ involve the abolition of all discrimination against a provider of services on the grounds of his nationality or of the fact that he is established in a Member State other than that where the service is to be provided."

With reference to broadcasting the Court then rules in the same case:[2] "Articles 59 and 60 of the EEC Treaty do not preclude national rules prohibiting the transmission of advertisements by cable television - as they prohibit the broadcasting of advertisements by television - if those rules are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is establsihed."

Under Articles 59 and 62, therefore, cases where a Member State subjects broadcasts from a different Member State - including those relayed by satellite - and their transmission by cable to more stringent conditions than the broadcasting and cable transmission of national programmes, or where it forbids or in any other way prevents or hinders the former compared with the latter, will always constitute a discriminatory restriction. In such cases the Member State treats the foreign broadcast worse than the national one and through this discrimination restricts the provision of services by nationals of a different Member State.

If, for example, a Member State stops, forbids, or hinders the broadcasting or transmission by a broadcaster established in another Member State of a programme intended entirely or partly for the national population - for instance by technical measures which interfere with reception; by banning the inclusion of such programmes or parts thereof in national cable systems; by other provisions on the recording or performance of broadcasting and transmission which only apply to foreign programmes; by direct measures against the other Member State, in order to protect national broadcasters from mass media, artistic or economic competition (loss in ratings or income from advertising) or from "excessive infiltration" of foreign culture although the foreign programme does not contravene national provisions on programme content, e.g. non-discriminatory prohibition of advertisements, that State is discriminating against the provider on the grounds of the origin of the programme, the nationality of the provider and the place where he is established.

The very aim of Articles 59 and 62 is to facilitate and encourage these services which are especially tailored to the needs of recipients in another Member State, i.e. not just to eliminate barriers to foreign services intended mainly for recipients in the country where the foreign provider of the service is established, and hence often of little interest to audiences in the receiving country. It should therefore be possible to supplement the

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[1] Case 52/79 /1980/ - 833, ground 11 and 856.
[2] Debauve at 859, operative part, para. 1.

range of programmes provided nationally for nationals by nationals with a parallel range of programmes from other Member States. If programmes from another Member State were permitted to be broadcast, or retransmitted by cable, only in the language(s) of the transmitting country, and not in the language of the receiving country, this would amount to discrimination of the kind forbidden under Articles 59 and 62.

If, on the other hand, a Member State treats the foreign broadcast better than the national one, i.e. it imposes less stringent requirements on retransmission of foreign broadcasts than on domestic broadcasting, or exempts retransmission from such requirements, this constitutes discrimination against its own broadcasts and broadcasters, but not a restriction on the cross-frontier provision of services within the meaning of Articles 59 and 62. If, for example, a Member State chooses to subject national advertisements, but not the retransmission of foreign advertisements, to certain restrictions or prohibitions, it is free to do so.

In the opposite case, however, this would infringe the right of the foreign broadcaster to provide international services. One example is Article 40(1) of the Italian Broadcasting Act. Under this Act the ministerial licence allowing a person to operate equipment for the reception and wireless retransmission of foreign radio and television programmes obliges the applicant to eliminate all parts from the foreign programmes which, regardless of the form it takes, have the nature of advertising. National programmes, however, are not subject to an advertising ban (see Part Four, B above).

The right of the broadcaster to transmit his programmes to recipients in all Member States would also be infringed if the broadcasting and transmission of all or some of his programmes were prevented or hindered not by a ban, but by other legal and/or technical means; or if they were made dependent upon prior arrangement, authorization, consultation or notification and national programmes were not; or if bans or technical measures causing interference or special conditions were imposed on recipients only in respect of such foreign programmes.

In other words, Articles 59 and 62 cover "any kind of discrimination" (Debauve) on the grounds of origin of broadcast, nationality of the provider of the programme and place where he is established. "The rules regarding the quality of treatment ... forbid not only overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result. This interpretation ... [is] necessary to ensure the effective working of one of the fundamental principles of the Community ...".[1] It is therefore quite possible that differences, such as the cultural background of the broadcasts, their provider or participants, or the language in which programmes are broadcast amount, in their actual effect, to discrimination by way of nationality, which is forbidden by the EEC Treaty.

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[1] E.g. Sotgiu, Case 152/73 [1974] 153, at 164 ground 11; Seco/Evi, Cases 62 and 63/81 [1982] 223, at 235 ground 8.

I. Cable distribution of foreign broadcast programmes

Aerial technology (amplification, conversion of signals) is improving. As a result, the scope for receiving broadcast programmes from other Member States is also improving. In addition, the development of telecommunications is opening up the possibility of delivering broadcast programmes from other Member States via microwave links, long-distance cable or telecommunications satellites and distributing them through domestic cable networks. As has already been explained, the EEC Treaty guarantees freedom to provide the broadcasting services transmitted in these various ways (A II 3).

This means that the national legislative bodies and authorities are faced with the question of how they can draft the provisions and organize administrative practice regarding the carrying of programmes via the cable network in such a way that programmes from other Member States are not discriminated against. Are there any criteria that can be applied here? What ranking should govern the carrying of programmes if the capacity of the cable system is not sufficient? This is often the case. Subscribers' receiving equipment is also limited in its capacity, so that in many cases it has to be decided which channels are to be occupied by which programmes.

This Green Paper cannot provide any detailed answer to these questions. However, a number of guidelines and pointers may be set out.

For example, if the only stipulation is that, first, the broadcast programmes specified by law for the broadcasting area and, secondly, those receivable at a given minimum field strength in the cable system's service area or with its receiving facilities at its announced location must be carried,[1] such a requirement must be extended to include the programmes legally specified by other Member States for the broadcasting area and similarly receivable. For example, account would have to be taken of the relevant foreign radio programmes broadcast in the language of the country by stations such as Deutschlandfunk, Deutsche Welle, Radio France internationale, RTL, Radio Nederland Wereldomroep, the BBC External Services, etc.

If, for example, it is also permitted to carry broadcast programmes receivable in this way and not specified by law for the broadcasting area, this permission must apply in a similar manner to programmes receivable as specified from other Member States without any quota being laid down.

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[1] See, for example, Heads of the State and Senate Chancelleries of the Länder of the Federal Republic of Germany, Report on the distribution of broadcast programmes (radio and television) through cable systems, presented to the Conference of the Prime Ministers of the Länder on 4 February 1983 in Bonn, Funk-Korrespondenz No 7 of 17 February 1983, Annex, p. D 1-2.

If there is further possibility of feeding into the cable system the other broadcast programmes receivable, this must also apply to all programmes from other Member States receivable in this way.

In cases where the capacity of the cable system is not sufficient, a selection criterion must be provided which is objective, is as neutral as possible from a Community point of view and discriminates as little as possible against broadcasts from other Member States. For example, it may be stipulated that the programmes must be included in the order of their reception field strength - the field strength of the signals at the receiver site. Rules are not permissible which stipulate, for example, that the domestic programmes must be included first and those from other Member States afterwards, or that such a foreign programme may be displaced from the cable system in favour of a new domestic programme (e.g. by withdrawing the authorization).

Domestic legislation framed in the manner set out above will neither itself make a selection impermissible in the light of the freedom to provide broadcasting services within the Community, nor will it enable an authority or the cable company to do so.

Provisions are also needed which are adapted to the technological state of the art, i.e. which do not de facto, by applying technically outdated definitions, artificially exclude broadcasts from other Member States which it has become technically possible to carry. It is therefore particularly important, for example, to ensure that it is permitted to carry not only programmes receivable at a normal quality level using average individual aerials in the service area of the cable system (which gives programmes from other Member States a chance only in frontier areas), but also those programmes which can be picked up with the help of new technical facilities (such as advanced reception equipment) and have a given strength.

Since it is possible today for programmes to be transmitted by the broadcaster to the cable system's receiving equipment by long-distance cable, terrestrial microwave links or telecommunications satellite, this should also be permitted.[1]

Where this is the case, statutory and official discrimination against the relaying of foreign programmes using these three methods of delivering broadcasts is also prohibited under Articles 59 and 62. The freedom to provide services within

[1] See the supplement to the report referred to in the previous footnote, which was noted by the Conference of Prime Ministers of the German Länder in Stuttgart on 21 October 1983, Funk-Korrespondenz No 43 of 28 October 1983, Annex, pp. D 1-3.

the Community and the right of nationals of the Member States to provide their services without any discriminatory restrictions to recipients resident in other Member States means that foreign broadcasting services may be provided within the country in these three ways, as well as in others and that they have an equal right to be included in the domestic cable system. However, individuals have no claim to have such programmes made available.

Thus, for example, broadcast programmes from programme suppliers in other Member States which, like the domestic broadcasts, are addressed specifically to viewers within the country and do not offend against domestic legislative provisions, must not be excluded from being delivered and fed into the domestic cable systems, for example in order to prevent competition or in order to reserve revenue from television advertising for the domestic economy, domestic broadcasting or the domestic press, or because the programme was not made wholly or partly within the country.

The rules governing the order in which programmes delivered by microwave link, long-distance cable or telecommunications satellite are fed into the cable system where it has limited capacity must similarly not discriminate, either formally or de facto, against programmes from other Member States. Here too, criteria that are neutral from a Community point of view must be established and applied.

The problems discussed in this section are taking on growing importance: the more the individual citizen is or becomes dependent on a cable network in order to receive foreign programmes, and the longer he has to wait for DBS reception, the greater is the temptation to misuse cable in order to curtail by means of discriminatory rules and practices the freedom to provide cross-frontier broadcasting guaranteed by Articles 59 and 62. Freedom of broadcasting cannot tolerate any protectionist restrictions on the providers and recipients of services. It requires, as a correlative to the dependence on cable, the guarantee that foreign programmes will be receivable via the cable.

II. Coverage of other Member States by satellite broadcasting

According to the Court of Justice,[1] the existence of national natural reception zones cannot therefore be seen as discrimination which is prohibited by the Treaty in regard to foreign broadcasters in that their geographical location allows them to broadcast their signals only in the natural reception zone. Such differences - the Court says[2] - due to the limits of technology "and to natural phenomena cannot be described as 'discrimination' within the meaning of the Treaty; the latter regards only differences in treatment arriving from human activity, and especially from measures taken by public authorities as discrimination".

A measure of this kind, which does not hold back the natural limits of transmission technology, but restricts international usage by artificial means, is the provision under § 2 A, ground 428A, laid down in 1971 in Article 7 of the Executive Order for the International Telecommunication Union, Radio Regulations which takes the form of an agreement under international law and reads as follows:[3] "In devising the characteristics of a space station in the broadcasting satellite service, all technical means available shall be used to reduce, to a maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries".

The provision makes no exceptions for the territory of the Community, and thus the Member States have committed themselves in this provision to action which considerably restricts intra-Community as opposed to national broadcasting by satellite and accordingly takes away the basis of the free provison of services provided for in the EEC Treaty. This therefore undermines one of the equalities and freedoms which make the Community. The ban on discrimination against cross-frontier radiation within the Community (Articles 59 and 62) must therefore be taken into account by the authorities in the Member States. The same goes for the clause whereby radiation over other Member States beyond the avoidable minimum requires prior consent. The prior consent principle leaves the right to the free provision of services at the discretion of the Member States. It seems thus likewise not consistent with the EEC Treaty.

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[1] Debauve at 860, last phrase of operative part.
[2] Debauve, ground 21 at 858.
[3] Now No 6222 of the World Administrative Radio Conference (WARC) 1979, United Nations (UN) Doc. A/AC. 105/271, Annex I, p. 4, of 10.4.1980.

At the World Administrative Radio Conference (WARC) held in Geneva in 1977,[1] apart from three groups of African and Arab states (see Part One B.III), only the Nordic countries made an express request for extensive footprints or services areas for common use. They obtained a common satellite position and, in addition to national footprints, two regional footprints for cross-frontier satellite broadcasts. Denmark, Sweden, Norway and Finland can use eight channels jointly, and Iceland, the Faroe Islands and Greenland, five.

The Community Member States acted differently and sometimes in a contradictory manner. The six original members requested and received the same orbit position in order to facilitate reciprocal satellite reception. Consequently, a broadcast from the other country can be received in spillover areas without altering the direction of the reception aerial. But there were to be no regional footprints covering these Member States. In fact, for technical reasons or political and economic objections, which were legally pushed through by means of refusing the prior consent called for by Article 7, ground 428A, of the Executive Order for the International Telecommunication Union, they settled for service areas for the individual satellites which, as far as possible, were based on their own territories. Germany, for example, refused Luxembourg permission to radiate over its territory because German broadcasters would have lost advertising income and the commercial slant of RTL would have had a negative effect on programmes in Germany (danger of a channel geared to popular taste). Belgium acted similarly.

This Regulation adopted at the Geneva Conference on national satellites regarding Community Member States - service area with minimum spillover - is as inconsistent with the objectives and spirit of the EEC Treaty as the provision of Article 7, No 428A, ofthe Executive Order for the International Telecommunications Union, which is put into concrete form by the footprint regulation and made a considerable contribution to its acceptance. The main aims of the EEC Treaty include "the abolition, as between Member States, of obstacles to freedom of movement for services" Article 3(c) and Articles 7 and 59 to 66), "the establishment of a common market" for all services (Article 2) and "the promotion throughout the Community of closer relations between the states belonging to it" (Article 2). The Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty" (Article 5(2)). This condition of Community law is hardly met by the Geneva Conferences of 1971 and 1977.

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[1] International Telecommunication Union, Final Acts of the World Administrative Radio Conference for the Planning of the Broadcasting Satellite Service ... Geneva 1977, Geneva RE III/1982.

The Final Act of the Conference was signed on 13 February 1977; it is attached to the plan for the distribution of frequencies and orbit positions for satellite broadcasting. This plan entered into force on 1 January 1979 and will be valid until 31 December 1993.

Despite efforts to achieve, where possible, national broadcasting lobes with the satellites, considerable spillover in the Community territory could not in some cases be avoided for scientific and technical reasons since electromagnetic waves expand conically even when they are bunched. Depending on the angle of radiation, they reach the earth's surface in circular or elliptical form, which does not correspond with the state borders.

Under Annex 8, para. 1 of the Final Act of the Geneva Satellite Conference of 1977,[1] in conjunction with No 428A of the 1971 Radio Regulations, however, the coverage area must be the smallest area with a constant given power flux density of 103 dBW/m^2 which encompasses the service area. Service area is "The area on the surface of the Earth in which the administration responsible for the service has the right to demand that the agreed protection conditions be provided".

The right of the respective administration to interference-free reception exists, therefore, only for its own national territory. Outside that the administrations of neighbouring states have the right to use the same frequency channels for their own earth communication services. They are therefore not obliged to protect the spillover frequencies of other states. Each Member State could therefore, within its territory with its own earth communication services, use frequencies and channels allotted to it on which satellite broadcasts from another Member State are transmitted at the same time. This would impair or eliminate the reception of satellite broadcasts.

Under international telecommunications law each Member State would therefore be in a position to invalidate the national part of the spillover from a foreign satellite. It would be able to discriminate against a broadcaster established in another Member State providing programmes by foreign satellitefor national recipients compared with a national broadcaster who provides his programme through a national satellite to recipients in the same national territory. In comparison with programmes beamed nationally by satellite to the same reception area, programmes transmitted by satellite from other Member States could be jammed or blotted out. Accordingly, the relevant regulation in the Final Act of the Geneva Conference is, in respect of Member States, a discriminating restriction of the free provision of services within the Community, as provided for in Article 62.

[1] ITV, Final Acts, loc. cit., pp. 90 - 91.

Although international cooperation and compliance with international obligations are basic conditions for efficient international broadcasting, this cooperation may not go so far as to restrict the equality and freedom of intra-Community services guaranteed by the EEC Treaty.[1]

For these reasons the Member States are obliged to use their terrestrial services in such a way that there is no interference with the reception of programmes from other Member States.

III. Foreign broadcasting programmes and domestic public policy

1. Applicability of special provisions for foreign nationals (Article 56(1))

(a) Scope of the exception

By virtue of Article 56(1) and 66, the chapters on the right of establishment and on services do "not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health".

Taking the wording of this provision and the relevant case law of the Court of Justice, the exception contained in Article 56(1) is not to be regarded as a precondition for the acquisition of the right to supply a service or the right of establishment, "but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty".[2] It is for the descriminating Member State to justify discrimination against

[1] As already pointed out by the Commission in its Decision 82/861/EEC of 10.12.1982 regarding British Telecommunications, JO L 360 of 21.12.1982, p.36 (42, at 43).

[2] Case 48/75 Royer (1976) ECR 497, at 512, ground 29.

foreign nationals involving the application in individual cases of provisions relating to the rights of aliens. Reasons other than the three listed are no justification for discriminating against nationals from other Member States.

Public security includes inter alia protection of the general public and of the individual against threats to the continued existence of the State and its institutions and to the life, freedom, honour and property of the individual.

Public order includes inter alia protection against threats to the prosperous human and civic community even and especially when this is guaranteed by unwritten rules on the conduct of individuals in public and this guarantee is a sine qua non for an orderly society.

Since the economic order is the very subject matter of the provisions of the EEC Treaty, it cannot form part of public policy within the meaning of Article 56(1). Otherwise, the two freedoms and equalities of treatment would be a matter for national legislation. This provision does not, therefore, permit any protective measures of an economic nature or with an economic objective. Witness also Articles 108, 109 and 226. Practice and doctrine are in agreement on this point. Where the rights of entry and residence are concerned, Council Directive 64/221/EEC,[1] issued pursuant to Article 56(2), bears out these points. Under Article 2(2) of that Directive, grounds of public policy may not be involved to service economic ends. And so, pursuant to Article 56(1) also, national provisions are inapplicable which discriminate against foreign broadcasting organizations in respect of advertisements transmitted by them to the country in question, the purpose of such provisions being to reserve advertising and advertising revenue for national broadcasters, to strengthen their economic base, to shield them from outside competition, etc.

As to the scope of this exception and in connection with the monitoring of the recourse had to it in individual cases, the Court of Justice has ruled as followed in two cases:[2] "The concept of public policy must, in the Community context and where, in particular, it is used as a justification for derogating from /a fundamental principle/ of Community law, be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community."

Thus, for example, "restrictions cannot be imposed on the right of a national of any Member State to enter the territory of another Member State, to stay there and to move within it unless his presence or conduct constitutes a genuine and sufficiently serious threat to public policy".[3] " ... recourse by a national authority to the concept of public policy presupposes ... the existence, in addition to the perturbation to the social order

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[1] Directive of 25 February 1964, OJ No L 56 of 4 April 1964, p. 850.
[2] Case 36/75 Rutili [1975] ECR 1219, at 1231, ground 27;
[3] Case 41/74 Van Duyn [1974] ECR 1337, at 1350, ground 18.
Rutili at 1231, ground 28.

which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society."[1] "Although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct."[2]

In accordance with these principles established by the Court of Justice with regard to Article 56(1), the freedom of nationals of other Member States to transmit from such other Member States broadcasts which can (also) be received within the country in question cannot be restricted even by way of exception (see also C V 1). The reception of such broadcasts within the country and/or their distribution within the country may be restricted, but only if and to the extent that there is a genuine and sufficiently serious threat to a fundamental interest of society recognized by the Community.

(b) Respect for the fundamental rights laid down in the Convention on Human Rights

The Court of Justice has ruled that, taken as a whole, restrictions which are placed on the powers of Member States in respect of control of aliens and which are imposed on account of the limitation to the three exceptions contained in Articles 48(3) and 56(1) and their formulation in the Council provisions adopted pursuant to Articles 49 and 56(2), "are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the Member States, and in Article 2 of Protocol No 4 of the same Convention, signed in Strasbourg on 16 September 1963, which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'".[3]

Three things transpire from the above rulings and the case law summarized at (a): first, it is for the Member States to determine, according to their own political and ethical criteria, the legitimate requirements of public policy, public security and public health in their territory; second, however, use of this discretionary power is subject to both substantive and procedural restrictions under Community law; third, Member States can, therefore, also be required in the name of Community law to respect the freedoms enshrined in the EEC Treaty and in the Convention on Human Rights.

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[1] Case 30/77 Bouchereau [1977] ECR 1999, at 2015, operative part, para. 1;
[2] Joined Cases 115 and 116/81 Adoui [1982] ECR 1665, at 1707, ground 8.
[3] Adoui at 1708, ground 8.
Rutili at 1232, ground 32.

The Court of Justice has thus established the link between the freedoms provided for in the EEC Treaty and the fundamental rights laid down in the European Convention on Human Rights. In interpreting and applying the EEC Treaty, the Court of Justice generally ensures that "the law is observed" (Article 164) and hence that the substantive provisions of the Convention are also observed. Since the latter are applicable in all Member States, they form part of the legal order in force in the Community. Community law is to be interpreted and applied in the light of those fundamental rights in so far as it does not afford wider protection. Those rights are in addition to the legal positions conferred and guaranteed by it and, under the system of Community law, have to be observed by the institutions of the Community and of the Member States as minimum provisions common to all of them.

(c) Free flow of information across frontiers (Article 10 of the European Convention on Human Rights)

The foregoing observations set out in (b) apply also to the freedom, guaranteed under Community law, to supply services within the Community as manifested in the freedom of cross-frontier broadcasting, on the one hand, and to the fundamental right, enshrined in the Convention on Human Rights, to the freedom of expression regardless of frontiers as manifested in the free flow of broadcasts, on the other.

Article 10 of the Convention on Human Rights reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 10 guarantees a single, but fundamental right, namely the right to freedom of expression (liberté d'expression, freie Meinungsäusserung, first sentence of paragraph 1).Under the second sentence of paragraph 1, this right includes the freedom to hold opinions (and to express them, cf. the first sentence of paragraph 1), the freedom to receive information and ideas, the freedom to impart information and ideas and the freedom to receive and impart information and ideas, without interference by public authority and regardless of frontiers (free flow of information and ideas).

Any interference by public authority, namely a law, administrative act or court judgment, entails a violation of Article 10 of the Convention if it does not fall within one of the exceptions provided for in paragraph 2.[1]

The European Commission of Human Rights took the view that commercial advertisements should be treated as "commercial speech" (cf. sentence 1, "freedom of expression"), that they should also be subsumed as commercial "ideas" under sentence 2 and that they were protected by paragraph 1.[2] However, they merited less protection than that accorded to the expression of "political" ideas in the broadest sense. Consequently, the test of what is "necessary" within the second paragraph of Article 10 regarding restrictions of the freedom to impart commercial "ideas" and for restrictions of the free flow of commercial "ideas" was less strict than in other cases. In accordance with Article 10(1) of the Convention, it is therefore immaterial for what purpose (commercial or non-commercial) a person feels impelled to use his freedom of expression.

The European Commission of Human Rights interpreted the freedom to broadcast information and ideas as follows[3]: "It is evident that the freedom to 'impart information and ideas' included in the right to freedom of expression under Article 10 of the Convention, cannot be taken to include a general and unfettered right for any private citizen or organization to have access to broadcasting time on radio and television in order to forward its opinion. On

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[1] European Court of Human Rights 7.12.1976 - Handyside - Publications of the European Court of Human Rights, Series A No 24 (1976) p. 21, § 43; European Court of Human Rights 26.4.1979 - Sunday Times - cyclostyled version, p. 21, § 45.

[2] European Commission of Human Rights 5.9.1979 - X v. Sweden, 7805/77 - Council of Europe, European Commission of Human Rights, Decisions and Reports 16 (1979) 68 (73).

[3] European Commission of Human Rights 12.7.1971 - X and Z/United Kingdom, 4515/70 - Yearbook of the European Convention on Human Rights 14 (1971) 538 (544, 546).

the other hand, the Commission considers that the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue under Art. 10 alone or in conjunction with Art. 14 /which prohibits discrimination/ of the Convention. Such an issue would, in principle, arise, for instance, if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time".

Article 10 of the Convention also guarantees the abovementioned freedoms to broadcasting and television enterprises; however, in States with a licensing procedure, the freedoms apply only if the broadcasting and television enterprises are licensed (third sentence of paragraph 1), i.e. the freedoms are not guaranteed for "everyone", which is the principle put forward in the first sentence. In other words, access to the freedoms established in Article 10 may be restricted in the case of broadcasting and television enterprises.

If a State has authorized a broadcasting or television enterprise (or has not introduced a licensing requirement), the enterprise has the individual right under the first and second sentences of paragraph 1 to transmit in that State (broadcasting State) broadcasts intended for domestic or foreign audiences. It enjoys freedom of broadcasting ("without interference by public authority", in so far as such interference is not by way of exception permitted under paragraph 2) and freedom of circulation for broadcasts ("regardless of frontiers").

The possibility of requiring licensing in accordance with the third sentence relates only to enterprises which are established within the territory of the relevant State, the broadcasting State. As the receiving State, a country can neither issue nor refuse broadcasting licences, and it can therefore neither permit nor prevent foreign broadcasts.

The European Commission of Human Rights has interpreted the expression "licensing" in a number of decisions. In the last mentioned case, the European Commission of Human Rights stated the following[1]: "The Commission considers that the notion of licensing implies that in granting a licence, the State may subject radio and television broadcasting to certain regulations. ... the Commission finds that the provisions of Art. 10(1) should be interpreted as permitting the State in granting a licence, to exclude, as in the present case, certain specified categories of advertisements." The advertisements in question were advertisements of a political nature.

In 1968, the European Commission of Human Rights ruled "that the term licensing mentioned in the Convention cannot be understood as excluding in any way a public television monopoly as such".[2]

In reliance on this decision, the European Commission of Human Rights decided in 1972 that the third sentence of Article 10(1) "should be interpreted as permitting the United Kingdom Government Authorities to ban private broadcasting within the United Kingdom".[3]

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[1] loc. cit. 546.

[2] European Commission of Human Rights 7.2.1968 - X v. Sweden, 3071/67 - Yearbook 11 (1968) 456 (464).

[3] European Commission of Human Rights 20.3.1972 - X v. United Kingdom, 4750/71 - Council of Europe, Collection of Decisions of the European Commission of Human Rights 40, 29 (30).

In 1976, referring to its abovementioned 1968 decision, the European Commission of Human Rights stated: "Notwithstanding this precedent, the Commission would not now be prepared purely and simply to maintain this point of view without further consideration. In the case in point, however, this issue can remain open."[1]

One of the issues in this case was the freedom of a firm to broadcast its own television programmes by multi-channel cable,[2] i.e. "active" cable television. The European Commission of Human Rights evidently started from the fact that on the one hand the guarantees afforded by the first and second sentences of Article 10(1) also applied to this activity, but that on the other hand "active" cable television companies are also "television enterprises" within the meaning of the third sentence and that consequently they may be subject to "licensing" before they are eligible for the rights provided for in the first and second sentences.[3]

A question which has not yet been decided is whether the third sentence also applies to "passive" cable television, i.e. whether it is applicable to firms which with the help of technical equipment receive programmes broadcast by broadcasters and distribute them through cable networks. Since the concepts contained in the Convention - in this instance the words "broadcasting /and/ television enterprises" - are autonomous and separate from national definitions (such as those laid down in telecommunications or broadcasting legislation), and in view of practice in the countries parties to the Convention, it would appear that the question must be answered in the affirmative.

At any rate, what may be regarded as certain is that "passive" cable companies also qualify for the freedoms laid down in the first and second sentences of Article 10(1) in receiving and distributing radio and television programmes broadcast by others.

In their case too, accordingly, legal, official or judicial "interference" in the "exercise of these freedoms" is under the terms of paragraph 2 permitted only by way of exception and provided that three conditions are fulfilled: the restriction must be prescribed by law, it must be necessary to preserve one of the interests listed in paragraph 2 and it must be so in a democratic society. The criteria for such need are therefore not only the requirements of attaining certain legitimate national objectives, but also the requirements of "a" democratic society, and therefore not just of one's own democratic society.

The relevant main activity of an "active" cable company in accordance with Article 10 is to "impart" its programme (information, ideas, opinions (second sentence), and other expressions of views (first sentence)) to its customers; it is the provider and distributor of communications. The "passive"

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[1] European Commission of Human Rights 12.3.1976 - Sacchi v Italy, 6452/74 - Council of Europe, European Commission of Human Rights, Decisions and Reports 5 (1976) 43 (50).

[2] loc. cit. 49.

[3] loc. cit. 50 No 4 paragraphs 1-3.

cable company's primary activity is to "receive" on behalf of its customers programmes broadcast by others; it is a recipient and distributor of communications.

The latter is objectively quite clear so long as the cable company distributes the receivable programme to its subscribers without any change of contents, in an unabridged form and simultaneously.

By contrast, if it changes the contents of the programme, it is not imparting the "information" received, but other information. While it remains the recipient of the original "information", it also becomes the provider and distributor of its own "information" within the meaning of the second sentence of Article 10(1) of the Convention. The "passive" cable company becomes an "active" one as well.

If the company distributes the programme received without any change in its contents, but does not distribute it in complete form and/or simultaneously, this will probably not as a rule constitute different "information" of its own, but, where the programme is distributed incomplete, it will probably involve partly the original "information" and partly no "information" at all, and, where there is a time lag in the distribution, it will probably amount to the old "information" which is merely distributed at a different time. If the cable company goes further and compiles its own programme from one or more programmes received, this will probably constitute new "information". The "passive" recipient then also becomes an "active" provider.

The fact that the main activity of "passive" cable companies that is relevant under Article 10 is to "receive" programmes and not to "impart" them is also quite clear in geographical terms so long as the cable network is situated in an area in which the subscribers can also receive the programme direct off-air at an (average or slightly limited) level of quality using (average or high performance) individual or community aerials. The cable system simply enables the programmes to be "received" in a different technical form (and possibly in an improved or cheaper form). To the extent that programmes are broadcast via direct broadcasting satellite and are receivable by means of individual and community aerials, these "natural" reception areas grow so as to extend far beyond the intra-Community frontiers of the Member States.

In the other areas, in which direct individual reception is not possible, although the cable system is not a substitute for the individual or community aerial, what is involved here too is the "reception" of information etc. For this "reception" is the mirror image of the "imparting" of programmes by the broadcasting organizations, and the programmes "imparted" are distributed to the subscribers without any change of contents.

A further point is that, as worded, the second sentence of Article 10(1) deals only with the "freedom .... to receive" "without interference by public authority". The provision does not therefore make any distinction as to the technical means by which reception and hence freedom to receive are made possible or, where the delivery of programmes is prohibited, made impossible.

Quite apart from this, Article 10 of the Convention should be interpreted in the light of technical developments since 1950.

If these conclusions are correct, there is "reception" of information etc. not only where the cable company picks up by means of an aerial broadcasts transmitted via terrestrial transmitter or via broadcasting satellite, but also in cases where it picks up by means of an aerial broadcasts transmitted terrestrially by microwave link or by telecommunications satellite, or where it is enabled to receive them by long distance cable. The second sentence of Article 10(1) protects the "freedom ... to receive ... information and ideas without interference by public authority and regardless of frontiers" and thus protects the free cross- frontier flow of expressions of opinion etc. regardless of the means by which they are conveyed.

If has not yet been decided whether the licensing permitted under the third sentence of paragraph 1 for broadcasting and television enterprises (including "active" and probably "passive" cable companies) must be restricted to authorization of the taking-up of the relevant activity. Is it limited to the technical (telecommunications) conditions and to the conditions relating to the enterprise itself (e.g. authorization of private television companies, granting of a monopoly, requirements as to the reliability of the founders, legal form, organization, composition of the bodies, broadcasting times, financing, accounting and responsibility)? Or can licensing extend to the exercise of the activity, providing, for example, for prior monitoring of all or certain programmes (problem of censorship), or prohibiting or restricing the distribution of broadcasts of a given type (e.g. commercial), broadcasts of a given origin (e.g. foreign) or broadcasts intended for a given audience (e.g. the public within the country)?

Some commentators take the view that the broadcasting State is entitled, on the basis of the third sentence, to lay down freely, i.e. without regard for the rights and freedoms provided for in the first and second sentences, rules governing the nature, scope and substance of the activity of broadcasting and television enterprises. Others take the view that this is permitted only within the limits laid down in paragraph 2.

According to this view, the "exercise" of the freedoms provided for in paragraph 1 may in fact be made subject only to such conditions, restrictions or sanctions as are prescribed by law and are necessary in a democratic society for the protection of quite specific interests listed in paragraph 2.

The first and second sentences of Article 10(1) of the Convention do not merely guarantee freedom of broadcasting and freedom of circulation of broadcasts for broadcasting and television enterprises (licensed in the broadcasting State), including "active" cable companies. Similarly, they do not merely guarantee freedom of reception, including freedom of distribution for "passive" cable companies (licensed in the receiving State). Rather, as far as the recipients are concerned, the individual (or as the first sentence

puts it "everyone") has also at least the individual right to receive the domestic and foreign broadcasts which he would like to receive and which he is actually able to receive.

This freedom of reception also applies to broadcasts which reach him via direct broadcasting satellite and/or by cable. Article 10 of the Convention confers the right to reception whatever the means which make such reception possible. There is nothing to suggest that the guarantees it affords should apply only to the technical means of receiving and imparting information that existed in 1950.

In the case of direct reception via ground stations or satellites, the extent of the individual's freedom of reception depends on the reception strength of his aerial, while in the case of reception via cable it depends on what programmes are relayed by the cable network to which he is connected. Each of the two reception methods may involve extensions and (potentially) restrictions of the extent of his freedom of reception. They are not mutually exclusive, but in many respects are complementary in providing maximum and optimum freedom of reception.

It is an open question whether from the individual right to reception there may in certain circumstances also arise a right to require the receiving State to promote reception. Such promotion could in particular consist in making it possible to feed broadcasts of other broadcasting organizations into a cable network, particularly where the necessary technical facilities are already available.

It follows from the freedom of reception that the receiving State may neither prohibit nor otherwise in principle exclude the reception of the broadcasts of a foreign broadcasting organization within the country. Only if the conditions laid down in Article 10(2) of the Convention are fulfilled may the receiving State seek, if necessary, to jam direct reception of the relevant broadcast within the country or restrict (partial blacking-out) or prohibit its distribution through cable. It would surely be only in exceptional circumstances that any such prohibition, any such demand for partial blacking-out, or the use of jamming stations could, in accordance with paragraph 2, be regarded as necessary in a democratic society, for example where the democratic order of the receiving State was in jeopardy.

It follows from the freedoms provided for in the second sentence of Article 10(1) of the Convention that the receiving State cannot demand of the broadcasting State or of its broadcasting organizations that broadcast programmes which can be received on its territory should have its prior approval. Information or ideas do not flow freely if they may be broadcast only after the receiving State has given its consent.

The reasons permitted under Article 10(2) of the Convention for restricting the freedoms enshrined in paragraph 1, and the requirement that any such State interference must be necessary in a democratic society, are discussed in detail elsewhere (C VI 1(b), (c) and (d) below). However, for the purposes of interpreting Article 56(1), under which such special treatment by Member States for foreign nationals as is necessary "on grounds of public policy, public security or public health" may continue, the following points should be made here.

In the only two language versions which are authentic, Article 10(2) of the Convention does not, like Article 56(1) of the Treaty, refer to "public policy" or "ordre public", but to "prevention of disorder" or "défense de l'ordre".

The concept used in the Convention is therefore narrower. What is meant is order in the police-related sense, particularly in the sense of keeping the peace.

The plea of "prevention of disorder"/"défense de l'ordre" cannot be used to impose restrictions on grounds of the social and cultural order of a country, whether generally or in specific areas such as the press or broadcasting.

Nor can the plea of "prevention of disorder"/"défense de l'ordre" be used to impose restrictions on grounds of the economic order of a State or of individual sectors, or on the grounds of specific public interests of an economic or financial nature. This can be seen from a comparison with Article 8(2) of the Convention. In that provision, "the economic well-being of the country"/"bien-être économique du pays" is acknowledged "alongside the "prevention of disorder"/"défense de l'ordre" as grounds for restricting the freedoms provided for in Article 8(1) (which safeguards private and family life). By contrast, Article 10(2) of the Convention does not contain this (or any similar) ground for exception.

If one not only compares the meaning of "public policy"/"ordre public" and "prevention of disorder"/"défense de l'ordre", but also includes those interests listed in Article 10(2) of the Convention which may be understood as specific instances of "public policy"/"ordre public", one can arrive at a definition of "public policy"/"ordre public" in Article 56(1) which, apart from order in the police related sense also includes "the prevention of crime", the protection of "morals", the prevention of the "disclosure of information received in confidence" and the maintenance of the "authority and impartiality of the judiciary".

In accordance with what was said above under (b) and at the beginning of (c), Article 56(1) must be interpreted and applied within the limits drawn by Article 10(2) of the Convention. It must therefore not be understood as an all-embracing, comprehensive "public order" clause. Otherwise, the door would be left wide open to the erosion of the European rights to equality and freedom guaranteed by Articles 52 to 66 of the Treaty and by Article 10 of the Convention. The exception could become the rule.

The overriding nature of Article 10(2) of the Convention for the purposes of interpreting Article 56(1) in cases where both provisions are relevant can be substantiated by the following arguments in addition to the Court's arguments already set out.

When the EEC Treaty was concluded in 1957, all the Member States had already signed the European Convention on Human Rights. In five of the States, Article 10 also applied under both international and national law, and in the sixth it has applied since 3 May 1974. Five of the then six Member States were therefore not free, in respect of subject matter which simultaneously comes under Article 10 of the Convention, to extend the three reserved rights which they included in the EEC Treaty (Article 56(1)) beyond the corresponding reserved rights contained in Article 10(2) of the Convention.

Nor is there any evidence that the Member States wished to do so. On the contrary, since the Community is the closer association, it can be assumed that the Member States regarded the substantive guarantees provided for in the Convention as a common minimum even in the overlapping area of the rights and freedom provided for in the EEC Treaty and, conversely, that they regarded the scope for restricting these guarantees as a maximum which they preferred not to apply to the full in the Community which they had established.

In the area of broadcasting and telecommunications law, therefore, the three reserved rights provided for in Article 56(1) apply within the upper limits which the corresponding reserved rights provided for in Article 10(2) of the Convention set for them. Furthermore, the application of national provisions adopted to protect one of these three interests thus defined are justified under Article 56(1) only where such application is "necessary in a democratic society" (Article 10(2) of the Convention; see the judgment in Rutili under (b) above and the remarks made under C VI 1 (c) below).

(d) Discriminatory restrictions on foreign broadcasting programmes?

It is not clear from the foregoing under what circumstances restrictions that do not apply to domestic broadcasting could be imposed on the transmission of programmes from other Member States. In other words, the significance, discussed above, of the exception in respect of public policy is that only seldom does it permit a Member State to prohibit, prevent or otherwise place at a disadvantage vis-à-vis national broadcasts the transmission for reception in its territory of programmes relayed from another Member State under the latter's law and by its nationals.

This is so regardless of the persons for whom the foreign broadcasts are intended in the first place: for those resident in the other Member State, for national residents, for nationals of more than one Member State, etc. Transmissions by broadcasting organizations providing external services, such as the Deutsche Welle, the Deutschlandfunk, Radio-France Internationale, the Société de Radiodiffusion et de Télévision pour l'Outre-mer, Europe 1, RTL and programmes intended for transmission abroad by organizations providing primarily domestic broadcasting services, such as the BBC, must not be subjected to special treatment in other Member States on the ground, say, that they did not form part of the national public broadcasting system, that they would compete with the latter in terms of advertising, intellectually or economically, or that there was a danger of national public opinion or culture coming under undue foreign influence.

Special treatment in one Member State for transmissions broadcast to it from another Member State could not be justified either on the grounds that they concerned, affected or influenced economic, social, cultural or political life in that country. For this is their precise purpose as endorsed in the EEC Treaty and in the European Convention on Human Rights and recognized under Community law. The dialogue between different cultures and their interpenetration and cross-fertilization, nurtured as they are by radio and television, do not pose a threat to a country's public policy but preserve it from isolation, one-sidedness and nationalism by imparting a European dimension.

Examples of the "special treatment for foreign nationals" not justified by virtue of Article 56(1) are: prior approval, consultation or notification of the receiving country; monitoring of transmission by the latter; agreement that the government of the country from which the transmissions are broadcast is responsible for those transmissions; the condition of reciprocity for transmissions received; the requirement that transmissions broadcast from other Member States must not be instrumental in the forming of "public opinion", etc.

Nor can such special treatment be justified on the ground that broadcasting within a country is a service in the public interest that could not be performed at all, or only under discriminatory conditions, by nationals of other Member States. For one thing, a service in the public interest is not coterminous with, say, a service in the State interest. For another, there can be no denying that programmes broadcast from other Member States are one factor in the forming of public opinion in the receiving Member State and thus impinge on the task of national broadcasting organizations. Even so, such programmes, even if broadcast in the national language, are recognizable by the audience as foreign broadcasts and are identifiable as a factor in the forming of public opinion. Foreign broadcasting is additional to domestic broadcasting but does not prevent it from performing its services in the public interest. It is not evident to what extent this additional source of information, opinions, ideas, culture, entertainment, etc., from other Member States could constitute a threat to national public policy in the manner described.

What is more, the imposition of requirements which, although applicable also to nationals, concerned the right of establishment, and not the free movement of services, could not be justified within the meaning of Articles 66 and 56(1) on grounds of national public policy. For example, a Member State could not rely on the argument that a de jure or de facto monopoly or oligopoly of one or more broadcasters existed in its territory that excluded the reception and relaying of transmissions from other Member States or made it subject to authorization. This is because the effect of a national broadcasting monopoly is confined to preventing third parties (nationals and foreigners) from setting up broadcasting stations in the country and transmitting signals from those stations. The inclusion of foreign transmissions, and their reception and relay, would not only nullify the freedom of establishment but also render impossible the achievement of a common market in broadcasting.

The same would be true of a requirement to the effect that a foreign broadcaster must be organized in the same way as a national broadcaster and/or must transmit a programme that satisfied the requirements laid down for national programmes. Such requirements would not, it is true, constitute de jure discrimination against broadcasters in other Member States, but the latter would be exposed to de facto discrimination as they would not normally be in a position to satisfy simultaneously the institutional and/or programme-content requirements imposed by all or only some Member States. In the final analysis, therefore, they would be prevented from broadcasting to that other Member State. They would be treated in the same way as broadcasters established there. The free movement of transmissions within the Community would be impossible. As mentioned above, however, the exception contained in Article 56(1) and justified on grounds of national public policy does not allow the relaying of programmes from other Member States to be judged by the same criteria as those applying to the national broadcasting set-up and to be made conditional on compliance with those criteria.

2. Approximation of special provisions for foreign nationals (Article 56(2)

Pursuant to Articles 56(2) and 66, "the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, issue directives for the coordination of the aforementioned provisions laid down by law, regulation or administrative action", that is to say those provisions that provide for special treatment of foreign nationals and are justified on grounds of public policy, public security or public health. Whereas all other forms of discrimination in respect of foreign nationals are prohibited per se (Articles 52, 53, 59 and 62), the cases in which discrimination is justified should be harmonized and thereby reduced to what is strictly necessary. Such coordination should, in particular, "protect /nationals from other Member States/ from any exercise of the powers resulting from the exception relating to limitations justified on grounds of public policy, public security or public health, which might go beyond the requirements justifying an exception to the basic principle of free movement of persons"[1] or, in this instance, the freedom to supply services and the freedom of establishment.

Since no special treatment for foreign nationals has as yet been introduced in the broadcasting field on grounds of public policy and since such treatment would, as we have already seen, be difficult to justify, the question of its harmonization probably does not arise at this juncture. The Commission can confine itself for the time being to ensuring, where necessary, that Article 56(1) is complied with (first indent of Article 155, and Article 169).

[1] Case 30/77 Bouchereau / 1977/ECR 1999, at 2010, ground 15; likewise, Case 67/74 Bonsignore / 1975/ECR 297, at 306, ground 5.

C. Restrictions affecting nationals and non-nationals without distinction (Articles 59 to 66 EEC)

The question whether steps need to be taken to approximate national laws on broadcasting and copyright, and if so what these measures should be, will depend to a large extent on how broad the prohibition on restrictions of the freedom to provide services contained in Articles 59 and 62 is considered to be (for the exact wording see the beginning of Section B above). If the national regulations which are claimed to affect the reception and retransmission of broadcasts from other Member States are no longer permitted under either Article 59 or Article 62, and must hence be rescinded, the approximation of laws which govern the taking up and pursuit of activities as a self-employed person - including broadcasting and the making of programmes - called for in Article 66 in conjunction with Article 57(2) will tend to become irrelevant. The purpose of such an approximation, namely "to make it easier for persons to take up and pursue activities as self-employed persons" (Article 57(2) in conjunction with Article 57(1)), will remain a requirement of the Treaty, but the legal barriers to an exchange of broadcasting services among the Member States should already have been removed under directly applicable Community law, which takes precedence over contrary national law. On the other hand, if the legal obstacles to the reception and retransmission of broadcasts from other Member States are not deemed to fall under the prohibition in the Treaty, an approximation of law will become necessary. Indeed, it will be imperative.

I. The provisions of the Treaty

Article 59 requires that restrictions on the freedom to provide services within the Community be abolished, while Article 62 prohibits the introduction of new restrictions; together they cover in principle not only all discrimination on the grounds of nationality or place of residence but all other obstacles to a free exchange of services between Member States.

1. Terms employed in the Treaty

The above considerations follow from the terms used in the relevant provisions of the Treaty. Articles 59, 62 and 63 do not refer to discrimination but to "restrictions". This is the term used when the aim is simply to prevent discrimination.

Thus Article 65 provides: "As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of the first paragraph of Article 59." Article 65, in banning any discrimination on the grounds of nationality or place of residence in respect of all other and not just individual Member States in the period before all restrictions are lifted under Article 59, implies that there are other kinds of restriction which will need to be abolished.

Further examples of the use of the narrower concept of discrimination when it alone is meant are Article 7 (prohibition of "any discrimination on grounds of nationality"), Article 37 (progressive adjustment of State monopolies of a commercial character), Article 68(2) (provisions on capital and credit). Article 67 (movement of capital) uses both terms, and in doing so confirms that "restrictions" are measures which apply without distinction to nationals and non-nationals. Finally, Article 3(c) calls for the abolition of "obstacles" to the free movement of services, in other words not just discrimination against non-nationals from other Member States.

2. Article 60, third paragraph

The second justification for this line of reasoning is contained in the third paragraph of Article 60, which states that the "person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided under the same conditions as are imposed by that State on its own nationals".

This provision can only mean that such regulations should have no effect or only a marginal one if a provider of a service does not pursue his activity in the State where the service is provided.

The third paragraph of Article 60 does not constitute a definition of the term "restrictions" as used in Article 59, nor does it establish a principle applying to all cross-frontier services. It

merely gives a special rule applying to a clearly defined subset of cases. It does not provide sufficient reason, as far as all other cases are concerned, not to apply the more general wording of Article 59, which calls for the abolition of restrictions and not just of discrimination. This is all the more relevant where a provider of a service not only does not pursue his activity in another State but also does not render the service in another State, but his own.

3. Objectives and conception of the Treaty

That Articles 59 - 66 are not confined to restrictions on non-nationals but also cover restrictions affecting nationals and non-nationals equally, follows, thirdly, from the objectives of these Articles and the general aims of the Treaty. One of the main tasks of the Community in pursuit of its primary economic, social and political objectives as stated in the Preamble and Article 2 is "establishing a common market" (Article 2). This entails creating within the Community conditions similar to those existing in a national market (cf. Article 43(3)(b)). This common market is to embrace not only labour, capital and goods but services as well. "For the purposes set out in Article 2, the activities of the Community shall include", according to Article 3, "the abolition, as between Member States, of obstacles to freedom of movement of ... services (Article 3(c))."

If it were a question simply of removing discrimination, the prohibition contained in Article 7 would be sufficient. Instead, the Contracting Parties have included a separate Chapter 3 under Title III of Part Two of the Treaty to regulate the free movement of services as one of the six "foundations of the Community", and provides for the creation of a common market in services, that is the removal of all obstacles to intra-Community exchanges of services with the aim of welding the national markets in services into a single market in which the conditions are as close as possible to those of a genuine internal market.

The Treaty is hence designed to prohibit any discrimination and restriction on the free movement of services between Member States (existing obstacles were to be abolished during the transitional period under Article 63, since when the first paragraph of Article 59 and Article 62 are directly applicable) in order to open national markets to services originating in other Member States. Differences between the national provisions regulating individual activities are to be removed by approximation under Article 66 in conjunction with Article 57 so that the national markets, once opened, become one common European market. In addition, there is to be an approximation of laws to remove discrimination on the grounds of public order, safety and health, such latter regulations remaining in force until they are harmonized (Article 66 in conjunction with Article 56).

II. Application of the Treaty by the Commission and the Council

1. Explanatory Memorandum to the General Programme

The Commission stressed in its Explanatory Memorandum[1] to the General Programme for the abolition of restrictions on freedom to provide service, adopted by the Council on 18 December 1961,[2] that "The rule of equal treatment with residents does not have the same general significance in this case as in the Chapter on freedom of establishment. It is only referred to here to cover cases in which providers of services established in one country travel to another to pursue their activities there on a temporary basis" (third paragraph of Article 60). Where recipients move to the supplier of a service, or where the service does not entail a change of location by the suppliers, "the freeing of services has an absolute character which contrasts with the relative character of the freedom of establishment. As in the case of free movement of goods and capital, the aim is the abolition of all restrictions and not only of those that are discriminatory".

The reason for this is that simply prohibiting discrimination is not sufficient in itself to allow the exercise in practice of the right to free circulation of services, capital and goods; it is sufficient for the exercise of right of establishment and free movement of labour. In the latter case, the persons concerned are moving from one State to another, with a change in the law to which they are subject. This is not true in the first case, where it is the service which passes from one State to another as it "circulates" across an internal frontier. The law to which the provider of the service is subject remains the same. He is still governed by the law of the country in which he is established and from which he supplies the service. The extent to which he is able to provide his service in another country depends in large measure on how far foreign regulations restricting the free circulation of services, capital or goods apply to him in addition to national law in his own country. For the supplier of the service, it is unimportant whether these regulations discriminate against him as a non-national or apply equally to nationals. If they are not the same as the law in his own country, it may be impossible for him to provide the service or he may make himself liable to sanctions.

This is why Articles 59 and 62 prohibit all "restrictions" on the free exchange of services and not merely discrimination, just as Articles 30 and 32 prohibit both restrictions on imports of goods (discrimination) and "all measures having equivalent effect", and more particularly restrictions which apply equally to imported and domestic goods. The latter restrictions have only a remote connection with the idea of discrimination against non-nationals. Finally, Article 67 dealing with the closely related field of capital movements specifically prohibits all discrimination and all restrictions.

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[1] Commission document III/COM(60)92 final of 28 July 1960, p. 22 (paragraph 14) and 23. (The quotations in the text are an ad hoc translation in English for the purposes of this document but see Bull. EC 6/7-1960 for a summary in English).

[2] OJ No 2, 15.1.1962, p. 32.

It is clear, therefore, that free exchange of services, free movement of goods and the circulation of capital belong together by their nature and function just as free movement of labour and right of establishment are inter-related. Article 59 does not contain any provisions corresponding to Article 48 or the second paragraph of Article 52, while the third paragraph of Article 60 does not define what restrictions are; it only makes a non-national provider of a service subject to local law if he temporarily pursues his activity in another country where the service is supplied, in other words if he temporarily takes up residence there. In all other cases (a non-national supplier of a service pursuing his activity in his own country) the service may not be restricted by the law in another country where it is being received (first paragraph of Article 59 and Article 62).

For all the reasons set out above and under I, Articles 59 and 62 must be regarded as more than an application to services of the general prohibition of "discrimination on grounds of nationality" (first paragraph of Article 7). As well as establishing equality, the two Articles cited are intended to guarantee the "freedom to provide services" (Article 62) from all "restrictions" both as an individual right and as an institutionalized part of the Community. By this is meant that the "liberalization" of services (Articles 61(2), 63 and 64), which is to say the "abolition as between Member States of obstacles to freedom of movement of services" (Article 3(c)), is a primary objective and "foundation of the Community" (title of Part Two of the Treaty); it is a contributory element in the common market and as such is something which the organs of the Community are duty-bound to establish for all kinds of service.

2. The General Programme and broadcasting

In line with what has been said above in 1, the restrictions to be abolished under Article 59 are defined in Title III B of the Council's General Programme as "Any prohibition of, or hindrance to, the movement of the item to be supplied in the course of the service or of the materials comprising such item or of the ... equipment ... to be employed in the provision of the service".[1] This is in addition to measures of the type referred to in A which hinder the person providing services "by treating him differently from nationals of the State concerned". All these restrictions are to be eliminated "whether they affect the person providing the services directly, or indirectly through the recipient of the service or through the service itself" (introductory sentence to Title III).

The subject of the present paper is the broadcasting and/or transmission of sound and television programmes. The "materials" comprising the service are sound and picture signals, while the "equipment" would be, for example, directional beams, cables and wires. This would mean that bans and restrictions both de jure and de facto on broadcasts and/or transmissions of programmes across national borders are covered by Title III B of the General Programme.

This is confirmed by the Commission's Explanatory Memorandum,[2] which defines services provided without the supplier or the recipient having to leave their own countries as services which do not occasion "direct contact between" the parties. This applies particularly to services which are "purely intellectual / immaterial_/ in character" or "technical".

[1] Loc. cit., p. 33.
[2] COM(60)92 final, p. 48 (paragraph 28) and p. 49 under (a).

The restrictions on such services (which must be abolished) include, according to the Memorandum,[1] "obstacles arising from regulations and practices in the country of the recipient / that / are liable to limit the use of a service originating in another Member State. This applies aprticularly to films. The basic problem relates to the commercial exploitation of copyright and similar rights connected with a film, that is the problem of exchanges of services in the field of cinematographic films." Copyright in cinema or television films or other broadcasts are valid for everyone, that is they do not depend on the nationality of the providers of the services incorporated in a performance, broadcast or transmission or on their place of residence. Other restrictions applying without such discrimination include broadcasting regulations and practices in the country of a recipient which prevent or impede the movement or reception of a broadcast service supplied from another Member State.

3. The Commission's position in the cases of Coditel v Ciné Vog and Debauve

In accordance with its interpretation of Article 59 and the third paragraph of Article 60, the Commission considered in the case of Coditel v Ciné Vog[2] that a rule applying without distinction to all persons resident in Belgium was a restriction on the free provision of a service and as such was prohibited under Article 59, since it gave the author of or owner of the rights in works of literature and art (in this case a cinematographic film) the exclusive right to permit the broadcast of a work and its retransmission either by wire or through the ether and hence to forbid unauthorized third parties from doing the same, in as far as the rule affected the retransmission of programmes broadcast in another Member State.

Similarly, in the case of Coditel v Debauve,[3] the Commission considered that a ban on the retransmission of domestic and foreign programmes containing advertising which was applied to all cable television companies established in Belgium constituted a restriction prohibited under Article 59, in as far as the rule affected advertising broadcast in another Member State.

Finally, the Commission took the view that Article 59 was directly applicable to these and all other non-discriminatory restrictions on the freedom to provide services.[4]

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[1] Loc. cit., p. 51.
[2] Case 62/79 / 1980 / ECR 3, p. 881 (pp. 884, 897-8).
[3] Case 52/79 / 1980 / ECR 833 (849-50).
[4] Debauve at 852 and Opinion of Mr Advocate-General Warner at 860 (873-4).

III. Interpretation of the Treaty by the Court of Justice

1. "Restrictions" covered by Articles 59 and 62

The Court of Justice has acknowledged in a number of judgments not concerned with broadcasting that the restrictions whose abolition is provided for by the first paragraph of Article 59 include not only all overt or covert,[1] de jure or de facto discrimination against the person providing a service on grounds of his nationality or the place in which he is established, but also "all requirements ... which may prevent or otherwise obstruct the activities of the person providing the service."[2]

In the Debauve judgment, the Court simply held, however, that the first paragraph of Article 59 involves "the abolition of all discrimination against a provider of services on the grounds of his nationality or of the fact that he is established in a Member State other than that where the service is to be provided."[3]

And in Coditel v Ciné Vog,[4] the Court held, ultimately in line with the above judgment, that "whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits /limitations, restrictions/ upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property ... ." "The provisions of the Treaty relating to the freedom to provide services do not" therefore "preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right."

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[1] i.e. "Forms of discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result" as "overt discrimination based on the nationality of the person providing a service". Joined Cases 62 and 63/81 Seco v Evi /1982/ ECR 223, 235, ground 8.

[2] Case 33/74 van Binsbergen /1974/ ECR 1299, 1309, ground 10; Case 39/75 Coenen /1975/ ECR 1547, 1555, ground 6; Case 279/80 Webb /1981/ ECR 3305, 3324, grounds 15/16; likewise, for example, Case 37/74 Walrave /1974/ ECR 405, 1420, ground 31 "inter alia", ground 34 "in any event in so far as "; Case 13/76 Donà /1976/ ECR 1333, 1341, ground 20 "at least in so far as". According to Joined Cases 110 and 111/78 van Wesemael and Follachio /1979/ ECR 35, 52, ground 27, see also grounds 29/30, Webb, at 3324, ground 14 and Seco v Evi at 235, ground 8 the provisions of Article 59 "entail" the abolition of all discrimination and hence are not exhausted therein.

[3] Debauve at 856, ground 11. According to Case 15/78 Koestler /1978/ ECR 1971, 1980, ground 4, 1981, ground 5, Article 59 covers only discrimination.

[4] Coditel v Ciné Vog at 903, ground 15, and at 905, operative part.

Although in the passages quoted from both judgments the Court appears to limit the scope of Article 59 to discrimination, and hence it was an established fact that Article 59 did not encompass both sets of circumstances because the relevant provisions of broadcasting and copyright law do not distinguish according to the nationality of the person providing the service or the place in which he is established, in Debauve[1] it also applies an exception to Article 59 designed to limit, not the prohibition on discrimination, but the prohibition on restrictions, applicable without distinction, to the movement of services:[2] "In veiw of the particular nature of certain services such as the broadcasting and transmission of television signals, specific requirements imposed upon providers of services which are founded upon the application of rules regulating certain types of activity and which are justified by the general interest and apply to all persons and undertakings established within the territory of the said Member State cannot be said to be incompatible with the Treaty to the extent to which a provider of services established in another Member State is not subject to similar regulations there."

According to this passage there are, therefore, restrictions applicable without distinction which are prohibited by the first paragraph of Article 59 and Article 62: firstly, the application of national rules justified by the general interest "similar" to foreign rules (second half of sentence quoted above);[3] and secondly, the application of national rules not justified by the general interest. Even within the latter category, however, an important area is, according to the judgment in Coditel v Ciné Vog, excluded in principle from the prohibition provided for in Article 59, namely the exercise of rights in the transmission of broadcasts.

The question as to which rules may be regarded as justified by the general interest will be examined separately at IV and VI.

2. Inapplicability of "similar" national rules

What is meant by "similar" national rules can be answered only in the light of the particular circumstances. Since under the EEC Treaty freedom of movement for services is the rule and not the exception, the requirement of similarity between the foreign and the national rule must be interpreted broadly.

Similar means neither identical nor equivalent but "comparable".[4] According to their purpose and content the rules must be comparable to each other and resemble one another. Differences which are not materially or qualitatively significant do not justify the application of national law.

[1] This is apparent from the end of the sentence quoted below, and is even more clear from van Binsbergen at 1309, grounds 10/12.
[2] Debauve at 856, ground 12.
[3] The Court gave a ruling to this effect for the first time in van Wesemael and Follachio at 52, end of ground 28.
[4] The Court uses this term repeatedly in van Wesemael and Follachio at 53, ground 30, 54, ground 39, 55, operative part, para. 3.

The survey given in Part Four shows that, from the point of view of conception and organizational and legal form, the broadcasting rules of the Member States partly resemble one another and partly differ from one another to a greater or lesser degree. General comparisons do not suffice, however, for the similarity or substitution test. What is needed is a specific comparison of the relevant provisions of the two sets of broadcasting regulations in a given case.

Part Six contains a great many specific details concerning advertising rights and copyright in broadcasting. They indicate that the individual problems are solved in a "similar" manner only in the minority of cases. Even between Member States which have relatively homogeneous ideas about values and rules, divergences have a habit of promptly appearing when it is a question of recognizing specific rules as similar. The approximation of advertising and copyright restrictions cannot at all events be dispensed with even with the help of a large-scale non-application of national rules in favour of similar foreign rules.

3. Range of the applicable laws or international scope of public advertising law

According to the Debauve judgment, the first paragraph of Article 59 and Article 62 prohibit restrictions applicable without distinction which are not justified by the general interest. Before examining which these are (IV, VI below), it must be established which legal orders are, in the light of the judgment, to be included in the examination. In proceedings, this is invariably the lex fori. Outside of courts and authorities, broadcasting undertakings must know, however, which laws of the Member States they have to observe if they are to avoid litigation and penalties, or whether Community law limits the applicability of one or other such set of national broadcasting regulations. In other words, must a broadcasting undertaking observe the restrictions justified in the general interest of all the Member States in whose territory its broadcasts can be received directly? Or does the freedom of movement for services between Member States allow it to observe only the rules of that State in which it provides its service and is active? If so, is it nevertheless de facto obliged to observe also the rules of those Member States to whose territory it wishes its broadcasts to be relayed by cable television distribution undertakings established there?

(a) Applicability only of the law of the place where the broadcast is produced?

In its judgments before and after Debauve, the Court granted the benefit of the unwritten exception it had created to the first paragraph of Article 59 and Article 62 - the applicability of restrictions justified by the general interest - exclusively to the Member State "where the service is given"[1] and which the provider of the service had regularly visited in order to give the service.[2] With one exception, the facts

[1] Van Binsbergen at 1309, grounds 10/12; Coenen at 1554, grounds 6/7, van Wesemael and Follachio at 44, 52, grounds 27/28; Webb at 3324, ground 16, 3325, ground 17.

[2] Van Binsbergen at 1308, grounds 2/5; Coenen at 1554, ground 2, 1555, ground 9; Webb at 3321, ground 5.

therefore constituted cases covered by the third paragraph of Article 60 (wording at I 2) or closely related to it.

(b) Additional applicability of the laws of the places of reception and relaying of the broadcast by cable television distribution undertakings?

In Debauve, on the other hand, the providers of the service - the broadcasting German, French and Luxembourg television undertakings - were neither active in the country of the Belgian recipients of the service nor had they given their services - the broadcasting of commercial advertisements - in Belgium, but only in Germany, France or Luxembourg.[1] The situation in Ciné Vog v Coditel was analagous: the film was broadcast in Germany, so the service was given there and not in Belgium.

To justify the extensive restriction of freedom of movement for television advertising, the Court refers to the widely divergent rules governing the broadcasting of advertisements and the absence of any approximation of laws. It goes on to say:[2] "It must be stressed that the prohibition on the transmission of advertisements by cable television ... cannot be examined in isolation. A review of all the Belgian legislation on broadcasting shows that prohibition is the corollary of the ban on the broadcasting of commercial advertisements imposed on the Belgian broadcasting organizations. ... In the absence of any harmonization of the relevant rules, a prohibition ... / of the retransmission of commercial advertisements/ falls within the residual power of each Member State to regulate television advertising on its territory on grounds of general interest. The position is not altered by the fact that such restrictions or prohibitions extend to television advertising originating in other Member States in so far as they are actually applied on the same terms to national television organizations."

The Court thereby exempts from the prohibition provided for in Articles 59 and 62, pending the approximation of national laws, also those restrictions to the free movement of commercial advertising which make their claim to validity subject, not to the pursuit of an activity in the national territory by the provider of a service established abroad or at least to the provision of the service in the national territory or, like the third paragraph of Article 60, to both, but solely to national effects of foreign broadcasts, or more precisely to the direct receivability of the broadcast in the national territory and the activity in the national territory of third parties (the cable television undertakings) based thereon. The restrictions admissible under Articles 59 and 62 include, not only rules concerning television advertising, but also, according to Coditel v Ciné Vog, rules concerning the protection of the owner of rights in the presentation of broadcasts.

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[1] The service provided by the Belgian cable television company Coditel to its subscribers - the reception of foreign broadcasts and their retransmission by cable - is a service provided in Belgium alone by a Belgian for Belgian residents and is therefore strictly speaking not a service to which Article 59 would be applicable. This relaying of foreign programmes does not, however, deprive their emission by the foreign broadcasting undertakings of their transnational nature vis-à-vis those who receive Belgian cable television (cf. A II 2 above).

[2] Debauve at 857, grounds 14 and 15 (emphasis added).

Hence the transnational provision of the service is subject not only to the law governing its provider but also to all laws in whose fields of application the broadcast is picked up and retransmitted.

This simultaneous applicability of the rules of several Member States to the same facts leads in practice to considerable uncertainty in the law and creates serious difficulties. The observance or enforcement of contradictory rules renders in many cases the free movement of broadcasting between Member States impossible. From being the rule, the free movement of services becomes an exception. This makes the harmonization of such advertising and copyright rules imperative and a matter of urgency. The Court's reference to the approximation of laws is therefore quite unambiguous.

(c) Additional applicability of the laws of the places where the broadcast is received directly?

May a Member State, in order to safeguard its prohibition or restrictions on advertising under Articles 59 and 62, ban or restrict not only the retransmission of foreign television advertising in its territory, but also the beaming of foreign advertising even by the foreign broadcasting undertaking and direct reception in its own territory? May it, in order to enforce such a prohibition directed at foreign territory, take measures in its own territory restricting direct reception?

The facts and the grounds of the judgment in the Debauve case - in particular the sentences quoted above - should not provide a basis for answering these questions in the affirmative. The Court was fully conversant with the issues involved. Mr Advocate-General Warner stated, for example, in his Opinion[1] that it was not a question of a prohibition, directed by Belgium at other Member States, of the beaming of television advertising into Belgium, but only of the prohibition, directed at cable television companies in Belgium, of their retransmission in Belgium. Belgian law acknowledged the existence of zones of natural reception of foreign broadcasting stations in Belgium and did not seek to interfere with the freedom of viewers living within those zones to receive directly the programmes broadcast by those stations. "Clearly the purpose of those rules is not, and it could not be, to exclude altogether the viewing of that material /commercial advertising/ on Belgian territory. Their purpose is only to exclude the active spreading of it beyond, in the case of each programme, the circle of those able to receive it directly." Since the Belgian rules had only that limited purpose, Community law could not invalidate them.

In fact, a more far-reaching prohibition of the beaming of foreign broadcasts or parts of programmes which have an effect only in the national territory, i.e. can be received directly, ought not to be compatible with Articles 59 and 62. Such an extension of the claim to validity of national rules to the activity of broadcasting undertakings in other Member States would not just restrict the freedom of movement of the broadcasts in question from other Member States, but would remove it. Articles 59 and 62 require, not that nationals of other Member States be enabled to provide in a country's territory services which are denied to nationals of that country, but that the nationals of other Member States be allowed to provide such services in

[1] Debauve at 869, right-hand column.

their own countries abroad even where and in so far as they have effect in the territory of the country concerned. This requirement that divergent foreign rules be accepted and complied with in so far as their observance abroad has effect only at home, or the requirement that no effects be conferred on national provisions beyond the Community's internal frontiers follows not only from the liberalization requirement of Article 59 but also from the requirement of the establishment of a common market for services (Articles 2 and 3(c)) and from the integration of the Member States into a Community (Articles 1 and 2).

IV. National general interest and foreign commercial advertising

1. Applicability of national law on television advertising to commercial advertising from abroad

(a) "Rules justified on grounds of general interest" (Debauve judgment)

The Court held first of all that restrictive national rules governing the broadcasting of television advertising in the national territory - including its prohibition - are justified by the general interest. After stressing that those rules were "widely divergent", it stated:[1] "In the absence of any approximation of national laws and taking into account the considerations of general interest underlying the restrictive rules in this area, the application of the laws in question cannot be regarded as a restriction upon freedom to provide services so long as those laws treat all such services identically whatever their origin or the nationality of place of establishment of the persons providing them."

The same must be true of prohibitions on the retransmission of advertisements by cable television. The Belgian prohibition was intended to maintain conformity with the scheme imposed on the national broadcasting organizations.[2] "In the absence of any harmonization of the relevant rules, a prohibition of this type falls within the residual power of each Member State to regulate, restrict or even totally prohibit television advertising on its territory on grounds of general interest."[3]

The Court thereby applied to restriction on television advertising an unwritten reservation under Community law which it had created earlier in

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[1] Debauve at 856, ground 13.

[2] Debauve at 857, ground 14.

[3] Debauve at 857, ground 15.

favour of national restrictions to the free movement of services justified by the general interest.[1] The reason for this exception is brief and general:[2] "In view of the particular nature of certain services such as the broadcasting and transmission of television signals". The Court simply takes the phrase used earlier in connection with all services "Taking into account the particular nature of the services to be provided"[3] and applies it to television. What this particular nature is - in general and in specific areas - still has to be settled.

Likewise, the Court of Justice does not say what is to be understood by "general interest", what the "considerations" are which "underlie" the restrictive rules on advertising or under what circumstances they are "justified" and when not. It directs its attention solely to substantive Belgian law with its prohibition of television advertising, enacted "on grounds of the general interest". Accordingly, it does not consider whether and to what extent the prohibitions are "justified" from the standpoint of Community law - in particular, of freedom of movement of services as evinced in the free flow of opinions and information.

(b) Provisions that are justified "on grounds of public policy, public security or public health" and which are enforced (Article 56(1), by analogy)

The Advocate-General,[4] the Commission[5] and the Federal Republic of Germany[6] did not regard this far-reaching judicial derogation from Article 59 to be applicable, but the right reserved under the Treaty in favour of provisions that are justified on grounds of public policy, security or health.

If Article 56(1) allows the Member States to take on those three grounds measures providing for special treatment for foreign nationals, "the Member States must a fortiori be allowed to take on those grounds measures applying indiscriminately to foreign nationals and to their own nationals".[7] The Advocate-General was in "no doubt that the control of television advertising falls fairly and squarely within the scope of public policy".[8] The latter, however, depends not only on the applicable law but also on the enforcement of that law.

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[1] van Binsbergen at 1309, ground 12; van Wesemael, Follachio at 52, ground 28.

[2] Debauve at 856, ground 12.

[3] van Binsbergen at 1309, ground 12 (activities of persons whose functions are to assist the administration of justice). Since Coenen at 1555, ground 9, it is still only: "In the light of the special nature of certain services" (in this case the activity of insurance brokers). Likewise van Wesemael, Follachio at 52, ground 28 (placing of entertainers in employment) and - after Debauve - Webb at 3325, ground 17 (provision of manpower).

[4] Advocate-General Warner in Debauve at 877, 878.

[5] Debauve at 850.

[6] Debauve at 847.

[7] Advocate-General Warner in Debauve at 877.

[8] Ibid.

In fact, the Belgian prohibition of the retransmission of advertising by cable of 1966 had at no time been enforced by the various governments and administrative authorities. Although it had been complied with, at the beginning, by some cable companies, the blotting out of advertising had given rise to major technical, practical and economic problems and had, in addition, raised questions concerning the permissibility of such "censorship" and of such alterations and disruptions (interruptions) of broadcasts. Successive Belgian governments had recognized this. The criminal prosecution of 1978/79 which underlay the Debauve case was the first prosecution and it was not brought by the government.[1] It remained an exception. In the Debauve case, France insisted that no changes could be made to broadcasts (blotting out, substitute material). This would lead to indirect discrimination against foreign broadcasts, prohibited under the EEC Treaty.[2] Moreover, from the time of the Debauve case up until now, programmes from Germany, France, Luxembourg and the Netherlands received by the Belgian cable companies have been retransmitted simultaneously, unaltered and have included the advertising material.

2. Approximation of laws governing broadcast advertising

As far as that area of broadcasting law is concerned which governs television advertising, according to the Debauve judgment (see above under 1a), Articles 59(1) and 62 prohibit only discrimination (different treatment) based on the domestic or foreign origin of the advertising, the nationality of the person providing the services or his place of establishment. In so far as restrictions on television advertising apply not only to national programmes but also to the retransmission of broadcasts from other Member States, they are to be eliminated not by implementing the directly enforceable prohibitions contained in the Treaty but its injunctions to approximate national laws.

This, then, produces a substantive and a temporal shift; while the Commission, the Advocate-General[3] and others involved in the proceedings took the view that the freedom to provide services directly guaranteed by the Treaty (Articles 59, 62) covered both the prohibition on subjecting foreign broadcast advertising to more stringent restrictions than domestic broadcast advertising as well as the prohibition on applying the same treatment or restrictions to foreign broadcast advertising as are applied to domestic advertising and that the task of the approximation of laws, for which provision is also made, is to establish, starting from the national markets with their differing legal frameworks which would then be opened up to one another, a common market in television advertising with the same outline conditions, the Court of Justice also assigns the task of opening up the national markets - that is to say the abolition of the restrictions on advertising coming from abroad - to the approximation of laws.

Thus, abolition of the said restrictions now becomes their equalization at Community level, their prohibition under the Treaty now becomes an injunction that they be approximated by the Community institutions. Immediate elimination

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[1] For details on the above see Debauve at 838-840; 845, 854, ground 5, 864-865.

[2] Debauve at 845

[3] Advocate-General Warner in Debauve at 870-873.

of the restrictions, with nothing to take their place, now becomes harmonization, deferred for the future. The "general interest" must first be safeguarded by the approximation of laws. This then renders superfluous the abolition of those aspects of the restrictions on advertising applied equally to domestic and foreign broadcasts, that relate to other countries. In the view of the Court of Justice, the disparities between the national laws on television advertising are so great that free movement of televised advertising which is, in fact, required and guaranteed by the EEC Treaty cannot be secured under Community law until they are levelled out.

The Court of Justice reached this conclusion even though the derogation laid down in Articles 57(3) and 66 provides for approximation of national laws prior to the abolition of restrictions on freedom of movement of services and the right of establishment only in respect of activities relating to the health of individuals, that is to say not in respect of activities relating to other public property.[1] The rule shows that laws that differ from Member State to Member State and resultant social conditions should not, in principle, preclude the abolition of restrictions on the cross-frontier movement of services but can be accepted until they are approximated.

(a) Competence, need, urgency

By what it has to say on the disparities between the national provisions on advertising and the connection between their lack of harmonization and the scope of the prohibition laid down in Article 59,[2] the Court of Justice simultaneously affirms the competence of the Community in regard to the approximation of the relevant laws on broadcasting, the need for such approximation and its urgency. Without such approximation, neither the liberalization prescribed in the Treaty in respect of advertising nor, moreover, the common market in that field could be brought into being.

In addition, according to the EEC Treaty itself, "priority shall be given to those services the liberalization of which helps to promote trade in goods." (Article 63(3)). The latter applies indisputably to broadcast advertising.

The Sixth Part (paragraphs A I, II and III(a) to (c)), deals in detail with the disparities between the Member States' rules on advertising, the negative effects of those disparities on freedom of broadcasting in the common market and thus the need for approximation of laws in this field. Reference can be made to those paragraphs here.

Certain points have already been made regarding the economic need for approximation of the laws governing broadcast advertising (Third Part A II in fine, B II2, D in fine, E in fine). This need is particularly marked in

[1] Article 57(3) states 'in the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States".

[2] Debauve at 856, ground 13, 857, ground 15.

the case of advertising direct satellite broadcasts and their financing through advertising revenue.

Satellite broadcasting is attractive to advertisers because it enables savings to be made that are not possible at present. Instead of having to advertise in a number of countries, the advertiser needs to operate only from a single location. However, if the differences between the national rules on advertising are not eliminated, the attraction that results from such economies of scale can be lost because advertising must continue to comply nationally with the differing requirements of the national laws. The anticipated earnings of the broadcasting organizations can accordingly not be fully secured nor can they even be secured to the extent that is necessary.

As far as retransmission by cable is concerned, it is improbable that cable companies are capable or prepared either to blot out advertising which infringes their own particular legislation or to replace it with advertising of their own ("active" cable broadcasting). Even if they had the latter capability, it is improbable that the foreign broadcasting organizations would grant them the right to alter their transmissions.

It is, accordingly, necessary, on financial as well as on practical grounds, to find a solution which will enable broadcasting satellites to exploit their capabilities to the optimum extent. The Debauve judgment has made it clear that this solution lies in approximation of the laws governing broadcast advertising.

(b) Applicability of Article 57(2)

In assigning the task of liberalizing advertising to the approximation of laws, the Court of Justice clearly has in mind Article 57(2). For Article 59(1) states that the restrictions on freedom to provide services "shall be progressively abolished within the framework of the provisions set out below". One of those provisions is Article 66: "the provisions of Articles 55 to 58 shall apply to the matters covered by this Chapter" - that is to say Article 57(2) also.

That provision states: "For the same purpose /namely "to make it easier for persons to take up and pursue activities as self-employed persons", paragraph 1/ the Council shall, before the end of the transitional period, acting on a proposal from the Commission and after consulting the Assembly, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons. Unanimity shall be required on matters which are the subject of legislation in at least one Member State ...".

The view is generally taken that "coordination" means the same as approximation, harmonization - expressions used in the Treaty in different places to cover the same task.

"Activities as self-employed persons" also includes the organization (operation) of broadcasting, or, more precisely, all the different activities of the organizers of broadcasting such as planning, production, coordination, transmission, reception and retransmission and exploitation of broadcasts of all kinds.

The provisions concerning the restrictions on broadcast advertising (admissibility, limits, form, content, monitoring) are also included among the "provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit" of activities as self-employed persons. These provisions form part of the law governing the broadcasting activities of self-employed persons. According to Article 57(2), therefore, they must be coordinated.

(c) The purpose of approximation

The purpose of such coordination is laid down by Article 57(2) itself. Firstly, it is necessary to make it easier to "take up" broadcasting activities, that is to say, primarily, establishment and authorization. Secondly, it must be made easier to "pursue" such activities as are included among the activities of organizers of broadcasting as self-employed persons, that is to say, in particular, the provision of the different broadcasting services.

"Making it easier" does not mean that approximation may not lead to the introduction of stricter rules in a Member State, that is to say alignment on the most liberal legislation at any particular time. The concept nevertheless indicates the liberalizing direction which coordination must take; the founding of independent entities and undertakings and the carrying on of their activities is to be made possible and encouraged through the approximation of laws, not rendered more difficult.

In particular, "making it easier" means eliminating difficulties which arise from legal disparities, it means "making such safeguards equivalent" (see Article 54(3)(g)) in order to make possible and to promote the taking up and pursuit of the relevant activities as self-employed persons throughout the Community under equivalent conditions.

The task of harmonizing or levelling out the disparities in the laws governing advertising assigned in the Debauve judgment to the approximation of laws corresponds to this. In this way, not only will the national markets be opened up to one another but the common market in part of the field in question - in broadcast advertising - that has to be established will be brought into being. This European market cannot function if the nationals of Member State A in Member State B simply enjoy the same rights as the nationals of Member State B in Member State B but only if the nationals of country A in country B enjoy the same rights as the nationals of country B in country A.

The approximation of laws accordingly encompasses not only cross-frontier movement of services but also movement of services at national level, not only establishment in another Member State but also in one's own country. The wording of Article 57 corresponds to this conception of the EEC Treaty and its interpretation by the Court of Justice. Article 3 does not simply prescribe "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital" (subpara.(c)) - that is to say, the opening of internal frontiers - but also "the institution of a system ensuring that competition in the common market is not distorted" (subpara.(f)), and "the approximation of the laws of Member States to the extent required for the proper functioning of the common market" (subpara.(h)) - that is to say equivalence of the legal conditions. The Community aspires to these main objectives and activities "as provided in this Treaty" (Article 3), that is to

say primarily under Articles 52 and 59 on the one hand and Articles 57(2) and 66 on the other.

The broadcasting and retransmission of advertising under conditions of freedom and equivalence is the first objective to be striven for. This follows not only from the legal grounds that have been set out and from the Debauve judgment but from the major economic importance of broadcast advertising to production, marketing and the free movement of advertised goods and services within the Community, that is to say for important sections of trade and industry and for consumers, and, in addition, for the advertising industry and for broadcasting organizations themselves (see also the Sixth Part A1).

V. National general interest and international coverage of the rules on the taking-up and pursuit of broadcasting activity

Consideration still has to be given to the significance which the reservation concerning the applicability of the national rules that are justified in the general interest has beyond the law on broadcast advertising. The exemption - which is tantamount to an approximation of the relevant legal provisions - from the prohibitions on restricting freedom to provide services (Articles 59 and 62) was couched by the Court of Justice in general terms and it did not restrict it to requirements regarding advertising.[1]

However, before discussing the material scope of the reservation (at VI), it is necessary to define its international coverage and the regulations which it thereby comprises. To what extent does the national reservation therefore include cases where frontiers are crossed and to what extent does it not?

First of all it is necessary to clarify the nature of the legal provisions on broadcasting and telecommunications. In accordance with the distinction in the EEC Treaty between rules on the taking-up and pursuit of activities of self-employed persons (the second paragraph of Article 52, Article 57(1), (2) and (3), and Article 66), they may be classified into two categories.

The taking-up of broadcasting activity is affected particularly by the rules on the following: the (exclusive) assignment of the activity to certain sponsors, the establishment of broadcasting organizations, their licensing pursuant to laws on telecommunications and/or broadcasting (e.g. in accordance with the extent to which they represent certain groups or movements in the population (number of members and so on), their legal form, their structure (type, task and composition of bodies, representation of socially significant categories), the responsibility of the corporation, its articles of association and financing.

The pursuit of broadcasting activity is affected particularly by the rules on programmes, i.e. certain requirements as to their objectives (e.g. the injunction not to serve private or commercial purposes), orientation (e.g. representation of a specific social trend), quality and content (e.g. comprehensive information faithful to the facts), the composition of programmes as a whole (e.g. regard for all points of view, sufficient news and educational programmes), and on management, responsibility and liability, and supervision.

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[1] See under III 1 above Debauve at 856, ground 5.

The answer to the question about the international coverage of these rules and of the reservation bringing about their application is not that in the event of broadcasts from foreign countries there may be no interference in the transmission process, since it is not physical, and even less so may action be taken against an organization established in a foreign country. On the one hand, the claim to recognition, i.e. the predetermined field of application of a rule, cannot be equated with the possibility of its being enforced. Without violating certain bounds drawn by general international law, statutory prohibitions or injunctions may in principle be directed at foreigners in foreign countries whose actions have consequences in another country where legal action may readily be taken against them in the said country. On the other, the transmission process may be interrupted in the country concerned if public agencies own or supervise the reception equipment, e.g. small relay transmitters, master aerials, community aerials, community reception facilities.

1. Limitation by Articles 59 and 62

It has already been explained (at III 3 c above) that and why Articles 59 and 62 preclude extending the law of the country of reception to the transmission of (advertising) broadcasts in another Member State. National law on broadcasting may not, therefore, lay down specific conditions for the taking-up and/or pursuit of broadcasting activity in another Member State on account of the transmission of broadcasts into its area of jusrisdiction, for instance by requiring a licence for its territory or prior consent, consultation or notification, or by imposing particular requirements with respect to the organization of the foreign broadcasting corporation or the programmes broadcast there.

Accordingly, the national reservation concerning the general interest (and that concerning public order, safety and health, at B III 1 above) of the country of reception does not extend so far that it covers the provision of a service (the transmission of a broadcast) in the country of transmission, nor can it prohibit, restrict or otherwise regulate this broadcasting. The principle of the freedom to provide services within the Community (Article 3(c)) and the individual right of nationals of the Member States to provide services for persons established in another Member State also presuppose freedom to broadcast beyond frontiers.

Possible national restrictions may therefore be directed only against the rediffusion (and of course transmission) of foreign broadcasts within the country. Broadcasts from other Member States into one's own country cannot be regulated by national reserved rights. Their field of application can extend no further than that of the national law whose application they ensure.

The reservation, and accordingly national law, is therefore applicable only when the foreign broadcast has "crossed" the frontier and is "within reach", i.e. when it is received in the country concerned. Only then, whether the broadcast is received direct or relayed by a transmitter or cable service, may national law have recourse to a reservation.

If national requirements could be imposed on foreign broadcasts before they reached receivers in the country concerned (and therefore also before they reached receivers in the country of transmission), there would be no freedom of cross-frontier provision of broadcasting services and hence no free flow of opinions, information and ideas "regardless of frontiers". For even before this movement, this flow, has started in a foreign country it could be prohibited, restricted or affected by law, or indeed be prevented.

Nevertheless, the freedom of nationals of other Member States to transmit broadcasts to another country, or to relay them in any manner (above, A II 3), and their freedom to express opinions, information and ideas in these broadcasts may not be restricted, even where similar restrictions are applied to broadcasters or programmes within the country. Only the reception and rediffusion of foreign broadcasts at home may be restricted, should such restriction be justified on grounds o the general interest (below, VI).

If the broadcasting corporations of each Member State which also transmit programmes to other Member States not only complied with the broadcasting legislation of their own country, but also with that of other countries, not only would broadcasting no longer be free and unaltered, in many cases it would be unfeasible. This could also result from conflicting requirements as to the legal form, organization or composition of the bodies of broadcasting organizations, or as to the form, type, content and composition of programmes. Even where regulations are merely different it is often impossible to comply with all of them. There are numerous examples of this.

2. Practice and law in the Member States

The practice of the Member States takes account of the actual situation and conforms to what has been said earlier. They have always affirmed and put into effect freedom to transmit territorial broadcasts, including those beyond their own frontiers. They have special radio programmes broadcast to foreign countries. Television programmes are increasingly broadcast beyond frontiers. Conversely, the Member States do not impede broadcasts from other countries and direct reception at home. Certain Governments have expressly acknowledged the principle that national law on broadcasting can only cover and regulate the rediffusion of foreign broadcasts at home.[1,2]

[1] See for example "Memorandum on policy regarding the relaying of foreign broadcasts via Dutch cable networks" presented to the Dutch Parliament by the Minister for Cultural Affairs, Leisure and Social Affairs of 29.11.1980, p. 12 (cyclostyled English translation), Notitie "Doorgifte van buitenlandse omroepprogramma's via Nederlandse kabelnetten", Kamerstukken II, zitting 1980/81, 16494, No 2; explanations given by the French Minister for Communications to the National Assembly in spring 1982, cited above Part Four, G, in limine.

[2] Also the German Expertenkommission Neue Medien - EKM, Baden-Württemberg, Abschlussbericht, Bd. I: Bericht und Projektempfehlungen, Stuttgart 1981, 182, No 8.10.5 and 159, No 8.4.2.2.

The Member States' laws on broadcasting and telecommunications accordingly apply only to the broadcasting organizations operating at home (above, Part Four). No Member State requires prior approval, consultation or notification of broadcasting intended for its territory. The law of the Member States contains neither prohibitions or injunctions imposed on broadcasting corporations established abroad broadcasting (also) to their particular country nor requirements as to their programmes.

For example, the German Federal Constitutional Court has removed from the constitution the obligation to ensure by means of suitable precautions that the entire range of programmes genuinely corresponds to actual diversity of opinion. However, it added the adjective "national" to the word "programmes"[1] and thereby made it clear that the task of subjecting foreign programmes which may be received in Germany to the national requirements regarding balance cannot fall to the German legislator.

Where national rules on broadcasts transmitted from abroad do exist they apply to rediffusion systems established in the country concerned.[2] There are no national rules concerning direct domestic receivers of foreign broadcasts which regulate reception or authorize interference therewith. The foregoing applies also to direct reception via satellite.

3. Scope of broadcasting monopolies

In the light of the foregoing (Sections 1 and III 3(c)) it would, for example, be incompatible with Articles 59 and 62 if a Member State, which has assigned and reserved broadcasting on its territory to and for one or more broadcasters so that no other broadcaster is allowed to transmit programmes on this territory, were to extend this prohibition to broadcasters in other Member States transmitting programmes in these Member States which can also be received in the Member State in question if this Member State were generally to prohibit or prevent direct reception of these foreign programmes.

If the transmission of programmes from other Member States were prohibited this would create a Community-wide broadcasting monopoly in respect of the territory in question. It would lead to the segregation and isolation of this Member State from the rest of the Community while the national undertaking on which a monopoly has been conferred would be able to freely transmit its programmes in Member States in which no monopoly exists or in which there is a monopoly solely in respect of the broadcasting of programmes on the territory of these Member States.

Not only the right of establishment for foreign television and radio broadcasters but also the freedom to provide services in respect of their programmes would be abolished as institutions and individual rights. It would be impossible to create a common market for radio and television. Radio and television broadcasters would have no access to the territory in question and receivers would have no access to foreign programmes.

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[1] BVerfG (Federal Consitutional Court) 16.6.1981, Entscheidungen des BVerfG 57, 295, (325).

[2] See for example the French regulation, Part Four, G, in limine.

This would also be incompatible with Article 10(1) of the European Convention on Human Rights (ECHR). If a State accepts that there should be a free flow of opinions, information and ideas it does not relinquish - in respect of its territory - its broadcasting monopoly but it does forego the right to determine the information which its citizens may receive. It cannot have both: a free flow of information across borders and the blocking of foreign programmes. In this respect foreign programmes are bound to encroach upon national radio and television systems. The purpose of the free flow of information (Article 10 of the ECHR) and the free movement of programmes (Articles 59 and 62 of the Treaty) is to open up to each other national systems which had been previously closed from each other.

This conclusion is confirmed by Article 90(1) and the case law already established on this point. According to this case law the effect of a national radio and television monopoly within the Community is no more than an exclusion of others (nationals and foreigners) from setting up radio and television stations in the country concerned and from broadcasting programmes there. It does not extend to the abolition of the right to cross-frontier programmes granted by Articles 59 and 62.

The Court of Justice confirmed in the Sacchi case that Article 90(1) permits Member States to grant television organizations the exclusive right to conduct radio and television transmissions, including cable transmissions.[1] Such privileged television organizations are therefore, irrespective of their legal form and purpose, undertakings within the meaning of Article 90(1) and of the other provisions of the EEC Treaty, to all of which paragraph 1 refers. The Treaty therefore claims to apply to such privileged television undertakings. As far as they are concerned, Member States must comply with all the prohibitions and injunctions contained in the Treaty.

The grant of an exclusive or special right does not, however, as such infringe those other provisions of the EEC Treaty, because Article 90(1) expressly leaves such a measure untouched. In the Sacchi case, the Court made three findings: "The fact that an undertaking to which a Member State grants exclusive rights within the meaning of Article 90, or extends such rights following further intervention by such State, has a monopoly, is not as such incompatible with Article 86 of the Treaty",[2] / prohibition on monopolization /. "The grant of the exclusive right to transmit television signals does not as such constitute a breach of Article 7 of the Treaty."[3] / Prohibition on any discrimination on grounds of nationality. / "The fact that an undertaking of a Member State has the exclusive right to transmit advertisements by television is not as such incompatible with the free movement of products, the marketing of which such advertisements are intended to promote."[4]

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[1] Sacchi at 409, ground 14.
[2] Sacchi at 432, operative part, paragraph 4.
[3] Sacchi at 433, operative part, paragraph 6.
[4] Sacchi at 432, operative part, para. 2, first sentence.

With regard to this last exclusive right the Court also specified the limits to Community law resulting from Article 90(1), i.e. the kind of measures Member States may under the Treaty neither enact nor maintain in force in relation to television undertakings. It held that:[1] "It would however be different if the exclusive rights were used to favour, within the Community, particular trade channels or particular commercial operators in relation to others." According to the grounds of the judgment[2] the Court includes therein "measures governing the marketing of products where the restrictive effect exceeds the effects intrinsic to trade rules ... . Such is the case, in particular, where the restrictive effects are out of proportion to their purpose, in the present case the organization, according to the law of a Member State, of television as a service in the public interest".

If these limits applicable to the conferment of an exclusive right for television advertisements are transferred to the grant of an exclusive right for television broadcasts in general, i.e. having regard, not to the free movement of goods, but solely to the free movement of services, the following emerges.

The exclusive right may not be used to promote within the Community certain patterns of services - specific programme traffic - or certain television undertakings compared with others. A restriction of the movement of services at variance with the Treaty can be seen in measures to prevent the transmission or unhampered reception of programmes from other Member States, the restrictive effects of which exceed the framework of the effects specific to such rules on services.

The effect specific to the exclusive or special right to provide services consists in the fact that, apart from the favoured undertaking or undertakings, no other undertaking at home may transmit broadcasts for domestic or foreign consumption.

This effect would be exceeded if undertakings which transmit broadcasts, not from home for foreign consumption but from abroad for foreign consumption were also included in the rule because their transmissions are also beamed at domestic territory (just as, conversely, the transmissions of the favoured domestic undertaking or undertakings are beamed from home also to foreign territory). For in this case the exclusive or special right to beam television programmes from home for the domestic territory and the territory of other Member States would be used to limit the exercise of the same right granted by another Member State to beam transmissions from its territory. This would favour transmissions from home and the domestic broadcasting undertakings or undertakings compared with transmissions from other Member States and their broadcasting undertakings.

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[1] Sacchi at 432, operative part, para. 2, second sentence.

[2] Sacchi at 429, ground 8.

These restricting effects which are not inherent in the exclusive or special right granted at home are out of proportion to the desired goal of the organization of television as a public service under the law of a Member State. The reasons for this are fourfold. First, such a goal may be pursued legitimately only in the case of a country's own domestic television. Secondly, transmissions from other Member States do not prevent such organization. Experience in the field of radio has long borne this out. Thirdly, television is, as stated in Part Four, in all Member States a function or public function or special public service governed in detail by special law, charters, concessions, licences, clauses and conditions, etc. It involves, with the possible exception of Luxembourg, related systems of public law based on similar convictions. The organization of television as a special category of undertaking, as a public function, as a service in the public interest in each of these States can therefore scarcely be jeopardized by cross-frontier television traffic between those States. Fourthly, completely isolating the domestic market would be tantamount to denying the existence of the Community and the common market. For its establishment a minimum of mutual opening-up of the Member States is essential also in the field of the exclusive and special rights conferred by them. Such rights may continue to produce effects inwards, but not at the Community's internal frontiers. This is clearly expressed by Article 90(1).

This is in keeping with the laws and practices of the Member States. Their radio and television laws do no more than grant monopoly and oligopoly rights for national broadcasting and, as a corollary, prohibit nationals and foreigners alike from setting up in the country concerned and from broadcasting radio or television programmes. These rules do not therefore prevent listeners and viewers within the territory covered by the broadcasting monopoly from being allowed to receive and from receiving foreign programmes. There is no obligation to use the national programmes available which excludes de jure or de facto competitive services from other countries. (See Part Four.) In some cases foreign programmes are even received and retransmitted by national monopolies.

4. Establishment on the territory of one country?

Could a Member State require broadcasting companies established in another Member State broadcasting programmes in this country which can also be picked up in the Member State concerned to set up a subsidiary,branch or agency in this Member State to assume legal responsibility and liability for the foreign programme or to at least appoint an authorized agent in this Member State for this purpose?

Such a legal obligation imposed on foreigners in their own countries would have to be interpreted under Community law as being equivalent to other obligations requiring foreigners in their own countries to take or to refrain from certain action as regards their organization or programmes (see Section III 3(c) and 1).

If a foreign provider of a service was required to have an establishment on the territory of the host country, he could be prevented from providing his service, under the provisions of Community law on the freedom to provide services, simply in compliance with the law of his own country. This would be the case if establishment were made compulsory to ensure that the provider of the service established in another country did not have to be treated legally as such but could be treated as if he had set up in the Member State concerned and broadcast his programmes in this country of his own will. Once he was actually established, national law could also be applied to his services - broadcasting of radio and television programmes - on this basis, even though these services are not provided in the country concerned and the provider of the services does not pursue any activity in this country for the purposes of providing such services, i.e. even though the conditions laid down in the third paragraph of Article 60 (see Section I 2) do not exist. The freedom to provide services across the internal borders of the Community under the legal conditions of the State in which programmes are broadcast would be replaced by the obligation to make use of the right of establishment laid down in the EEC Treaty and, on the basis of these rules, to also comply with the law concerning the rights of aliens of the State in which the provider of the service is established. This would be incompatible with Articles 59 and 62.

This conclusion is in keeping with the case law established by the Court of Justice. The Court has been asked in two cases whether a Member State should be able to require the person providing the service to have an habitual residence in this State in order to be able to be covered by its professional rules relating to organization, qualifications, professional ethics, supervision and liability. In the van Binsbergen case, a Dutch legal adviser had transferred his residence from the Netherlands to Belgium in the course of a case and was prevented from acting in the case on those grounds.[1] In the Coenen case, a Dutch insurance broker residing in Belgium, on the other hand, appealed against the ban imposed on him from exercising his profession in the Netherlands despite the fact that he had an office there.[2]

The Court stated that the condition of permanent establishment for professional purposes itself may, according to the circumstances, have the result of depriving Article 59 of any effect.[3] On the other hand this requirement could by way of exception be considered compatible

[1] Van Binsbergen at 1307 and 1308, grounds 2, 3, 4 and 5.
[2] Coenen at 1554, grounds 2, 3 and 5.
[3] Van Binsbergen at 1309, ground 11; Coenen at 1554, ground 6.

with Articles 59 and 60 if it is objectively justified by the need to ensure observance of or to prevent circumvention of professional rules of conduct justified by the general good.[1]

The Court accepted such a requirement of residence but only "within the territory of the State in which the service is to be provided",[2] i.e. in which the activity in question is exercised. In the cases quoted the service was provided in the State in which the beneficiaries of the service resided. The persons providing the service carried out their activities temporarily, in the van Binsbergen case, and habitually, in the Coenen case on this territory, for the purposes of providing these services. In the van Binsbergen case the third paragraph of Article 60 (Section I 2) applied. In the Coenen case this provision applied not because a permanent office was maintained in the country of the beneficiaries but because this was a case of establishment.

The Court has thus allowed Member States to make the provision of services conditional by way of exception on a residence requirement but solely in cases where the services in question have been provided on their territory by virtue of activities pursued there, i.e. on the grounds that the territories of the two countries are concerned, to impose an establishment injunction on a foreigner resident in another country which restricts or abolishes his freedom to provide services in another country.

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[1] Van Binsbergen at 1309, grounds 12, 13, 14; Coenen at 1555, grounds 9 and 12. The more recent decision by the Court of 10 February 1982 (Case No 76/81 Transporoute (1982) at 417, 427-428, ground 14) shows that these are very rare exceptions. In this case the principle of the freedom to provide services in respect of public work contracts is affirmed and the "scheme of the Treaty provisions concerning the provision of services" is defined as follows: "to make the provision of services in one Member State by a contractor established in another Member State conditional upon the possession of an establishment permit in the first State would be to deprive Article 59 of the Treaty of all effectiveness the purpose of that Article being precisely to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided".

[2] Van Binsbergen at 1309, grounds 10, 11, 12, 13 (the Court mentions this requirement five times); Coenen at 1554, grounds 6 and 7; at 1555, grounds 9, 10, 11 (this clause is repeated six times in the grounds).

The situation is quite different as regards the broadcasting of cross-frontier radio and television programmes in other countries. This service is not provided in the country of the national receiver - listener or viewer - but in the country of the person providing the service - the broadcaster. The latter does not exercise his activities for the purpose of providing his service - the broadcasting of programmes - temporarily in the country of the national receiver. This is hence not a situation somewhere between the freedom to provide services and establishment but a simple case of the movement of services across frontiers where the person providing the services has not changed his place of residence.

The fundamental difference between the Community rules on establishment and those on the freedom to provide services is evident here. This difference is as follows: an independent operator who has set up in another Member State to that of his own is, by virtue of this act, also subject to the law of the country in which he has settled and this country may apply the same conditions to him as those it applies to its own citizens whereas the person providing a service continues to be subject to the law of the Member State in which he is resident, in which he provides his service and in which sole country he carried out his activities and consequently is not subject to the rules concerning the exercise of activities of the Member States in which there are also beneficiaries of the service he provides. If this were not so, the freedom to provide services within the Community would be reduced to the various national possibilities offered - if at all - by the right of establishment in each Member State and would hence be little more than an illusion. The right of establishment and the freedom to provide services are complementary, i.e. they both contribute to the establishment of the common market for independent activities. They have different functions in the integration of the Member States into a Community. They complement rather than preclude each other.

On all these grounds radio and television companies of other Member States which broadcast programmes which can be received in a country are not required by the legislator of that country to be established in that country so as to be made subject to the provisions of its national radio and television law - particularly as regards programme requirements. Only if the branch in the country concerned receives the programmes of its parent company and rebroadcasts or redistributes them by cable may national radio and television law apply, i.e. make the branch and its foreign programmes subject to its provisions where its application is justified by the general good (see Section VI).

5. Authorization in a country?

The foregoing also applies mutatis mutandis to the extension of an authorization procedure for national radio and television companies to broadcasters residing in another Member State which broadcast programmes in this Member State because or if these can also be received in the country in question. Such a requirement would be incompatible with Articles 59 and 62.

Here too this is in keeping with case law. The Webb case[1] revolved around the issue whether Article 59 precludes a Member State which requires a licence for the provision of manpower from making a company established in another Member State hold a licence for the provision of manpower on the territory of the first Member State. The Court rules that it did not, subject to a number of reservations, but clearly repeated, as it had done in the van Binsbergen and Coenen cases, that a licence could be required by the Member State "in which the service is to be provided"[2] and in which the person providing the service temporarily exercised his activities for the purposes of providing his services (Article 60, third paragraph).[3] What has already been said in relation to the van Binsbergen and Coenen cases (see Section 4) also applies to this judgment.

VI. National general interest and retransmission of programmes from other countries

Sections V and III 3 c explained that Articles 59 and 62 preclude imposing the national prohibitions and injunctions applied to broadcasting stations and programmes at home on broadcasting stations and programmes from other countries even on grounds of the national general interest. Even this type of exceptional extension of national broadcasting legislation to stations in other Member States and/or to programmes which foreign stations broadcast in their own country conflicts with the Debauve judgment and with the freedom of broadcasting within the Community derived from Article 10 of the ECHR. Nor is it in keeping with the legislation and practice in the Member States. Instead in the Debauve case the Court of Justice interpreted Articles 59 and 62 as allowing the authorities to enforce only those national provisions which apply to the citizens of the Member State concerned, govern the retransmission of broadcasts from abroad in that Member State and are justified by the general interest.

Where this is the case that leaves the question, therefore, of the substantive scope of this exemption, established by case law, from the prohibition on restricting the freedom of broadcasting (see Articles 59 and 62). More precisely: what action may Member States take under the Community legal system in respect of persons who exercise their freedom to provide services - one of the freedoms safeguarded by Community legislation - by receiving broadcasts from other Member States and

[1] Webb at 3305 (3309). See also van Wesemael at 52, grounds 29, 54 and 39.
[2] Webb at 3325, grounds 19, 20, 21.
[3] Webb at 3321, ground 5; at 3323, ground 12; at 3325, grounds 17, 19, 21.

retransmitting them unchanged at the same time (see Section A II 2 and 3), in other words who help foreign broadcasters exercise their right to provide their service not only to those viewers and listeners in frontier regions who can pick them up directly?

1. Applicability of national rules "justified by the general interest" on programmes or on the protection of youth and of reputation

No matter what the content of the programmes broadcasting is a service within the meaning of the EEC Treaty (see Article 60(1) and Section A I), and Articles 59 and 62 confer the freedom to provide services. Accordingly, it is both admissible and desirable to broadcast programmes across national frontiers - irrespective of whether they are intended primarily for home or foreign audiences. Since freedom of broadcasting is one form of the freedom to provide services guaranteed by the EEC Treaty there is no need to justify moves to exercise it; instead, the justification is required for the Member States' plans or provisions to restrict it. The only question is whether the restrictions imposed on Community-wide broadcasting, if any, are themselves admissible.

Thought must therefore be given to the implications which this reserved right to apply provisions justified by the general interest has both for the national broadcasting legislation and for the demands made on programmes. After all, the Debauve judgment empowers the Member States to invoke general interest at the cost of freedom to provide services as a general rule not only in connection with advertising broadcasts.[1]

(a) Basic principles of case law on which the interpretation is based

This section is based closely on the case law which the Court of Justice has established in respect of restrictions imposed on the freedom to provide services by rules adopted on grounds of general interest and applied indiscriminately to nationals and foreigners and of restrictions placed on the free movement of persons and on their right of establishment by providing for special treatment for foreign nationals on grounds of public policy, public security or public health (Article 56(1); see also Section B III 1 - though no further reference is made to the judgments cited in this Section here). The following broad lines have emerged:

Since the general good justifies exceptions from one of the "fundamental principles of the Treaty"[2] the concept must be interpreted strictly.

For the same reason it cannot be left to each Member State to decide the scope of the term for itself without review by Community institutions. Of course, it is for the Member States to assess the legitimate requirements of the general interest on their territory, applying their

[1] Debauve at 856, ground 12.
[2] Webb at 3325, ground 17.

own political, legal, social and cultural standards. However, Community case law restricts their right to exercise this freedom of discretion - in the case in point, in matters concerning retransmission of broadcasts from other Member States: any decision which they take to invoke the general interest criterion must also be "justified" from the viewpoint of Community law.[1]

When is this the case? The justification clause has both formal and substantive implications.

Formally, according to the established case law it implies that the reservation concerning general interest entitles Member States to impose only those restrictions which are in keeping with the requirements of the law, and of Community law in particular, on their own citizens and on nationals of other Member States.

Given the requirement that justification must be given for any interference at national level with the freedom to provide services, the criterion of proportionality must be applied to identify excessive, and hence unjustified, restrictions of the freedom of broadcasting and to maintain the prohibition imposed on them by Articles 59 and 62. The Debauve judgment sets out from the premise that this principle applies equally to broadcasting.[2]

In line with this proportionality criterion the rights of the individual - in this case his freedom to receive and retransmit broadcasts from other countries - may not be restricted more than necessary to achieve the objectives sought. The disadvantages for the individual must be in reasonable proportion to the advantages for the general public. Proportionality implies that the methods used - in this case the rule restricting freedom - are an appropriate means of attaining the objective sought (principle of appropriateness)[3] and are essential in order to do so, in other words that the objective cannot be achieved by less restrictive means, i.e. by rules which impose less severe restrictions on freedom (principle of necessity, objective justification or prohibition of excess).[4] Consequently, this reserved right may not be applied to restrict these safeguarded freedoms to a degree out of proportion to the objectives sought and the means employed, and certainly not to abolish them. Both would be tantamount to abuse of this reserved right.

Substantively, the justification clause allows and calls for interpretation and application of the general interest criterion which respect the limits that the European Convention on Human Rights sets to interference with rights and freedoms enshrined in the Convention and equivalent to rights and freedoms conferred by Community law.

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[1] Seco v Evi at 236, ground 10, at 237, ground 15 and at 238, operative part.

[2] Debauve at 859, ground 22, at 859 and 860, operative part, para. 2,

[3] at 837 (left-hand column), 840, 841 and 847.

[4] Seco v Evi at 237, ground 14.

van Binsbergen at 1309, ground 14; Coenen at 1555, ground 9; van Wesemael, Follachio at 52 and 53, grounds 29 and 30.

In the context discussed in this paper the restrictions which Articles 59 and 66 impose on the Member States' powers to deal with broadcasting and telecommunications - which are now limited to reservations based on the national general interest - are one particular form of a general principle enshrined in Article 10(2) of the ECHR. Under Article 10(2) the freedoms conferred by Article 10(1) may be restricted only by law and to protect the interests listed in Article 10(2) and even then no further than necessary in a democratic society (see Section B III 1(c)).

Since Article 10 of the ECHR was already binding on five of the six Member States when the EEC Treaty was concluded and the Member States were neither willing to extend the rights reserved in Article 10(2) by the reservation concerning general interest implicit in Articles 59 and 62 of the EEC Treaty - bearing in mind that the Community is by far the closer association - nor able to without infringing the Convention, the limits placed on this reserved right by Article 10(2) of the ECHR still apply. It therefore follows that at most the interests listed in Article 10(2) and corresponding to that reserved right may be recognized as "grounds of general interest" by Community law. Similarly, provisions to safeguard them are "justified" only if they are necessary in a democratic society.

(b) Grounds of general interest

Article 10(2) of the ECHR lists the following possible justifications for restricting the free flow of information regardless of frontiers:

(i) national security;
(ii) territorial integrity;
(iii) public safety;
(iv) prevention of disorder;
(v) prevention of crime;
(vi) protection of health;
(vii) protection of morals;
(viii) protection of the reputation or rights of others;
(ix) prevention of the disclosure of information received in confidence;
(x) maintaining the authority and impartiality of the judiciary.

This list lays down in clear terms the maximum extent of "grounds of general interest" for the purposes of Community law, apart from the cases where the list refers to grounds of individual interest (protection of the reputation of rights of others). It is worth repeating that in the EEC Treaty the Member States were neither willing nor able to make it possible to subject the rights guaranteed by the Treaty to restrictions which went beyond those allowed by the ECHR and - de facto at least - therefore also curbed the corresponding freedoms conferred by the Convention.

Whether Community law can recognize non-discriminatory rules on transmissions, in the country concerned, of both domestic and foreign programmes as in the general interest depends on whether the rules include requirements designed to protect one or more of the interests listed in Article 10(2) of the ECHR. If so, the next step is to check whether there is any justification for applying the rule to retransmission of broadcasts from abroad as well (see Section C).

First, however, one must define precisely what constitutes each of these interests. Since they involve derogations from the principle of freedom of expression, they are interpreted narrowly.[1] The individual terms are interpreted not in accordance with their meaning within the country,[2] but "within the meaning of the Convention", i.e. autonomously.

Most of them are relatively clearly-defined, and hence easy to apply for legal purposes; consequently, no further comment appears necessary here. For instance, rules to protect the integrity of the State (see Part VI, Section B I, for examples) or on law and order (see loc. cit. for examples) clearly come under categories (i) to (v), those to safeguard public morality (see loc. cit. for examples) and youth (see Part VI, Section B II 1 for further details) under "protection of morals" and those to protect the moral rights of individuals (see Part VI, Section B I and III) under "protection of the reputation or rights of others".

The provisions on the protection of the owners of copyright and performers' rights may also come under "protection ... of the rights of others ",[3] as may provisions on the protection of the rights of consumers against misleading and deceptive practices in advertisements.[4]

In practice the key question is what does "prevention of disorder" mean. Similarly, in some unauthentic language versions the term for "public safety" could also be interpreted more broadly than intended by the wording of the authentic versions. However, any doubts can soon be dispelled by looking at the terms which are the only ones valid - namely, "public safety" (or "sûreté public") and "prevention of disorder" (or "à la défense de l'ordre"). It is perfectly clear from these that the security or order dealt with by police regulations or criminal law is what is meant. Article 10(2) of the ECHR avoids the broader concept "public policy" ("ordre public"), just as the official German translation avoids, say, "öffentliche Ordnung".

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[1] "The Court is faced ... with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted ..." European Court of Human Rights 26.4.1979 - Sunday Times - loc. cit., p. 30, before § 66, with further references.

[2] European Court of Human Rights, loc. cit., p. 24, § 55 with further references, and p. 27, § 60.

[3] See the arguments for and against in European Commission of Human Rights 15.12.1966 - Televizier v Netherlands 2690/65 - Yearbook of the European Convention on Human Rights 9 (1966) 512 (538, 540, 542). The question was not decided, because the application was withdrawn.

[4] See European Commission of Human Rights 5.5.1979 X v Sweden, loc. cit., p. 73.

For all these reasons enforcement of the national broadcasting legislation neither comes under Article 10(2) of the ECHR nor, hence, is one of those grounds of national general interest which justify interference with the freedom guaranteed by Community law to broadcast from other Member States and with the retransmission of broadcasts from other countries on the national network. The same applies to specific requirements such as the public, public-law or non-commercial character of broadcasting, its public service nature, its public role, its internal structure, its function in helping to form public opinion, its capacity to integrate its viewers and listeners into the State and the general provisions governing programmes (see also (d)).

There are a number of other reasons for this conclusion. First, audiences can readily recognize broadcasts from other countries as such; hence the impact of foreign broadcasts as a factor in forming public opinion can be kept within limits, even if they are received and retransmitted in the language(s) of the country concerned.

Another reason is that this mutual exchange and interpenetration of cultures is inherent in the free movement of workers and of the self-employed which has already become established within the Community. These rights guaranteed by Community law preclude placing restrictions motivated purely by broadcasting policy on the retransmission of broadcasts from other Member States.

Above all, though, restrictions on the grounds of broadcasting policy would hit at the heart and foundation of the rights and freedoms conferred by Article 10(1) of the ECHR and by Articles 59 and 62 of the EEC Treaty. For these rights and freedoms could no longer be exercised to the full extent allowed and intended by the broadcasting legislation of the country of transmission. As a result the programmes would lose at least part of their unique foreign character. Freedoms which transcend national frontiers would be distorted into obligations to comply with the programming requirements laid down by the broadcasting legislation of the country concerned which, in many cases, would make it impossible to exercise these freedoms at all. It therefore follows that the national general interest is not the same as the national broadcasting legislation. On the contrary, this, and any other, national legislation prevails only in the situations listed and only then where necessary in a democratic society.

Nor do either Article 10(2) of the ECHR or the reservation concerned general interest allowed by Community law admit economic reasons for restricting the freedom of broadcasting within the Community, and, hence, the rights and freedoms guaranteed by Article 10(1) of the ECHR - for example, rules applying indiscriminately to broadcasts from the country concerned and from other countries to maintain (a) the economic base of the national broadcasting services, (b) advertising and/or licence fee revenue in the country in which the programme is shown and (c) the economic and competitive structure of the national media (see Section B III 1 (a) and (c) in fine).

Overall, free flow of information across frontiers and freedom of broadcasting within the Community imply that the Member States' self-contained broadcasting systems must be opened up to each other as they stand, with each complementing and influencing the other. Accordingly, all-embracing grounds and judgments are insufficient justification for restricting the rights and freedoms conferred by Article 10(1) of the ECHR and Articles 59 and 62 of the EEC Treaty from the point of view of Article 10(2) of the ECHR and of the general interest criterion which must be applied and interpreted in the light of that Article. On the contrary,

these rights and freedoms are so fundamental that Article 10(2) of the ECHR instead specifies which interests in need of protection could possibly take precedence over them under certain circumstances.

(c) Justified rules

Even if a legal provision protects one of these interests - and hence one component of the general interest recognized by Community law - it remains to be seen whether there is any justification for applying it to retransmission of broadcasts from other Member States. The formal implications were discussed in Section (a).

Substantively, the restrictive measure must be "necessary in a democratic society" (see Article 10(2) of the ECHR). As the European Court of Human Rights has made clear,[1] the adjective "necessary" is not synonymous with "indispensable". Nor has it the flexibility of such expressions as "admissible", "usual", "useful", "reasonable" or "desirable". However, it does imply the existence of a "pressing social need".

In the Court's view, Article 10(2) of the Convention gave the Contracting States a power of appreciation. However, that power of appreciation was not unlimited. The Court was empowered to give the final ruling on whether a "restriction" was reconcilable with the freedom of expression protected by Article 10 of the Convention. The domestic margin of appreciation thus went hand in hand with a European supervision, which covered not only the basic legislation, but also the decision applying it, even one given by an independent court.

Such supervision was not limited to ascertaining whether a State had exercised its discretion reasonably, carefully and in good faith. Even a State so acting remained subject to the Court's control as regards the compatibility of its conduct with the engagements it had undertaken under the Convention.

"It is 'necessity' in terms of the Convention which the Court has to assess, its role being to review the conformity of national acts with the standards of that instrument."[2] Such standards

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[1] European Court of Human Rights 7.12.1976 - Handyside - loc. cit. p. 22 § 48, p. 23, §§ 49, 50; European Court of Human Rights 26.4.1979 - Sunday Times loc. cit. p. 26, § 59.

[2] European Court of Human Rights 26.4.1979 - Sunday Times - loc. cit. p. 27, § 60.

included whether, in the light of all the circumstances of the case, the relevant "interference" (second sentence of Article 10(1) of the Convention) in freedom of expression corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", and whether the reasons given by the national authorities to justify the "interference" were "relevant and sufficient under Article 10(2)", particularly in view of the task of the media to impart information and ideas and the right and interest of the public to receive them. It was therefore not sufficient that the "interference" involved belonged to that class of exceptions listed in Article 10(2) which had been invoked by the State in question.[1]

Thus, the authorities in the Member States and in the Community are provided with the principles and criteria on the basis of which they can assess and must decide whether or not it is "justified" in terms of Community law for a national provision which has been or is to be adopted for the protection of a general interest recognized in accordance with Community law ((b) above and (d) below)) to be extended to apply to the distribution of broadcasts from other Member States.

In view of these pronouncements, the argument that the rule applies equally to domestic programmes is not adequate justification for applying a rule adopted on grounds of the general interest recognized by Community law to the retransmission of programmes from abroad. For the purposes of Community law the fact that requirements such as this apply equally to national broadcasts and to broadcasts from other countries is not in itself justification for imposing them on broadcasts from other countries or proof that they are necessary in a democratic society. For this the programmes would have to be directed specifically against one or more of the legal rights which Article 10(2) of the ECHR lists as worthy of protection at international level. Only programmes which pose a threat to public safety, order, health or morals in the country concerned can be considered in this category.

"In a democratic society" means that the restriction on freedom must be necessary not only in a specific state or democracy, but in a free society in general. Although one's own society may be taken as the starting point, it is not the only yardstick. The true standard is the society understood by the Council of Europe institutions set up to apply and protect human rights. It therefore follows that the European rights and freedoms conferred by Article 10(1) of the ECHR and the Community rights and freedoms derived from them cannot be changed back into national rights and freedoms by imposing the restrictions allowed by Article 10(2) and by applying the general interest criterion derived from that Article. For these restrictions are in turn limited by two reservations - what is "necessary" in "a" European democratic society - and are hence bound by the principle of proportionality.

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[1] European Court of Human Rights 7.12.1976 - Handyside - loc. cit. pp. 22-24, §§ 48-50; European Court of Human Rights 26.4.1979 - Sunday Times - loc. cit. p. 27, § 62, pp. 29-30, § 65.

sufficiently serious risk to one of the fundamental interests of the company in the receiving country and if the restriction on the freedom of broadcasting is necessary in a democratic society and, as such, justified from the point of view of the Community and of the freedom to provide services which it embodies.

(d) Requirements as to the content of foreign programmes

The most important question in practice is whether rules concerning the content of programmes may also be imposed on foreign broadcasts as soon as they are rebroadcast within the country, so that the parts of the programme which infringe the rules must be deleted by the rebroadcaster.

First, it must again be emphasized that under Article 10(2) of the European Convention on Human Rights and the corresponding reservation under Community law which permits "rules ... justified by the general interest", the only restrictions or conditions which are permissible - and that by way of exception - are those "prescribed by law". Rules of inferior rank - such as regulations, administrative provisions, general contractual conditions, byelaws, internal directives, agreements between broadcasting organizations etc. - cannot rely on the reservation and hence cannot impose any restrictions on foreign programmes when these are rebroadcast within the country.

The residual possibility of imposing by law restrictions or conditions on programmes from other Member States which are to be rebroadcast within the country leaves scope for two groups of rules: those intended to protect a value recognized in Article 10(2) of the Human Rights Convention and those intended for other purposes.

The latter are not caught by the reservation in Article 10(2), nor by that of the "general interest" recognized by Community law, and thus cannot be applied to such foreign programmes. Examples of these requirements are those relating to the nature and quality of programmes (e.g. information, entertainment, education; high quality entertainment), to the orientation of programmes (e.g. impartiality, representation of a particular tendency in society), to the reliability of information (e.g. prior examination of source, content and accuracy), to the programmes available generally from a broadcasting organization (e.g. minimum requirements as regards the expression of different opinions or the balance of programmes). Rules concerning broadcasting time and breaks also fall into this group.

Rules made to protect the values mentioned in Article 10(2) of the Convention include the special rules (some of them specific to the media) designed for the protection of the young and rules concerning the right of reply (see below, Part Six, B II.1 and III.1). They also include a certain number of provisions of general law - frequently criminal law - concerning state security, peace and order, public morals in sexual matters and aspects of individual personality such as reputation, privacy, the right to one's own portrait (some examples of these situatio are given in Part Six under B.1).

If a national legislature were to venture to extend such rules to foreign programmes to be rebroadcast within the country, it would not only have to consider whether this was permissible under its own law - especially constitutional law - but also whether it was justified under the law of the Human Rights Convention (reservation in Article 10(2)) and Community law (reservation of the general interest). In this context Community law, as already explained, imposes on the Member States at least the same limitations on restriction of the freedom to provide broadcasting services as the Convention imposes on restriction of the free flow of information regardless of frontiers. In case of doubt, it is highly desirable that the legislature should authorize or permit[1] exceptions, in the case of foreign programmes relayed within the country, from the requirements imposed on national programmes.

2. Approximation of the law on broadcasting

(a) Approximation of laws and freedom to provide services

Could and should these problems, and the other problems discussed under heading 1, be solved by means of approximation of laws? It is impossible to answer this question in general terms.

If a specific rule infringes Article 59 or 62, it is no longer applicable and must be repealed. Such a rule can neither be maintained pending approximation of the relevant provisions nor be legalized by being incorporated in a directive concerned with approximation.

Where on the other hand a rule has been made on a ground recognized by Community law as justified in the general interest within the country (1(b) above), its application is also justified under Community law (1(c) above), and different rules exist in other Member States so that freedom to provide services is impossible or restricted, there is a need for approximation under Article 57(2) so as to attain this freedom. By thus opening up the national arrangements to create a uniform legal situation throughout the Community, a common market in this sector must be created.

Articles 59 and 62 on the one hand (quoted at the beginning of B) and Article 57(2) on the other hand (quoted in C IV 2(b)) are aimed at different objectives. The two first-mentioned articles are intended, apart from precisely defined exceptions (applicability of special rules for foreign nationals under Article 56(1) and of rules justified by the general interest and applicable without discrimination to nationals and non-nationals alike) to eliminate all discriminatory and all indiscriminately restrictive rules. Article 57(2) however is based on the general objective,

[1] See for example Section 85(1) of the new French Act and the explanations thereon given by the Minister for Communications in TF 1, loc. cit. (Part Four, under G, footnote 2) 137.

by approximating the legal and administrative provisions of the Member States, "to make it easier for persons to take up and pursue activities as self-employed persons" (Article 57) and thus to lessen the obstacles arising from the differences between these rules.

In so far, then, as freedom to provide services on the basis of Articles 59 and 62 has been attained or can be attained, there is no need for a Directive based on Article 57(2), but rather for a harmonization of the rules justified by the general interest, and thus not requiring repeal, in order to make it possible in this sphere also to pursue the freedom to provide services within a framework of common rules.

More than this, Article 57(2), worded as it is with great clarity, seeks to attain more far-reaching objectives of the Treaty beyond the freedom to provide services within the meaning of Articles 59 and 62, namely the establishment of a common market or the creation of legal conditions for the individual activities of self-employed persons corresponding to those of an internal market. This approximation therefore comprises not only the rules justified on grounds of the general interest but also the remaining "provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons" (Article 57(2) which apply indiscriminately to nationals and non-nationals alike.

The opening up of the national markets thus falls (when no reservation is applicable) within the prohibitions and obligations imposed by the Treaty, whilst their merger into a single market (and the abolition or restriction of the reservations) is a matter for the approximation of laws. The latter is based on Article 57(2), except for the approximation of the special arrangements mentioned in B III 1 for foreign nationals which are based on grounds of public order, public security or public health. This coordination must be undertaken on the basis of Article 56(2) (see B III 2).

(b) Rules for the protection of public security, public policy and morals

Member States' rules for the protection of state security, peace and order, public morals and youth are, as explained above (1(b) and (c)), among those which may even under Community law be applied to foreign broadcasts to be relayed within the country, on grounds "justified by the general interest". If such rules differ from one Member State to another and hence the standards imposed on a broadcast likewise differ, these differences can lead to restrictions on freedom to provide services in connection with broadcasting (obstacles, deletions, intervention by the courts, etc.).

However, an approximation of most of these rules is not desirable for several reasons, discussed in Part Six under B I. Probably the most important is the limited practical importance of these rules for broadcasting and television.

One exception to this should be the law on the protection of the young from broadcasts which can be harmful for the moral and spiritual well-being of children and young people (see Part Six, B II).

(c) Rules concerning programmes

Rules imposing general requirements on programmes do not fall under the reservation of general interest recognized by Community law (1(b) and (d) above). Where they are applied to foreign broadcasts to be relayed within the country, and thus restrict freedom of broadcasting, they are caught by the prohibitions in Articles 59 and 62. The elimination of such restrictions is not a matter for approximation of laws but rather a matter of applying the EEC Treaty.

Quite apart from any such infringements of the Treaty however an approximation of the rules on broadcasting - especially as regards the content of programmes - is already possible, and in the long term necessary, in order to make such activities "easier" (Article 57(2)) and to achieve a common market for broadcasting. The question is not whether this objective of the EEC Treaty must be attained, but when and at what stage of integration.

In the sphere of broadcasting, as in others, the Commission recommends a gradual approach and intends therefore at present simply to circulate proposals on the approximation of the law on broadcast advertising (above, IV 2 and below, Part Six A), of the law on the protection of the young in connection with broadcasting (above, (a) and Part Six B II), of the law on the right of reply (above, (a) and Part Six B III), and of the law of copyright in relation to broadcasting (below, VII and Part Six C).

A new situation would arise however if the reservation permitting the application of rules justified by the general interest were to be more broadly interpreted than is suggested in this Green Paper. The primary concern here has been to interpret this reservation with due regard to the special importance of the freedoms at stake, namely those of the provision of services or the free movement of broadcasting and of the free flow of information regardless of frontiers.

In the view of the Commission a provision which, like that of Articles 59 and 62, confers a fundamental right on persons protected by Community law and also creates an institutional freedom, i.e. an objective formative principle of the common market, would at the end of the day be worthless if at the same time it gave Member States a practically unconditional reservation, a virtually boundless freedom to impose restrictions. In that case the freedom originally granted can be taken away. The right becomes an empty shell. The question of how far the Treaty and the Community institutions can fulfil their task of protecting and developing European fundamental rights, and with them a Community-wide democracy, depends on where the boundaries are drawn between the commitment to the freedoms enshrined in the Treaty and the power to restrict them unilaterally.

For this reason the Commission, in interpreting the reservation, has drawn primarily on the Court's decisions on freedom of movement of workers and of self-employed persons, especially those on Article 56(1) (above, B II 1 (a) and (b)). It has not attempted to extend the broad interpretation of the reservation given by the Court in Debauve, in connection with the law on the broadcasting of advertisements, to other aspects of broadcasting law, particularly where this would involve giving priority to national requirements on the content of programmes over the principle of freedom of broadcasting within the Community and the free flow of information across frontiers.

The consequence of a broad interpretation of the reservation would be the same as that recognized by the Court in Debauve in connection with the law on broadcast advertising:[1] the approximation of the law on programmes would be necessary. Just as the relay of foreign advertisements within a state can, until the rules on advertising are harmonized, be subjected to domestic arrangements and thus prohibited or restricted, so the relay of other foreign broadcasts (particularly information, opinions, ideas, entertainment, art, education, sport) which do not comply with rules similar to the domestic programme rules can be prevented or impeded until this part also of the law on broadcasting is harmonized. Experience teaches us that this would take many years and would not easily come about. The free provision of these services also and the free flow of this information (in the widest sense) would be made subject to the reservation of a prior approximation of the national rules of law and would thus for a long time be largely meaningless.

For several reasons it appears to the Commission that there are no convincing grounds for extending the treatment of advertising to the law on the content of programmes.

The primary object of commercial advertising is to encourage the production, marketing and sale of goods (or services). Other types of broadcasting are concerned with the furtherance of social or cultural interests. Admittedly Article 10(1) of the European Convention on Human Rights extends also to the free flow of advertising; but this enjoys a lesser degree of protection than other ideas, information and opinions. The broadcasting of advertisements involves the use of the freedom of information for commercial ends; this does not appear to merit the same degree of protection or to be so important for democracy as the protection of programmes with a social and cultural content.

The broadcasting of advertisements, where it is permitted, is a direct source of revenue for the broadcasting organization, whilst other forms of broadcasting (apart from Pay TV) are not. If, therefore, broadcasting coming from abroad is not subject to similar conditions as regards quantity, quality and timing to those applicable within the country, but is subject to substantially more liberal principles, this could lead to a deflection of advertising to foreign broadcasting organizations and thus to a reduction in the income of domestic broadcasting organizations. The terms of their competition with the foreign broadcasting organizations would be distorted by the differences in the law.

[1] Debauve at 856, ground 13, and at 857, ground 15.

Such a partial shift of advertising over to foreign stations could, in certain circumstances, also have financial repercussions on the national press. National restrictions on advertising by broadcasting stations also serve to maintain the financial base of the press, the major part of which comes from advertising.

Finally, national bans and restrictions on radio and television advertising are to protect the audience - either from advertising altogether or from advertising for certain products, or again from a so-called "commercialization" of programmes because of the extent, timing and target area of advertising.

The considerations governing the legal requirements for other broadcasts are quite different. It is not a matter of assessing the commercial interests of the advertising world, the financial interests of the broadcasting organizations and of the state as well as the financial and cultural interests of the audience (as consumer, as subscriber, as listener and as spectator). It is rather a matter of formulating important fundamental rights and their inter-relationship.

In a Community which provides and guarantees fundamental European rights to freedom and equality in addition to the national rights, it is important that the two liberal systems should not work against each other but rather complement each other. More precisely, this means, in the field of radio and television, that the national set-ups regarding cable broadcasting should be open to one another but also that the Community should respect their individual identities. This implies on the one hand particular restraint where harmonization of the law on radio and television programmes is concerned and, on the other hand, understanding for national provisos, which suppress only in exceptional cases freedom to broadcast and disseminate information, in the name of the particular national system, so that it is no longer urgent to carry out harmonization. The idea under Articles 59 and 62 of the Treaty, together with Article 10 of the European Convention on Human Rights, is to provide cross-frontier broadcasts and flow of information and, precisely, to keep foreign programmes independent from the receiving state's own system.

Harmonization of the general provisions on programme content (programme control and limitation) might also damage the expression and dissemination of the range of political, constitutional and cultural material in the Community. Part of this variety is also the differing view of national fundamental rights and the consequent provisions on programmes. Such developments should not be interfered with as long as the Member States are demonstrating a growing preparedness to accept the risk inherent in free broadcasting and flow of information and do not take refuge in a policy of reservations about the national redistribution of foreign broadcasts from other Member States.

(d) Applicability of Article 57(2)

Since the grounds for applying these provisions to the harmonization of radio and television advertising law (see IV.2(b) and (c) above) have already been stated, it remains to be seen whether Article 57(2) can also act as the legal basis for the harmonization of other radio and television law as well as, if necessary, telecommunications law.

In Article 57(2) provision is made for the "coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons".

Either natural or legal persons may engage in the broadcasting of radio and television programmes and they do so in all the Member States. This is, therefore, a business activity, an independent activity. Just as there are numerous occupations or progressions in broadcasting (radio and television) that all benefit (as being for employed persons) from the provisions on freedom of establishment and freedom to provide services (inasmuch as they can engage in activities as self-employed persons)[1], there is also the activity in the Member States that involves setting up and/or running an independent broadcasting station which designs, produces and broadcasts programmes or takes over and relays programmes from other stations.

From the Community's point of view it is immaterial whether radio and television broadcasting is seen as a profession, a service industry, a public function or a public service; suffice it that, under Article 57(2), it is an activity that can be or is taken up and/or exercised by a self-employed person.

Since this activity, by its very nature, must not necessarily be reserved for the state and is in fact not so reserved but is in many cases handed over to an institution set up by law, which then exercises it independently, it remains within the scope of Article 57(2) as not being a state occupation. Moreover, for the purposes of applying this Article, it does not matter how important the independent activity is for the state, for the general public, for forming public opinion, for political parties, specific groups or individuals.

Neither does it matter very much what kind of independent activity is being exercised or what is involved, whether it is in itself of a commercial nature of deals with economic matters. This is confirmed in the second sentence of Article 57(2) and in Article 57(3), which refers explicitly to the need to harmonize provisions on health-related activities.

Under the EEC Treaty, the freedom of Europe is also granted to anyone exercising an intellectual/cultural activity - particularly of an artistic, literary, journalistic or educational nature - and with it comes freedom of establishment and the free movement of the services provided by such persons, provided they are self-employed. Therefore, it is of no consequence whether an activity is exercised in the sphere of economics, law or technology or is concerned with society (e.g. education, health, sport, entertainment, leisure activities) or intellectual pursuits (culture, art, science, research). For example, independently operating undertakings are included, such as those which put on plays, operas, concerts or films or which run a publishing house, a periodical, newspaper, news agency or illustrated magazine.

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[1] For example: programme assistants/editors, reporters, speakers, script writers, composers, conductors, musicians, singers, actors, playwrights, directors, camermen, cutters, sound engineers, film engineers, programme managers or managers of technical departments, studio managers, programme directors, general managers or directors general.

In fact the EEC Treaty does not state whether the independent activity has to be a trade, commerce, craft or any other form of activity, independent or otherwise. The main point is whether it constitutes a service "normally provided for remuneration" (Article 60(1)). It has already been amply demonstrated in section A.I.2 that this is the case where radio and television is concerned.

For these reasons Article 57(2) cannot be applied solely to the sphere of radio and television advertising. It encompasses rather everything that has anything to do with the activities of a radio and television broadcasting organization.

The Member States' legislation on radio and telecommunications forms part of the provisions that govern "the taking up and pursuit of activities as self-employed persons" (Article 57(2)). For they govern how and whether radio and television stations operate. They confer right of control and licensing. They set personal, professional, organizational and technical standards for the radio and television company or companies and their actions. They set out the terms for the establishment and operation of radio and television undertakings.

This Green Paper deals first and foremost with the provisions on the pursuit of radio and television activities. From the summary of the Member States' legislation on radio and television (Part Four) it can be seen, however, that the provisions on the taking up of these activities (establishment of organizations, granting of monopolies, acceptance, legal form, aims, structure, organization, responsibility, financing, etc.) also differ considerably and, in some cases, reveal substantial differences in conception and system.

Nevertheless, the Commission is not intending to become involved in a harmonization process for the time being. The first step to be taken seems to be to achieve the free movement of broadcasts and information without regard to intra-Community frontiers, especially in the spheres of satellite and cable television. This step is concerned with the pursuit and not the taking up of broadcasting activity. Not until the provisions on right of establishment for broadcasting stations are made more flexible - for which Article 57(2) is of use as well as for ensuring freedom to provide services - will the harmonization of some provisions on the taking up of broadcasting activities become essential. In the Commission's opinion, this should be the second step towards achieving the framework legislation demanded by Parliament. It is difficult to carry through before or at the same time as the first step. This would be asking too much of both the Member States and the Community.

It must not be forgotten in this context that Article 57(2) not only provides for the harmonization of the provisions covered by it but also dictates such harmonization. For the wording is in the coloured future tense ("the Council shall ... on a proposal from the Commission and after consulting the Assembly, issue directives ..."), which is the legal imperative - it must issue. Therefore, the Community institutions may not exercise their discretion as to whether there should be harmonization but only as to when and how, and how far it should go.

VII. National copyright and foreign broadcasts

Free movement of broadcasting services in the Community is restricted not only by the broadcasting laws - especially the provisions on advertising and programme content - and telecommunications legislation (see B. I, Part One B. III, IV above) but also by copyright. The situation in this area is described in Part Six under C. I and II.

Whether harmonization of the copyright legislation preventing or hindering the free movement of broadcasts is admissible, necessary and urgent depends - as with advertising and programme rights - first and foremost on whether such copyright restrictions on the provision of services are already covered by the interdiction of Articles 59 and 62 and are hence removed or not. In the latter case, only harmonization of these provisions can make free movement of broadcasts possible within the Community.

1. Applicability of national provisions based on literary and artistic property rights

In the Coditel v Ciné Vog case, the Court had to decide "whether Articles 59 and 60 of the Treaty prohibit an assignment, limited to the territory of a Member State, of the copyright in a film, in view of the fact that a series of such assignments might result in the partitioning of the Common Market as regards the undertaking of economic activity in the film industry."[1]

The Commission said that they did (see II.3. above). In its view, protection of the subject-matter of the specific performing right (concerning the simultaneous retransmission by cable of the original broadcast) does not require that the owner of that right should have a right to give his authorization, with the result that he can prohibit retransmission. As the owner has consented to the initial broadcast, his legitimate interest may be regarded as satisfied if national law entitles him to receive fair remuneration from the cable diffusion company which made the simultaneous retransmission. The Commission came to this middle-of-the-road conclusion on the basis of a comparative analysis of the very different legal situations in the individual Member States, in the United States and according to the Berne Convention.[2] The Commission had even raised the question as to whether this state of national copyright law must be accepted without more ado or whether the Community should take steps to harmonize.[3]

The Court did not follow the Commission and answered in the negative, as follows:[4] "Whilst Article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass

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[1] Coditel v Ciné Vog at 902, ground 11.
[2] Coditel v Ciné Vog at 894-896.
[3] Coditel v Ciné Vog at 897.
[4] Coditel v Ciné Vog at 903, grounds 15 and 16.

limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. ... The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard."

When dealing with the provisions on the protection of intellectual property, we are not concerned with provisions made in the general interest as we were with the restrictions on advertising. The Court bases its restrictive interpretation of Article 59 and 62 on legal and economic considerations.[1] Firstly "the fact that the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work" and "that the exploitation of copyright in films and the fees attaching thereto cannot be regulated without regard being had to the possibility of television broadcasts of those films".

Thus, the Court recognized that there was a proviso regarding the applicability of legislation on the provision of services, which was based on the concept of literary and artistic property. This possibility for restricting freedom to provide services, which is not explicitly provided for in the Treaty, corresponds to the possibility offered in the first sentence of Article 36 of restricting the free movement of goods "justified on grounds of ... the protection of industrial and commercial property". According to the judgment, a restriction is justified in the sense of the first sentence of Article 36, as with the legal proviso about performing rights, when it forms part of the "specific subject-matter", "essential function" or the existence of the intellectual right. A restriction can be unjustified when it affects the "exercise" of the intellectual right. It depends on the circumstances of the case in question.

In clarification of Coditel I, the Coditel v Ciné Vog II Decision[2] contains the explanation that Article 36 concerns restrictions on the free movement of goods whereas here we "are concerned with the question of prohibitions or restrictions placed upon the free movement of services". Nevertheless, "the distinction, implicit in Article 36, between the existence of a right conferred by the legislation of a Member State in regard to the protection of artistic and intellectual property, which cannot be affected by the provisions of the Treaty, and the exercise of such right, which might constitute a disguised restriction on trade between Member States, also applies where that right is exercised in the context of the movement of services". It is "conceivable that certain aspects of the manner in which the right is exercised may prove to be incompatible with Articles 59 and 60...".

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[1] Coditel v Ciné Vog at 903, ground 14.

[2] Case 262/81 / 1982 / ECR 3381 Coditel v Ciné Vog II (3400, ground 10; grounds 13 and 14).

In quoting this last sentence the Court refers back to the restriction or limit of the proviso in Coditel I, namely "save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States." This is in accordance with the second sentence of Article 36.

2. Harmonization of copyright for radio and television

The effect of the Coditel I Decision on copyright in respect of radio and television broadcasts is the same as the effect of the Debauve judgment on radio and television advertising - despite Articles 59 and 62 the respective restrictions may be maintained basically. Hence, the free movement of numerous broadcasting services has been postponed - in both the sets of circumstances in point - until a solution is found by harmonizing the different provisions. Only thus will it be possible to build up a Common Market for radio and television broadcasts. Just where the problems and differences lie is set out in Part Six (C.I, II) as well as why and in which fields harmonization appears necessary (C. II, III) and what solution the Commission proposes (C.IV).

3. Applicability of Article 57(2)

The directive on the harmonization of the Member States' copyright provisions relating to the pursuit of broadcasting activities could and should be based on Article 57(2). The question then is whether we are dealing with "provisions ... concerning the ... pursuit of activities as self-employed persons" - here radio and television broadcasting.

Copyright is a general prerequisite for the freedom to pursue the activity protected by it. However, copyright is generally understood to incorporate special rules governing radio and television activities.[1] These provisions govern important soecial conditions for the exercise of the activity of a radio and television broadcasting organization. In the Commission's view (Part Six, C.IV.) we are concerned with a subdivision of these provisions, namely the retransmission of cross-frontier radio and television broadcasts by cable companies. Such transmission or exploitation of works protected by copyright - as well as their broadcasting by radio and television stations - forms part and parcel of the pursuit of an independent activity by such companies, as do their other activities. For this reason, the copyright provisions specific to radio and television must also be included in the provisions governing the pursuit of broadcasting as an independent activity. Hence they come under Article 57(2).

[1] Expertenkommission Neue Medien, loc. cit., p. 153.

Furthermore, Article 57(2) must not be construed too narrowly, but must be interpreted in the light of its objective, which is "to make it easier for persons to take up and pursue activities as self-employed persons." In accordance with the established practice of the Commission, Parliament and the Council in areas such as insurance, banking and savings banks, the provision also includes the coordination of sectoral rules and regulations governing legal conditions for exercising competition within the individual areas in which people pursue activities as self-employed persons, and coordination of the protective provisions prescribed for self-employed persons in their own interests and in the interests of others. These include the abovementioned broadcasting copyright provisions.

D. Direct effect of freedom to provide services

Article 59(1) does not contain merely an instruction to the Community organs and the Member States to abolish restrictions on the freedom to provide international broadcasts in the Community, i.e. an institutional guarantee of radio and television broadcasting throughout the Community as an objective principle of the Community constitution to be achieved by the exercise of sovereignty. It also protects this freedom as a subjective right of the individual against intervention by the authorities or third parties. The foreign provider of a service may therefore enforce his freedom to transmit programmes from his own Member State into other Member States before the authorities and courts of those States. The same right of the individual is accorded by Article 62, which forbids Member States to introduce any new restrictions on the freedom to provide broadcasting services.

This view, that Articles 59 and 62 have direct effect not only in relation to provisions which discriminate against foreign broadcasters or programmes but also in relation to provisions which treat nationals and non-nationals or domestic and foreign broadcasts alike, has already been expressed by the Commission in Debauve:[1] "Article 59 has direct effect in regard to all types of restriction which fall within the scope of that provision."

The reasons for this view were expressed by the Commission as follows:[2] "If the term 'restriction' in Article 59 covers restrictions other than mere discrimination on grounds of nationality or residence, there is no reason for refusing to recognize the direct effect of Article 59. In the van Binsbergen judgment, cited above, the Court attributed such direct effect to the first paragraph of Article 59 and the third paragraph of Article 60, 'at least in so far as they seek to abolish any discrimination ...,' which indicates that the Court, delivering judgment upon the facts of that case, merely refrained from saying any more than was necessary to enable the court making the reference to give its judgment, while leaving the way open for the discovery of other types of restriction falling within the scope of Article 59."

Mr Advocate-General Warner expressed the same view:[3] "The Court has held in at least three cases that that paragraph /Article 59(1)/ has direct effect 'at all events' in so far as it seeks to abolish any discrimination against a person providing a service by reason of his nationality or of his residence - a formula the use of which tends incidentally to confirm that Article 59 has also a wider purpose. I imagine that the Court used that formula in those cases in order to avoid having to go further than was

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1 /1980/ ECR 833, at 852.
2 Debauve, loc. cit.
3 Opinion in Debauve, at 873-874.

necessary for their solution. The three cases are the van Binsbergen case, the Walrave and Koch case and ... Donà ...[1] There are also cases the judgments in which would be difficult to reconcile with the view that the first paragraph of Article 59 had direct effect only to that limited extent: see in particular ... van Wesemael ....[2] I can see no ground upon which it could be held that the direct effect of that paragraph was so limited, nor was any such ground suggested by anyone who submitted observations to the Court in these cases [Debauve and Coditel v Ciné Vog]. I would therefore hold that the first paragraph of Article 59 had direct effect in all its aspects .... In my opinion, however, the extent of the direct effect of Article 62 and of the first paragraph of Article 59 must be the same."

In van Wesemael the Court explained the direct effect of Article 59(1) as follows, without distinguishing between restrictions discriminating against non-nationals and those applicable to nationals and non-nationals alike:[3] "In laying down that freedom to provide services shall be attained by the end of the transitional period, that provision, interpreted in the light of Article 8(7) of the Treaty, imposes an obligation to obtain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures. It follows that the essential requirements of Article 59 of the Treaty, which was to be implemented progressively during the transitional period by means of the directives referred to in Article 63, became directly and unconditionally applicable on the expiry of that period [on 1 January 1970]."

Thus Articles 59(1) and 62 are by their nature capable of taking effect both as rules imposing a prohibition and as rules conferring rights to equality and freedom. Since the end of the transitional period, being quite general and designed to make provision for the future, they do not require any further specific implementing measures beyond the general programme laid down. As rules imposing prohibitions they crystallize only when they are infringed. As rules conferring rights to freedom, were they not directly effective in the Member States they would be largely nugatory in the hands of those seeking to enforce their rights. Their day-to-day application by domestic courts and authorities would be limited to removing discrimination. Freedom to provide services across frontiers could be denied, and could not be enforced without the intervention of the Commission in formal proceedings under Article 155 or 169.

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[1] Case 33/74 [1974] ECR 1299, at 1310-1313; Case 36/74 [1974] ECR 1405, at 1421-1422, paragraph 5 of the operative part; Case 13/76 [1976] ECR 1333, at 1342, paragraph 2 of the operative part.

[2] Cases 110 and 111/78 [1979] ECR 35, at 52, ground 26.

[3] van Wesemael, at 52, grounds 25 and 26.

If Articles 59(1) and 62 cover restrictions on freedom to provide services - in this case broadcasting services - arising out of rules operative without discrimination, to say that those articles have direct effect is not to say that the relevant domestic rules are entirely inapplicable. Rather, those rules are inapplicable only when they extend to broadcasters (or broadcasts) from other Member States and thus restrict the provision of services across frontiers. As regards domestic broadcasters and the domestic provision of services the rules are unaffected. The Commission pointed this out clearly in its observations in Debauve and Coditel v Ciné Vog (see above C II 3).

This interpretation of Articles 59 and 62 does not affect the applicability of such provisions - especially those of broadcasting or telecommunications law - applying indiscriminately to the relaying of foreign and domestic broadcasts within the country as are justified on grounds of the general interest, e.g. those concerning advertising (Debauve) or those based on literary or artistic property (Coditel v Ciné Vog).

The situation is thus no different from that of the application - likewise still permissible - of discriminatory provisions prescribing special rules for foreigners where these are justified on the grounds of public policy, public security or health (Article 56(1)). The fact that there are such discriminatory provisions which exceptionally still remain applicable has not prevented the Court from holding that any other domestic provisions, not falling under these three exceptions, that impose special rules on foreigners are inapplicable, and thus confirming the direct effect of Article 59(1). It would be consonant with this view to hold that even those provisions that involve no discrimination cannot be applied to the relaying of foreign programmes within the country unless they fall under one of the two exceptions recognized by the Court.

E. Exceptions

I. Rules applying to undertakings entrusted with the operation of services of general economic interest (Article 90(2))

Article 90(2) provides that: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

And Article 90(3) adds: "The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

1. "Undertakings"

Are broadcasting organizations "undertakings" within the meaning of the Treaty, and especially of Article 90(2)?

It is now widely accepted that "undertaking" includes any activity exercised, otherwise than as an employee, in the manufacture or distribution of goods or services for the market. Hence, an "undertaking" within the mean of Community law need not have legal personality, or be carried on with a view to profit.[1]

[1] Joined Cases 209 to 215 and 218/78 FEDETAB /1980/ ECR 3125 at 3250, ground 88.

As described and illustrated in greater detail in Part Four, the individual broadcasting companies, services, corporations, unions, foundations and institutions carry on, despite their different legal forms, manifold economic and economically important activities as suppliers and purchasers on the relevant markets: as producers and/or purchasers of programmes, as organizers of live broadcasts, as distributors of programmes and broadcasts through transmission and/or relay, as exploiters of their programmes vis-à-vis third parties, as creators, entertainers and/or users of production units, broadcasting studios, broadcasting stations and transmitters, as employers and purchasers, as founders of subsidiary companies, as investors and borrowers, as owners and holders of copyright and performers' rights. Broadcasting organizations form an economic and organizational unit comprising the human, material and financial resources needed for the production and distribution of radio and television programmes.

All the broadcasting organizations discussed in Part Four are therefore undertakings within the meaning of the EEC Treaty and are covered by its relevant provisions (especially Articles 85 to 90). This is an independent Community law concept. Its content cannot be inferred, therefore, from the respective national laws and hence does not differ from one Member State to another.

In 1974 the German Government argued in the Sacchi case that television services are not undertakings within the meaning of the EEC Treaty since they provide a public service, a service of the public authorities.[1] The Italian Government maintained that the services are not an economic activity but operate a public service of a cultural, recreational and informative nature; they are public utilities.[2] The transmission of television signals takes place within the framework of the performance of a public service, a sphere which comes entirely and exclusively under national sovereignty.[3]

The Court of Justice did not agree with this line of argument - although it did not expressly analyse it. Like the Commission,[4] it regarded television services as undertakings within the meaning of the EEC Treaty. It therefore held that, not only are the rules on freedom to provide services applicable to their broadcasts and those on the free movement of goods to their trade in material and products, but also that the rules applying to undertakings, in particular Article 90, are applicable.[5]

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[1]
[2] Case 155/73 / 1974 / ECR 409 (417-418).
[3] Sacchi at 419.
[4] Sacchi at 424.
[5] Sacchi at 414-415.
Sacchi at 429, grounds 13, 14, 15.

2. "Entrusted" undertakings

To answer the question whether a broadcasting organization can come under Article 90(2), one must first consider the Court's interpretation of it. According to the Court, the rule of restrictive interpretation applicable to all derogations from the EEC Treaty also applies to Article 90(2):[1] "As Article 90(2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, there must be a strict definition of those undertakings which can take advantage of it."

Starting from this premise, the Court held once more that undertakings "are entrusted" with the operation of services of general economic interest and that a particular task can be "assigned" to them only where this is done by an act of sovereignty:[2] "Private undertakings may come under that provision, but they must be entrusted with the operation of services of general economic interest by an act of the public authority. This emerges clearly from the fact that the reference to 'particular tasks assigned to them' applies also to undertakings having the character of a revenue-producing monopoly."

Such an act of sovereignty may, according to the case-law, take the form of a law which assigns a particular task to a private-law undertaking set up for that purpose with State participation in the capital, (establishment and operation of a port on the Moselle), grants the undertaking certain privileges for the performance of that task (tax exemptions, the assumption of maintenance charges by the State, right to be consulted before any authorisation is granted for the establishment and operation of further ports) and[3] governs the influence of the State over the undertaking's organs.

A statute, royal charter or decree (order) which establishes a broadcasting undertaking, confers on it a public task or public service and governs its activities and relations with the public authorities (the State or some other area authority) may be regarded as an act of sovereignty within the meaning of this case-law.

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[1] Case 127/73 BRT v SABAM / 1974 / ECR 313 at 318, ground 19.
[2] BRT v SABAM at 318; grounds 20 and 21; Case 172/80 Züchner v Bayerische Vereinsbank / 1981 / ECR 2021 at 2030, end of ground 8.
[3] Case 10/71 Luxembourg v Müller / 1971 / ECR 723 at 730, ground 8. The precise facts are to be found on pp. 725, 732 and 738-739.

As explained in greater detail in Part Four under C (concerning NOS and STER) and D, this is the case with the foundations, services, corporations and State broadcasting companies described therein.

A governmental act based on a special law, entrusting duties or conferring powers, whereby the public broadcasting service, which is governed in detail by the said law, is transferred to a limited company all of whose shares are owned by the public authorities may also be regarded as an act of sovereignty within the meaning of the case-law. As stated in Part Four B, RAI falls into this category.

On the other hand, the grant of a mere State authorization, permission, concession or licence to organize broadcasting or the allocation of broadcasting time without the simultaneous conferment of a public task does not constitute an act of sovereignty within the meaning of the case-law on Article 90(2). There are examples of this, too, in Part Four, in particular RTL (A), the nine Netherlands private unions and foundations (C), the sixteen British private programme companies (E) and numerous private cable or wireless relay companies in various Member States, especially in Italy (B).

In agreement with the above, the Court held that:[1] "An undertaking to which the State has not assigned any task and which manages private interests, including intellectual property rights protected by law, is not covered by the provisions of Article 90(2) of the EEC Treaty." This case concerned an association of authors and composers set up for the purpose of protecting and exploiting the (copy) rights and interests of its members mainly vis-à-vis broadcasting organizations and gramophone record manufacturers.

3. "Service of general economic interest"

It remains to be examined whether those undertakings which are entrusted with the organization of broadcasting by legal acts of the type described are "services of general economic interest".

It is apparent from the nature of broadcasts and programmes, their production and distribution (diffusion or transmission) that the organization of broadcasting - in particular the presentation and distribution (diffusion or transmission) of broadcasts and programmes - involves "services" within the meaning of Article 90(2).

In the Sacchi case the German Government suggested[2] that broadcasts are "services of general economic interest". This applies even to the radio and television transmission of advertisements, since radio and television advertising are possible only within the framework of more general programmes. By reason of its impact on the formation of public

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[1] BRT v SABAM at 320, operative part, para. 2.
[2] Sacchi at 418, 429, ground 13.

opinion, the radio and television transmission of advertisements must reflect the principles governing radio and television transmission in general. The Commission rejected this suggestion.[1] Mr Advocate-General Reischl took the view that the derogation in Article 90(2) was applicable.[2]

The Court stated that what mattered was the way in which the national law was formulated:[3] "Moreover, if certain Member States treat undertakings entrusted with the operation of television, even as regards their commecial activities, in particular advertising, as undertakings entrusted with the operation of services of general economic interest, the same prohibitions apply, as regards their behaviour within the market, by reason of Article 90(2), so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks."

A broadcasting undertaking may, therefore, be considered to be "entrusted with the operation of services of general economic interest". This is, however, not the case per se or in principle, but only where the relevant national law governs the services (activities) of the undertaking, i.e. the particular tasks assigned to it (Article 90(2)), in such a way that they are to be recognized under Community law as being in the general economic interest.

The fact that broadcasters are undertakings and undertakings are by definition of an economic nature (above, 1), and the further fact that broadcasting undertakings also carry on numerous economic activities, do not therefore in themselves permit the conclusion to be drawn that such economic activities are activities of general economic interest - and that the non-economic activities are activities of general economic interest. Instead, these are different questions which must be distinguished from one another.

Article 90(2) imposes two cumulative requirements: the nature of the broadcasting organization as an undertaking, i.e. as an (also) economically active entity, a participant in economic life, and the nature of the services the operation of which is entrusted to it by official act (economic activities such as commercial advertising and other activities which are economic only in so far as they are carried on for remuneration) as being in the general economic interest.

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[1] Sacchi at 425.
[2] Sacchi at 443 to 444.
[3] Sacchi at 430, ground 15, emphasis added.

There is nothing inconsistent, therefore, in the duel approach the Court took in the Sacchi case, on the one hand acknowledging that a broadcaster is an undertaking and carries on "activities of an economic nature"[1] and, on the other, examining in addition whether its economic services (the "commercial activity, in particular advertising") are to be provided under the law in the general or individual economic interest,[2] or whether the operation of services of a non-economic nature - in particular news, entertainment and educational broadcasts - is entrusted to the broadcasting undertaking in the general economic interest or in order to promote general interests of a different type. As long ago as 1971 the Commission distinguished between services of general economic and those of general other, especially cultural and social, interest.[3]

In the Sacchi case the Court held that Article 90(2) did not apply to the Italian broadcasting undertaking RAI. The sentence quoted from the grounds, worded as it is in a conditional and abstract manner, leaves open the question whether the reason for this is that the Court did not regard RAI as being entrusted with the operation of services of general economic interest, or that it was not proved that the application of the Treaty prevented performance of the tasks assigned to RAI (below, 4). At all events, the Court held that Articles 86[4] and 7[5] are applicable to the conduct of broadcasting undertakings possessing a monopoly of television advertising (RAI), Articles 30 to 36 to their trade in television material[6] and Articles 59 to 66 to the transmission of television signals, including those in the nature of advertisements.[7]

Whether a service of general economic interest within the meaning of Article 90(2) exists depends primarily on how the individual Member State has formulated its law. It is the State that entrusts an undertaking with a specific service and thereby determines which "interest", which purpose and the "performance" of which "particular tasks" it serves.

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[1] Sacchi at 430, ground 14, third paragraph.
[2] Sacchi at 430, ground 15.
[3] Commission Decision 71/224/EEC of 2 June 1971 - GEMA - OJ L 134, 20.6.1971, p. 15 (27 No III 2).
[4] Sacchi at 430, grounds 16-18, 432.
[5] Sacchi at 431, grounds 19 and 20, 432, operative part, para. 6.
[6] Sacchi at 427, grounds 7 and 8, 431, operative part, para. 1, second sentence.
[7] Sacchi at 427, ground 6, 431, operative part, para. 1.

Then it must be considered whether these national legal data satisfy the criteria of the Community law term. These criteria are to be inferred, not from the respective national laws, thereby differing from one Member State to another, but from the meaning of the words of which the concept, valid throughout the Community, is composed. What matters, therefore, is not national terms or descriptions, but in whose and in what interest national law entrusts the operation of the service to the undertaking. Is it an interest of the Community or of individuals, and if it is the former, is it of an economic nature?

"The Commission is responsible for determining whether or not an undertaking is entrusted with "the operation of services of general economic interest" within the meaning of the first sentence of Article 90(2) of the EEC Treaty. This can be determined only on a case by case basis."[1] Article 90(2) does not contain a general exception to the applicability of the EEC Treaty in the case of undertakings in certain fields such as broadcasting. It merely exempts from the Treaty individual service undertakings within one or other sector, each of which falls under the Treaty, in the event of a particular organization of the undertaking's activities by an act of national sovereignty, but only where and in so far as two further conditions (below, 4 and 5) are met.

The analysis in Part Four of national broadcasting legislation showed that all Member States regard broadcasting as a service of general interest and have organized it accordingly. Indeed, express mention is made in many of the laws of "general interest" (B, G, H, K), "national interest" (B), "general utility" (C), "public service" (B, D, E, G), "national service" (F), "public task" or "concern of the Community" (H, Federal Constitutional Court, Land Hessen).

The broadcasting laws of the Member States state just as clearly, however, that this public task, this public, general interest in the organization of broadcasting is not of an economic but of a social (affecting the social life of individuals) and cultural nature. Regardless of their content, broadcasts are services of general social and cultural interest because they translate into reality the rights of citizens to produce and receive radio and television communications (cf., for example, beginning of G). Every type of broadcasting activity constitutes services of an instructive, opinion-forming, entertaining or educational nature.

[1] Commission's answer to Written Question No 1197/81, OJ C 43, 17.2.1982, p. 12.

It is, to quote only a few provisions, a "public service for the dissemination of information, culture and entertainment" (E), "the provision of news, information, entertainment and art ... for the benefit of the Community" (I), and the "transmission of information and news and of works of literature and art" (K). "The programmes of the Bayerische Rundfunk are intended to educate, inform and entertain." (Section 4(1)). The rules governing Radio Bremen (Section 2(1), the Hessische Rundfunk (Section 3(2)), the Norddeutsche Rundfunk (Section 5(1)) and the Südwestfunk (Section 3(3)) are similarly worded; the laws are to be found in Part Four, under H.

Other laws express this general social and cultural interest in broadcasts in different terms and in greater detail, as in France (references at G), Italy (B), the Netherlands (C), the German Länder of Baden-Württemberg (Section 2 SDR Statute), Berlin (Section 3); North-Rhine Westphalia (Section 4) and Saarland (Section 10); cf. H.

To sum up, a detailed analysis of the laws at present in force should show that the special service provided by broadcasting, namely its transmission activity, is intended, not only to supply the population with material goods of general economic interest such as water, energy or transport services, but to satisfy its need for intangible goods of general intellectual interest, in particular instruction and knowledge, stimulus and advice, relaxation and entertainment, art and culture. These are certainly services of general, but not of general economic interest.

Even where commercial advertising in broadcasting is permitted under the laws of the Member States and has been entrusted to a broadcasting undertaking by an act within the meaning of the case-law of the Court of Justice described at 1 above (a clear conferment in this sense took place in the case of the Netherlands STER, Part Four C above), radio and television advertising has not been organized as a service of general economic interest. Although the laws assume, as in the case of other broadcasts, a general or public interest in radio and television advertising, they do so, not in relation to its economic aspects and its impact on the sale of goods and services, but in relation to the protection of the viewer from certain dangers (such as danger to health) and the protection of other broadcasts from a shortening of their duration, interruptions, etc., in other words from "commercialization". Within these legal limits drawn in the general social and cultural interest, and in the interest of health, advertisements are permitted to varying degrees, not because it is felt there is a general economic interest in them, but because individual economic interests in the marketing of goods and services, and in being informed about them, should also be given a chance.

Otherwise, the answer to the question whether a broadasting undertaking can rely on the derogation from Article 90(2) depends, not on one or other of its secondary tasks, but on its clearly-defined principal task, its "particular task" as Article 90(2) describes it. According to the case-law,[1] the activity in question must "fall within" the "special task" of the undertakings concerned, and it must, moreover, "be established that in performing such" activity "they are operating a service of general economic interest with which they have been entrusted by a measure adopted by the public authorities." The adjective "economic" thus cannot be ignored. To extend the exception to general interests of other kinds would be to disregard the Court's injunction to interpret it restrictively. (above, 2).

4. "Performance of the particular tasks assigned to them"

If a Member State organizes the diffusion of radio and television advertising and/or of other programmes by an undertaking as services of general economic interest within the meaning of Article 90(2), broadcasting undertakings "are subject" to the rules contained in the EEC Treaty "in so far as the applciation of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them". Whether, and if so, to what extent a broadcasting undertaking is subject to a rule therefore depends, according to the wording of the first sentence of paragraph 2, first of all on whether or not it is in fact applied. It must then be examined whether the broadcasting undertaking could no longer perform its tasks as a result of such application. If an in so far as this is the case, the rule in question does not apply. It is necessary to proceed accordingly with regard to the other rules. Since they serve different purposes - e.g. establishment, the movement of services, competition, etc. - their application affects the performance of the task of broadcasting undertakings differently: be it not at all, or be it favourably or unfavourably.

Article 90(2) therefore contains no unconditional exception to the Treaty as a whole for individual undertakings. Instead, it provides for a conditional exception, i.e. an exception dependent on a prior examination of the consequences of the application of the individual rules, to the validity of those rules alone which would prevent a broadcasting undertaking from performing its tasks. This must be proved by the undertaking to the Commission's satisfaction. The prohibitions provided for in the Treaty "apply, so long as it is not shown that the said prohibitions are incompatible with the performance of their tasks."[2]

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[1] Zuchner at 2030, ground 7.

[2] Saachi at 430, ground 15.

The concept of the "particular tasks assigned" to the undertaking has no inherent substance. Instead, it is a generic term for the two types of undertaking covered by Article 90(2), namely those "entrusted with the operation of services of general economic interest" and those "having the character of a revenue-producing monopoly". As can be seen from the wording and structure of the first sentence of paragraph 2, only two formulations were chosen because the revenue-raising task of the revenue-producing monopoly had also to be covered. The particular tasks of the remaining undertakings covered by paragraph 2 therefore consist in the provision of services of general economic interest.[1]

If foreign radio and television programmes are diffused at home - be it from another Member State (freedom to provide services), or from an establishment at home (freedom of establishment) - i.e. if the relevant Treaty provisions (Articles 52 to 66) apply, domestic broadcasting undertakings will be obstructed in the continued performance of their tasks neither in law nor in fact. To deprive the broadcasting undertakings of other Member States of the fundamental rights granted to them by the EEC Treaty, it would not be sufficient that their exercise makes it more difficult for domestic broadcasting undertakings to perform their tasks.[2] According to the clear wording of the first sentence of Article 90(2), the exercise of the rights of establishment, movement of services, etc. would have to "obstruct", i.e. prevent and render impossible performance of the tasks of the domestic broadcasting undertaking. This is the case, however, neither in law nor in fact. The additional supply of foreign broadcasts and their reception at home do not prevent the presentation and transmission of domestic programmes under domestic law. On the contrary, domestic broadcasting undertakings have the same European fundamental rights in the other Member States. A mutual extension of opportunities for action takes place throughout the territory of the Community.

5. "Interests of the Community"

The derogation provided for in the first sentence is limited by the second sentence of Article 90(2): "The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

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[1] A similar view was expressed by the Commission in its Decision 82/861/EEC of 10 December 1982 - British Telecommunications - OJ No 360 of 21.12.1982, p. 36 at p. 42, 41st recital.

[2] The Commission expressed a similar view in the abovementioned British Telecom Decision, loc. cit., p. 42, 41st and 42nd recitals. See also the Opinion of Mrs Advocate-General Rozès of 26 April 1983 in Case 78/82 Commission v Italy / 1983 / ECR .... (cyclostyled version pp. 38-39).

In this context the development of trade essentially means the movement of services. The Treaty protects the movement of services not only as an objective principle underlying the common market - and hence as a legal institution - but also as a subjective right of citizens of the Member States to freedom and equality in respect of the provision of services across frontiers - i.e. as a fundamental right.

The interests of the Community in the development of the movement of services as thus defined forms an absolute limit to the derogation provided for in the first sentence. In the event of a conflict with interests of Member States, the interests of the Community take precedence.

In the field of broadcasting, the interests of the Community consist, according to the objectives of the EEC Treaty, especially in achieving the minimum of freedom of movement for broadcasts between the Member States and of interstate freedom of transmission and reception for citizens in the Community (Articles 3(c), 59 and 62) necessary to establish a common market in this field also (Article 2) thereby promoting, in addition to the democratic economic and social objectives of the Community, closer relations between the Member States (Article 2) and laying the foundations of an ever closer union among the peoples of Europe (first paragraph of the Preamble).

II. Right of establishment and freedom to provide services (Articles 52 to 66)

We have seen under I that Article 90(2) does not restrict the application to broadcasting organizations of the rules contained in the Treaty; we must now consider whether the application of the rules on the right of establishment of broadcasters and on trade in their services may be restricted by Articles 55 and 58. There are two questions to be answered here: is broadcasting connected with the exercise of official authority in some Member States, so that the two freedoms do not there apply? And are public service broadcasters in general, as well as those broadcasting for purely commercial reasons, entitled to claim freedom of establishment and the freedom to provide cross-border services?

1. Privileged activities: broadcasting and the exercise of official authority

(a) Article 55, first paragraph, to Article 66

The first paragraph of Article 55, in conjunction with Article 66, states that the Chapters of the Treaty dealing with the right of establishment and the freedom to provide services "shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority."

The Court has interpreted this provision as follows: "Having regard to the fundamental character of freedom of establishment and the rule on equal treatment with nationals in the system of the Treaty, the exceptions allowed by the first paragraph of Article 55 cannot be given a scope which would exceed the objective for which this exemption clause was inserted."[1] The same would apply to the freedom to provide services.

The purpose of these exceptions was to enable Member States to exclude non-nationals from taking up or performing functions involving the exercise of official authority. The Court held that this need was fully satisfied "when the exclusion of non-nationals is limited to those activities which, taken on their own, constitute a direct and specific connection with the exercise of official authority. An extension of the exception allowed by Article 55 to a whole profession would be possible only in cases where such activities were linked with that profession in such a way that freedom of establishment would result in imposing on the Member States concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority. This extension is on the other hand not possible when within the framework of an independent profession, the activities connected with the exercise of official authority are separable from the professional activity in question taken as a whole."[2] The same applies to other independent activities performed for remuneration.

In the absence of any harmonization of the national rules, under Article 57, "the possible application of the restrictions on freedom of establishment provided for by the first paragraph of Article 55 must ..... be considered separately in connection with each Member State having regard to the national provisions applicable to the organization and the practice of this profession. This consideration must however take into account the Community character of the limits imposed by Article 55 on the exceptions permitted to the principle of freedom of establishment in order to avoid the effectiveness of the Treaty being defeated by unilateral provisions of Member States."[3]

As Advocate-General Mayras put it, "if each State retains the power to organize a particular activity in its territory under conditions such that it is connected with the exercise of official authority, it is still necessary for this concept to receive the same definition throughout the whole Community. Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connection with the exercise of this authority can therefore arise only from the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration. In this respect Article 55 must be compared with Article 48(4), the objective of

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[1] Reyners, at 654, ground 43.
[2] Reyners, grounds 45 to 47.
[3] Reyners, grounds 49, 50.

which, as you have seen in the ..... case of Sotgiu,[1] is to allow Member States to restrict the admission of foreign workers to certain activities in the public service which involve the exercise of powers of the State. The objective of Article 55 is very similar ....."[2]

If we consider the Member States' law in the light of the first paragraph of Article 55, we find that broadcasting has a private character even under national law in Luxembourg (Part Four, under A), in Italy (as regards local radio, Part Four, B), the Netherlands (C, with the possible exceptions of NOS and STER), partly in the United Kingdom (E), and more recently partly in France (G). Cable services are wholly or partly private in Italy (B), Belgium (D), Ireland (F) and Denmark (I). The first paragraph of Article 55 raises no difficulty here: it does not provide for any restriction on the fundamental European freedoms going beyond what may be rendered possible by the laws of the individual State. And in any event the fact that the broadcasters concerned hold concessions or licences from the State does not constitute sufficient grounds for considering the activity they carry on under the concession or licence to be "connected with the exercise of official authority".

The same applies even where broadcasting bodies are set up by the State or a regional or local authority by law (or by order or charter or State contract), as was done in Belgium, Denmark, France, Germany, Greece and Ireland, and partly in the Netherlands and the United Kingdom (Part Four, C to K). The creation by law of the foundations or corporations here concerned does represent the exercise of official authority, but it does not follow that the activities carried on by the broadcasters on the basis of the law are "connected with the exercise of official authority" within the meaning of the paragraph. It is not sufficient that the activity has some close link with official authority; the activity must itself be connected with the exercise of official authority, which means that the person concerned must by his activity participate in the exercise of official authority. This is clearest from the French and Italian versions of the paragraph. Whether or not a broadcasting organization participates in the exercise of official authority in this way will depend on the legal nature of its activity, meaning the means of action available to the legal persons, whether set up under public or private law.

Nor is this situation affected even where individual States or regional authorities grant a broadcaster a monopoly by law (see Part Four), or give it monopoly or oligopoly status in practice. Here too official authority is exercised in the grant of a monopoly or refusal to establish competing broadcasters, but not necessarily in the monopoly activity then carried on.

If we now consider how the activity carried on by broadcasters is to be described, we may note first of all that the broadcasting legislation in Denmark (Part Four, I) Greece (as regards ERT 1, K),

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[1] Case 152/72 / 1974 / ECR 153.

[2] Opinion in Reyners, at 664-665. The Commission took the same view (at 640-641).

the Netherlands (as regards NOS and STER, C, and most of the German Länder, (H),[1] confines itself to conferring duties and functions on the bodies it sets up, without making any explicit statements as to the public or private nature of those duties or functions.

The German Federal Constitutional Court has held that the fundamental freedom of broadcasting requires that there be no State involvement in the organization of broadcasting, and that all social forces of consequence should participate. Broadcasting, it said, could be organized by associations of broadcasters set up under public law or, in certain conditions, under private law.[2] The organization of broadcasts was however a public function in the sense of a function of the public administration.[3] Elsewhere the Constitutional Court held that the Länder had transferred to the public-law bodies they had set up by legislation a function of public administration which they themselves could not perform directly, because of the requirement that broadcasting be free of State involvement. The activities of these broadcasting bodies thus belonged to the sphere of public law.[4]

The following broadcasting legislation describes the functions it transfers as a "public service": the Belgian legislation governing BRT, RTBF and BRF (Part Four, D); the French legislation governing TDF, INCA, the limited companies TF 1, A 2, FR 3, the regional television companies, the television production company and the marketing company (G); the Italian legislation governing the RAI (B); and the United Kingdom legislation governing the BBC and the IBA (E). The French 1982 Act describes TDF and INCA as "établissements publics à caractère industriel et commercial" (public establishments of an industrial and commercial character).

On the wording of the first paragraph of Article 55 and its interpretation by the Court of Justice, however, the question whether and to what extent the fundamental European rights of freedom of establishment and freedom to provide services can be restricted in a Member State does not depend on whether or in what way the respective domestic law describes a particular self-employed activity (considered as a whole comprising a number of activities belonging to it), or where it places such an activity in its legal system, or what legal form it gives to the body carrying this activity on. The paragraph does not relate to the type of functions involved (public or private, public-law or private-law, public administration or private management) or the status of the person concerned (a person governed by public or private law); it relates only to a particular aspect of what that person does. The sole question is whether the domestic broadcasting law has so designed certain broadcasting activities that "taken on their own /they/ constitute a direct and specific connection with the exercise of official authority", as the Court put it in Reyners.

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[1] An exception is Hesse, where broadcasting is stated to be a public matter in Section 3(1) of the Hesse Broadcasting Act of 2 October 194 published in Gesetz- und Verordnungsblatt Hessen p. 123.

[2] Judgment of 28 February 1961, published in Entscheidungen des BVerfG 12, 205, 259-263.

[3] Loc. cit. 243-246.

[4] Judgment of 27 July 1971, published in Entscheidungen des BVerfG 31, 314, 329.

Under the rules laid down by States broadcasters are required to disseminate information, education and entertainment. To this end they are authorized and required to carry out the following main activities (for more detail see Part Four). They organize live broadcasts. They produce other programmes, or parts of programmes, or have them produced. They broadcast their programmes or in some cases transmit them by cable. For these purposes they set up, maintain or use transmission facilities, departments or separate firms for the production of programmes, and studios for the organization of broadcasts. They plan the individual broadcast items, design or select them, combine them into their general programmes and supervise their execution in accordance with criteria laid down by law.

In carrying on all these activities[1] broadcasting organizations do not act as authorities or as offices or indirect agencies of the State or some regional authority, but as corporations, established under public or private law, operating for their own account and independent of the State. They are not placed over the people they deal with (those receiving their programmes, those contributing to their broadcasts, and the suppliers and producers of programmes, premises and equipment); they deal with them in the ordinary way, at the same level. They do not act as authorities, issuing orders and exercising compulsion; they use the means available in private law. Indeed they are not entitled to exercise powers of a public-law nature over citizens, namely to intervene in the citizens' private sphere, to address binding legal acts to them, or to exercise compulsion.[2] In their varied activities broadcasters have no powers, prerogatives or privileges to call on in their dealings with citizens. They supply no services which listeners or viewers are required to take by law, by order of some authority, or even by order of the broadcasting body itself.

Thus in the domestic law of the Member States practically none of the many individual activities engaged in by broadcasters has a direct and specific connection with the exercise of official authority such as would be caught by the first paragraph of Article 55, and it follows that the activity of broadcasting as a whole is not connection with the exercise of official authority.[3]

As we have seen, the concept in Community law does not mean the same thing as performing a public service, or a service governed by public law, or a function of the public administration. These concepts are broader. They may involve the exercise of official authority; but they need not necessarily do so. The exercise of official authority contemplated in the first paragraph of Article 55 is just one way, the most forceful way, in which a public function may be performed. Other instruments are those we have set out above.

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[1] The Greek ERT 2 is still an independent authority, see Part Four, K.

[2] An exception is the power conferred on the three Belgian bodies and RTE in Ireland to acquire land by compulsory purchase where necessary (see Part Four, D and F).

[3] The power of compulsory purchase of land which exists in two Member States is a marginal part of broadcasting activities as a whole, and easily "separable", in the words of the Court.

They derive primarily from private law, and may confer an "industrial and commercial character" even on bodies established under public law, as is done explicitly in the French Broadcasting Act of 1982.

(b) Article 55, second paragraph, and Article 66

Some of the individual activities comprised in a self-employed activity as a whole may be connected with the exercise of official authority in one Member State, but not in the others; and in that case Article 55, first paragraph, and Article 66 have the effect that the right of establishment and the freedom to provide services apply only in those other Member States. It may be made difficult or impossible for non-nationals to pursue such an activity in the first Member State, while its own nationals have free access to the rest of the Community. Unequal treatment of this kind, with two fundamental freedoms being partly deprived of their force, could be a source of disturbances or difficulties in the Community. The second paragraph of Article 55 therefore provides that "the Council may, acting by a qualified majority on a proposal from the Commission, rule that the provisions of this Chapter shall not apply to certain activities." As we have seen under (a), broadcasting comprises practically no activities which have a direct and specific connection with the exercise of official authority, so that the Commission is not faced with the question whether or not it should make use of its powers under this paragraph. It has never done so in any matter to date.

2. Exempted broadcasting organizations

(a) Persons and forms of organization caught (Articles 52, 58 59 and 66)

The EEC Treaty states that nationals of Member States are entitled to establish themselves in another Member State (Article 52, first paragraph, first sentence). They may establish themselves in the other Member State (first sentence) and carry on a self-employed activity there, or they may set up agencies, branches or subsidiaries there (second sentence). They may set up and manage undertakings there, in particular companies or firms within the meaning of the second paragraph of Article 58 (Article 52, second paragraph).

The EEC Treaty applies to suppliers of services who are nationals of Member States established in the Community (Article 59, first paragraph); acting unanimously on a proposal from the Commission, the Council may also decide that it is to apply to nationals of a third country who provide services and who are established within the Community (second paragraph).

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States (Article 58, first paragraph). This provision forms part of the Chapter on freedom of establishment, but is applied in the Chapter on services by Article 66.

The same Article 66 likewise applies the definition of the companies and firms given in the second paragraph of Article 58. That definition reads: "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are not profit-making."

The concep. of companies or firms is defined as broadly as possible in this paragraph. It comprises all forms of companies which exist in the law of the Member States. These include public limited companies, associations, foundations, corporations and other bodies governed by public law.

(b) Broadcasting companies and profit-making activities (Article 58, second sentence)

However, the second sentence means that companies in any of these forms enjoy freedom of establishment and freedom to provide services only provided they are carried on with a view to profit.

As we have seen in Part Four, this is without any doubt the case with RTL (A); with the 15 UK programme contractors, their joint subsidiary ITN, and the TV-AM company (E); with the French marketing company (G); with the Italian RAI's subsidiaries SIPRA and SACIS (B); with the nine advertising companies of the German Land broadcasting organizations (H); and with a large number of privately-owned cable television companies (A to F). They therefore have the right of establishment and the right to supply their services freely within the Community.

The eight Dutch private-law broadcasting associations and foundations, along with NOS and STER, which are public-law foundations, may make profits only provided these are devoted to performing their broadcasting function (for more details, see C). Can they be considered profit-making within the meaning of the second paragraph of Article 58?

The situation is similar with the following organizations which are also non-profit-making in the sense that they operate without a view to making a profit for their owners: in Italy the RAI (B); in Belgium BRT, RTBF and BRF (D); in Denmark DR (I); in Germany BR, HR, NDR, RB, SR, SFB, SDR, SWF, WDF, ZDF (H); in France TDF, INCA, TF 1, A 2, FR 3, the regional television companies, and the television production company (G); in Greece ERT 1 (K); in Ireland RTE (F); and in the United Kingdom the BBC and IBA (E).

These "companies", in the terminology of the second paragraph of Article 58, do however pursue another important commercial objective which does represent a view to profit, in the sense of a desire to cover the costs of their own financing, particularly from advertising (whether directly, or through the profits made by their subsidiaries and accruing to them, or through the payments made to them by programme contractors); from the exploitation of their productions and their copyrights and other rights by outside parties; from investments; from publications; and from public events. Can the objective of acquiring money in this way, where no financial gain to the owners is intended, be considered a desire to make a profit for purposes of the second paragraph of Article 58?

The expression "non-profit-making" is not intended literally. It is not to be interpreted in a technical sense derived from company law, but rather in harmony with the other provisions of the two Chapters and with the objectives of the Treaty. It is a concept of Community law with its own meaning, and not a concept of domestic law whose meaning may vary from one Member State to another.

This is clear first of all from the second paragraph of Article 58 itself. Cooperative societies, for example, operate without a view to profit for

purposes of the law of the Member States, and this might otherwise be taken to mean that they have no freedom of establishment or freedom to provide services. But they do enjoy both freedoms: the paragraph specifically includes them. Thus the expression "non-profit-making" has another, broader meaning.

The meaning is that the company must pursue a commercial or commercially relevant objective, not in the technical sense that its legal form or founding documents require it to operate with a view to gain, but rather in the sense that it takes part in commercial life, that it carries on an economic activity. Its objective as laid down by law or its founding documents might have to do with information culture, or sport, for example; but once this is linked to a commercial or commercially relevant activity, the company is within the scope of the Treaty.

It makes no difference whether the objective laid down by law or in the founding documents is of a public or private nature, whether it is in the interests of the general public or of individuals, whether it is pursued in the general interest or out of self-interest. The second paragraph of Article 58 also specifically includes all forms of corporation governed by public law, so that such corporations too enjoy freedom of establishment and freedom to supply services.

Secondly, this view of the meaning of the words "non-profit-making" is also supported by the link which exists between Articles 58 (and 66), 52 and 60. The second paragraph of Article 52 states that "freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58 ...". The right of establishment is thus not confined to the companies and firms referred to in Article 58, but explicitly includes all undertakings whether they are non-profit-making or not, and regardless of whether they are publicly or privately owned. Article 90(1), which explicitly states that public undertakings and undertakings to which Member States grant special or exclusive rights are within the scope of the EEC Treaty as a whole, confirms this. The Treaty defines its scope in terms of economic fact, and not in terms of legal distinctions.

Although the Danish version uses words suggesting commercial activities, the other versions speak only of activities, so that there is no reference to a commercial purpose. It is not disputed that the right of establishment does apply to activities which are not aimed at profit maximization but which are nevertheless expected to provide an income (namely the professions), or which are in fact for the general benefit but which are regularly carried on for consideration, or which are carried on for consideration partly by persons who are acting with a view to gain and partly by persons who are not and who may well be in competition with those who are.

Thirdly, in line with this interpretation of Article 52, all versions of the first paragraph of Article 60 define the services within the scope of the EEC Treaty as those which "are normally provided for remuneration". Services may be provided for remuneration by companies and firms operating without a view to profit. But no one has yet denied such companies or firms the right to supply their services free in the Community. In the established case law of the Court the Treaty is to be interpreted in such a way that it is not partly or entirely deprived of practical effect (the rule of effectiveness, règle de l'effet utile, Effektivitätsgrundsatz).

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Fourthly and lastly, the interpretation of the second paragraph of Article 58 put forward here is in line with the general objectives of the EEC Treaty. The Court of Justice has held: "Having regard to the objectives of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty. When such activity has the character of gainful employment or remunerated service, it comes more particularly within the scope, according to the case, of Articles 48 to 51 or 59 to 66 of the Treaty."[1] An activity is thus an economic activity when it is carried on for gain. The Court made this particularly clear in the Donà case where, after saying that the practice of sport was subject to Community law only in so far as it constituted an economic activity, it sent on: "This applies to the activities of professional or semi-professional football players, which are in the nature of gainful employment or remunerated service."[2] The same must apply to journalistic activity (reporting and commenting) and to cultural activity (of an artistic/entertainment nature).

The details provided in Part Four show that the organization of broadcasts is not only a social and cultural activity in the Member States, but is also an "economic activity" within the meaning of Article 2 of the EEC Treaty. Firstly, broadcasters make their transmissions for remuneration (cf. above, A I 2). Secondly, as we said in Part Four, the production of programmes, the organization of live broadcasts and their transmission also imply a considerable level of economic activity. This is particularly relevant in the case of transmissions and programmes with no commercial content. The production of programmes and organization of broadcasts, mobilizing the staff and the technical and financial resources needed for each item, may well come under other headings too, but irrespective of the content of the broadcasts it is an economic activity.

Thus the EEC Treaty applies to the activities of broadcasters, which together constitute a self-employed activity for purposes of Articles 52 and 66. Subject to Article 90(1) (see C V 3 above), it confers the right of establishment in the other Member States on the associations, companies, corporations, institutes and foundations discussed in Part Four. In particular they are entitled to set up agencies, branches, subsidiaries and other undertakings there (Article 52). They are also entitled to supply their services, i.e. to broadcast their programmes, across the Community's internal frontiers (Articles 59 and 62). "In order to make it easier" for broadcasters to exercise their freedom to supply services and their freedom of establishment (Article 57(1) and (2) and Article 66), the Treaty prescribes "the coordination of the provisions laid down by law, regulation or administrative action in the Member States concerning the taking up and pursuit of activities as self-employed persons" (Article 57(2) and Article 66), which thus include the activity of broadcasting.

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[1] Case 36/74 Walrave [1974] ECR 1405: at 1422, operative part, para. 1; at 1417, grounds 4 and 5 (cycling); Case 13/76 Donà [1976] ECR 1333, [2] 1340, grounds 12 and 13 (football).

[2] Donà, ground 12.

In line with this conclusion, the Court held in the Sacchi[1] and Debauve[2] cases that the broadcasting of television signals, including those in the nature of advertisements, and the transmission of such signals by cable, comes, as such, within the rules of the Treaty relating to services (Articles 59 to 66).

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[1] Case 155/73 [1974] ECR 409, 432, operative part, para. 1.
[2] Case 52/79 [1980] ECR 833, 855 (ground 8).

COMMISSION OF THE EUROPEAN COMMUNITIES

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TELEVISION WITHOUT FRONTIERS

GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON MAI FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE

(Communication from the Commission to the Council)

Part Six

Pages 209-331

PART SIX

HARMONIZATION OF LEGISLATION

To avoid repetition, the reader's attention is directed to Part Four of this Green Paper, which deals with the situation in each country, for any information concerning the relevant national broadcasting system or broadcasting legislation, for an indication of the various provisions governing broadcasting and for an explanation of the abbreviations used for broadcasting organizations, etc.

A. Rules on advertising

Radio and television advertising (broadcast advertising) is subject, in all the Member States, to rules and regulations of various types. These are made up partly of the law applying to advertising in general and partly of provisions specific to radio and television advertising. The regulations differ in directness and severity; in two Member States, broadcast advertising is forbidden.

It is obvious that a ban of this type can inhibit trans-frontier broadcasting of advertisements, but even less stringent regulations can hamper it. Such is the effect especially of differing levels of regulation of advertising.

This section gives an outline of the categories of relevant national rules and regulations (I), examines their effects on the common market and the need for harmonization (II) and discusses the scope for harmonization (III).

I. National legislation

1. Overview

For the purposes of this Green Paper, the main national laws applying to radio and television advertising can be broken down into the following categories; first and foremost, there are the rules and regulations which specifically determine whether and how broadcast advertising may be carried on, restricting TV advertising time, dealing with the form and content of advertisements and separating advertisements from other programmes; the second category is that of general law on advertising, particularly the law on the prevention of misleading or unfair advertising; the third category is made up of the advertising regulations for specific branches, particularly food and beverages, tobacco products, pharmaceuticals, cosmetics and textiles and also takes in related labelling and advertising rules as well as regulations on advertising by certain professions. Lastly, radio and television advertising is subject not only to national statutory provisions but also to self-regulation of a general or specific nature.

For the purpose of achieving freedom to provide broadcasting services, these rules and regulations have varying degrees of impact. By far the most significant are the specific advertising regulations for broadcasting, which generally apply to all advertisements in the relevant sphere and forbid broadcast advertisements altogether at certain times if they have a specific content or take specific forms. They can be expected to be the most direct and most perceptible obstacles to the freedom to provide broadcasting services. They certainly need to be dealt with in any analysis of harmonization measures (see Section 2 below).

The situation is different for general law on advertising and advertising regulations for specific branches. The relevant rules do not apply specifically to broadcast advertising, but normally to all forms of advertising and to all media. Broadcast advertising as such is neither forbidden nor in general restricted by these rules. It is only from time to time that a particular statement made during a broadcast advertisement may happen to conflict with the provisions of general or specific advertising law, for example because it is regarded as misleading or flouting the advertising rules for medicines. Sanctions are directed only against that statement in the advertisement. Retransmission of the statement in question may be prohibited and, in the worst hypothesis, the advertiser may be punished. But broadcast advertising as a whole is not normally restricted by such rules.

The differences in general and specific advertising law may, in certain cases, act as an obstacle to cross-frontier broadcast advertising and hamper the dissemination of individual advertising messages across internal frontiers. Even so, they should be excluded from this analysis because, on the one hand, they do not act as obstacles generally but only in isolated, individual cases and, on the other, they can be dealt with only as part of a general and comprehensive harmonization drive. The proposal for a directive on misleading and unfair advertising, drafted in 1978 and amended in 1979,[1] thus covers "advertising" generally, defined in Article 2 of the proposal as "the making of a representation in any form in the course of a trade, business or profession for the purpose of promoting the supply of goods or services". Broadcast advertising transmitted via satellite or by cable is clearly caught by this definition.

The same applies to specific advertising rules for certain branches of the economy such as foodstuffs, pharmaceuticals, textiles and the like. Where moves towards harmonization have already been launched in those areas, they rightly extend to all forms of advertising, including broadcast advertising. Thus, Article 1(2) of the proposal of 13 April 1981 for a directive on the approximation of the laws in the Member Staes relating to claims made in the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer[2] gives the following definition of a "claim": "any statement intended to promote the sale of a foodstuff, transmitted by any medium, including generic advertising". Subsequent work on harmonization should also avoid any media-specific fragmentation of the relevant provisions. In the general and the specific law on advertising and competition, all advertising media should, as a matter of principle, be treated on equal terms. Any obstacles to broadcast advertising should be removed as part of the general harmonization process. We must, therefore, exclude from the following analysis of harmonization as it affects the individual media the general law on advertising and competition and the specific law in both areas as it is applied to particular branches of the economy.

However, one exception must be made: the bans on advertising applicable to specific goods and/or services, particularly tobacco products and alcoholic beverages. In some Member States, bans on advertising of this sort form part of the regulations relating specifically to broadcast advertising while, in others, they are contained in the general law on advertising or in the law on advertising in specific branches, which once again applies to specific media or is general in scope. Lastly, bans are imposed on advertising under semi-official or voluntary self-regulation arrangements. For the purposes of our harmonization study, it is irrelevant which laws or other arrangements provide for a ban on advertising. They must all be taken into account. This is because they not only have an ad hoc or sporadic effect in individual cases but also prohibit advertising for specific products and/or services in a general and absolute manner and can, therefore, be equated with a partial ban on broadcast advertising. Bans on advertising for specific products and/or services must, therefore, be dealt with after the media-specific

[1] OJ No C 70, 21.3.1978, p.4; OJ No C 194, 1.8.1979, p.3.
[2] OJ No C 198, 6.8.1981, p.4.

advertising regulations where they can be isolated from the specific law on advertising and are likely to have an appreciable effect on the cross-frontier provision of services (see Section 3).

In this context, special attention should be paid to regulatory arrangements, particularly self-regulation, whether they exist on a purely voluntary basis or whether they have been established by statute or in some other way with State involvement. General arrangements or arrangements tailored to specific branches are of less interest here. They are the counterpart to general and specific law on advertising and competition and they too have at best a sporadic and ad hoc effect on broadcast advertising; they can therefore be dealt with only as part of a general harmonization programme, and not as part of a harmonization process confined to specific media. Accordingly, the proposal for a directive on misleading and unfair advertising includes in its scope such self-regulatory arrangements as exist in the Member States (see Articles 5 and 6).

For the purposes of this Green Paper, it is the regulatory bodies set up specifically for broadcast advertising that are important; such bodies have been set up by a number of broadcasting authorities in particular or operate at national level though their responsibility is confined to broadcast advertising. These will be dealt with following discussion of the national broadcast advertising regulations (see Section 4).

2. Broadcast advertising regulations in the individual Member States

(a) Member States in which broadcast advertising is forbidden

Denmark

Although not expressly laid down, an advertising ban applies to Danmarks Radio, which broadcasts one national television programme and three national radio programmes, together with regional radio programmes. It is laid down in Section 6 of the Broadcasting Act of 1973 that Danmarks Radio is to be financed by fees levied for the use of radio and television receiving apparatus. Section 15 provides that the State may make grants for the fulfilment of specific tasks. The Act leaves no scope for revenue from commercial advertising.

Even in the cases where the Minister of Culture has given authorization under Section 3(2) for the trial operation of "active" local cable television, financing from advertising is not permitted. The cable programmes are financed by the cable subscribers and partly through contributions from local authorities and central government.

However, cable operators in Denmark are allowed to relay advertisements contained in foreign broadcasting programmes ("passive" cable broadcasting). This is apparent from Section 3(1) of the Act, whereby foreign programmes have to be transmitted unchanged and simultaneously. The following is an extract from the observations on the proposal amending the 1973 Broadcasting Act made by the Minister for Culture on 12 February 1984:[1]

"The Ministry of Culture has considered ... whether the /proposed/ wider transmission of foreign programmes /received via microwave links, long-distance cable and telecommunications satellites/ by Danish cable networks necessitates special provisions relating to responsibility for the content of the programmes relayed, including provisions on the content of any advertising. The Minsitry of Culture is, however, of the opinion that there is not at the moment a sufficient basis for proposals for such new provisions. In this connection, it would point out in particular that the synchronous retransmission unchanged of neighbouring countries' television programmes via Danish cable networks has not yet given rise to any problems of responsibility and that so far we have not experienced any problems of responsibility in connection with the transmission via Danish cable networks of foreign programmes beamed from telecommunications satellites".

[1] Lovforslag nr. L 42, Folketinget 1983-84 (2. samling) Blad nr. 43, S.9.

Under the Government's amending proposal, (private) companies, associations and the like will, in future, be able to broadcast television programmes in Denmark(alongside and independently of Danmarks Radio) provided they have been authorized to do so by a committee to be set up for this purpose. The intention is that they should be able to beam or broadcast their programmes throughout the country or on a regional basis using a new channel (TV2) and a new network of transmitters. These future competitiors of Danmarks Radio are to finance their programmes in whole or in part from a licence fee (in the same way as Danmarks Radio) and/or advertising revenue; if need be, they could also rely on revenue from subscriptions. The committee mentioned above will have the task of proposing rules on financing and on the authorization procedure.[1]

The observations regarding the proposed legislation contain the following:[2] "... the Ministry of Culture is of the opinion that programme activities on a new TV channel should not be financed solely out of revenue from licence fees. Financing from advertising should also be permitted to some extent so that advertisements could be broadcast in slots at fixed times. Rules should, however, be drawn up to ensure that advertisers are unable to influence programme content ... the Committee is to formulate proposals for more detailed rules on the production of advertisements, the overall ceiling for advertising time, the duration of advertisements and their placing, advertising guidelines and the setting up of a special advertising body ...

The Ministry takes the view that there is a clear case for advertising time on a new Danish TV channel being sold by a special company not dependent on those with responsibility for programme activities. Consideration should, however, be given to whether the prices charged for the blending in of advertisements should, in the final analysis, be fixed by the Folketing's Finance Committee ... . Advertising revenue should be restricted so that it accounts for the smaller share, e.g. 25% of total revenue."

Talks between the representatives of the parties in the Folketing have revealed that the part of the proposal dealing with the authorization of advertising will not find majority support and, as a result, will probably have to be dropped.

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[1] Section 1(3) of the proposal on a new Section 19a(1)(2) to be incorporated in the 1973 Act; Lovforslag, loc.cit., p.2.

[2] Lovforslag, loc.cit., pp.5, 13 and 14.

Belgium

In the case of the RTBF and BRT broadcasting organizations,[1] advertising is banned under the Broadcasting Act of 1960.[2] By decree of the "Communauté culturelle française" of 8 July 1983, the RTBF has been allowed to broadcast non-commercial advertising since the beginning of 1984.[3]

The cable companies too are forbidden from relaying advertisements.[4] The Court's judgement in the Debauve case declared this ban to be fundamentally compatible with the EEC Treaty.[5] However, at the present time, the Belgian cable networks transmit a large number of Luxembourg, Dutch and to a lesser extent, German and French broadcasts which carry advertisements; some of the advertisements are directly aimed at a target audience of Belgian consumers. The reason given for the decision to continue relaying these advertisements is the technical difficulty of removing the commercial breaks from continuous broadcasts. By and large, the transmission of this advertising is tolerated. The authorities with power to prosecute refrain from so doing. Judgments in the Belgian courts have described the ban as having been "suspended".[6]

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[1] There is also the Belgian "Rundfunk- und Fernsezentrum für deutschsprachige Sendungen (the German-language counterpart of the RTBF and the BRT).

[2] Article 28(3) of the Loi organique des Instituts de la Radiodiffusion.

[3] Télévision belge.

[4] Moniteur belge of 13 August 1983, p. 10305.

[4] Article 21 of the Arrêté Royal relatif aux réseaux de distribution d'émissions de radiodiffusion aux habitations de tiers of 24 December 1966 (Law relating to networks for the distribution of broadcasts to the residences of third parties).

[5] /1980/ ECR, at 833. See also the prior judgment by the Tribunal Correctionel de Liège of 23 February 1979 in Jurisprudence de Liège of 1 September 1979, at 309, and the judgment given, following the Court's ruling, by the Tribunal Correctionel de Liège on 27 June 1980 in Jurisprudence de Liège of 6 September 1980, at 210.

[6] Cour d'appel de Bruxelles, 17 May 1978, in Revue de droit intellectuel - Ingénieur-Conseil 1978, at 311. Tribunal civil de Bruxelles, 10 May 1978 in Journal des Tribunaux 1978, at 524 A.A. Tribunal commercial de Bruxelles, Jurisprudence Commerciale de Belgique 1977, III, 593.

Mention should also be made of the local radio broadcasting companies provided for in the Act of 30 July 1979.[1] The authorization and operation of such companies are defined in the Regulation of 20 August 1981,[2] which stipulates in Article 16 that broadcasts must not be in the nature of commercial advertising. It is debatable whether this provision is valid under the Belgian constitution. The same is also true for a similar provision in the decree by the Conseil de la Communauté culturelle française which reiterates the ban on advertising.[3] In practice, even local radio broadcasters have gone over to broadcasting advertisements. However, in its judgment of 27 September 1982,[4] the Tribunal Correctionel de Liège found against the local radio company "Radio Basse-Meuse" in a case brought by the public broadcasting authorities for violation of the ban on advertising contained in Article 16 of the Arrêté Royal of 20 August 1981 and ordered it to pay damages. The Liège court considered the provision to be valid and not in conflict with the EEC Treaty.

A "Projet de Loi relatif à l'émission de publicité commerciale par les Instituts chargés d'assurer le service public de la radio et de la télévision" (Bill on advertising broadcast by the Institutes entrusted with providing public-service radio and television broadcasting), drawn up in 1982, provides that only the public broadcasting authorities may transmit commercial radio and television advertising. It also states that legislation will be enacted banning advertising for specific goods and services and defining the days, times and maximum duration for advertisements. Advertising is to be clearly separated from the other programme material and must not interrupt programmes. Further provisions are to be enacted in regulations. A "Conseil de la Publicité" (Advertising Council) is to be created, under the Prime Minister, to draw up a code on the content and form of advertising, to ensure that the provisions are adhered to and to rule on disputes. Bodies with their own legal personality are to be set up to produce the advertisements. Any other person or body broadcasting advertisements or participating in their broadcasting, even as promoter or sponsor, will be committing an offence. The relaying in Belgium of foreign broadcasts may be forbidden by law where they do not meet the criteria laid down for national broadcast advertising.

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[1] Loi relative aux radiocommunications, 30 July 1979 (Act relating to broadcasting).

[2] Arrêté Royal réglement l'établissement et le fonctionnement des stations de radiodiffusion sonore locale, 20 August 1981 (Act regulating the creation and operation of local radio broadcasting stations).

[3] Décret fixant les conditions de reconnaissance des radios locales, 8 September 1981, Article 8 (Decree determining the terms for the recognition of local radio stations.)

[4] Jurisprudence de Liège, 23 October 1982, at 382; Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1983, at 302, with observation by Henning-Bodewig (Industrial property rights and copyright).

(b) Member States in which broadcast advertising is permitted

Germany

Radio advertisements have been broadcast in Germany for more than thirty years. Nowadays, all the public land broadcasting authorities - with the exception of Westdeutscher Rundfunk in Cologne - carry advertisements on their radio stations. Radio advertising is the responsibility of privately organized subsidiaries of the broadcasting organizations, which also exercise supervision over their subsidiaries.[1] The basic rules on radio advertising are enshrined in a number of Land broadcasting acts and in the statutes of the broadcasting organizations.[2] The actual details of radio advertising are regulated by the Land governments or the broadcasting organizations. They vary from one broadcaster to another, but some degree of harmonization does exist. Radio advertising is broadcast in the mornings and afternoons until 1900 hours and on the Drittes Programme (service channels - third programmes) until 2100 hours, up to a maximum of ten minutes per hour. On Sundays and holidays there is no radio advertising. Some channels (BR 3, HR 3, SDR 2, SR 3, SDR 3 and SWF 3) broadcasting advertising blocks only while others (HR 1, SR 1 and SFB 1) transmit only advertising spots in the course of programmes. Both types of advertising are to be found on a number of channels (BR 1, RB 1, SDR 1 and SWF 1).[3]

Under Section 23(2) of the Charter of 6 June 1961 incorporating under public law the Zweites Deutsches Fernsehen (ZDF - second German television channel), the latter is required to cover that portion of its expenditure not financed from fees with revenue from television advertising.[4] Section 22(3) of the Charter stipulates that advertisements are to be kept clearly separate from other programme material. Total advertising time is laid down by agreement with the Land Prime Ministers. After 2000 hours and on Sundays and Federal holidays, advertisements are not allowed to be shown. There must be no question of advertising organizations or media influencing programmes.

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[1] On the establishment of the advertising subsidiaries, see, for example, the Statute of Radio Bremen of 18 September 1981 (Section 3(2)), the Charter of 20 August 1980 concerning the Norddeutscher Rundfunk (Section 34(1)(i)), the Statute of the Norddeutscher Rundfunk of 20 March 1981 (Article 27), and Section 35(2) of Act No 806 of 1 December 1964 on the organization of broadcasting in Saarland (in the version of 1 August 1968).

[2] See Article 5(3) of the Act of 10 August 1948 on the creation and duties of a public-law organization, the Bayerische Rundfunk (in the version of 26 September 1973); Section 3(10) of the Act of 2 October 1948 on the Hessischer Rundfunk; Section 35(2) of the Charter of 20 August 1980 on the Norddeutscher Rundfunk; Section 35(1) of Act No 806 of 2 December 1964 on the organization of broadcasting in Saarland (in the version of 1 August 1968); Section 4 of the Statute of the broadcasting organization "Sender Freies Berlin", Annex to the Act establishing a broadcasting oranization, the "Sender Freies Berlin" (in the version of 5 December 1974).

[3] On the above, see the comparative report entitled "Rundfunkwerbung in Europa und in den USA - Eine Ubersicht, Media Perspektiven 1979, p. 210 (at 212); ARD - Jahrbuch 1983, Hamburg 1983, p. 357.

[4] In 1979, 41% of the ZDF's revenue was obtained from broadcast advertising. For the first television channel authorities, the figure was 31%. The situation remained unchanged in subsequent years; see also Part Four, at H.

In the final protocol to the Charter (No I.1), the signatory Länder undertake to impose on the authorities set up under the respective Land legislation governing broadcast advertising on the first television channel operated by them the same obligations as are imposed on the ZDF under the Charter and under the agreement between the Land Prime Ministers provided for in the Charter.

The Land Prime Ministers decided[1] that total advertising time on the first TV channel, which is produced jointly by the Länder broadcasting organizations,[2] and on the second channel should be set at an annual working-day average of twenty minutes. Up to five minutes per working day of unused advertising time may be carried over.

All advertisements are shown in four advertising blocks between 1730 and 1930 hours on the second channel (ZDF) and between 1800 and 2000 hours on the first channel (ARD 1). During the latter period the nine regional organizations making up the ARD broadcast their own regional programmes. There is no advertising on the third channel (ARD 2), which has only regional coverage and which the nine regional organizations also transmit.

The advertising subsidiaries of the Land broadcasting organizations have agreed jointly to draw up a high-quality framework programme for television advertising which is designed to attract viewers by entertaining and educating them but which must not contain any direct or indirect advertising.[3]

The provisions governing the duration and implementation of television advertisements are spelt out and supplemented by a special set of guidelines. Section 2 of the guidelines lists the public holidays on which no advertising may be broadcast. Section 6(1) stipulates that advertising shall be presented only for commercial reasons, but not for political purposes or for expressing religious views or ideological convictions. Advertisement in respect of writings, recordings, drawings, performances or objects which clearly cause offence of annoyance, put young people at risk or have been banned under criminal law because of their content are not permitted. Advertising spots must not violate laws, be offensive, have a harmful effect or cause embarassment. Special regard is to be had to the interests of children and young people (Section 7).

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[1] Decision of 6 June 1961. See Section 3 of the "Richtlinien für die Werbesendungen des Zweiten Deutschen Fernsehens" (Guidelines for advertisements broadcast by the ZDF) of 14 April 1967. For Saarland, the detailed guidelines were reproduced in Section 2 of the Verordnung zur Durchführung des Gesetzes über die Veranstaltung von Rundfunksendungen in Saarland (Regulation implementing the Act on the organization of broadcasting in Saarland) of 22 December 1964.

[2] Cf. Agreement between the Länder of 17 April 1959 on the coordination of the first television channel.

[3] See Programmebeitragsvertrag (Programme contribution agreement), Section 1, in the version of 12 July 1977.

In order to investigate the effects of a wider supply of television programmes, trials with private and public "active" and "passive" cable television have been under way in Ludwigshafen/Vorderpfalz since 1 January 1984[1] and in Munich since 1 April 1984.[2] Two further trials are to be launched in Berlin[3] and Dortmund[4] in 1985. The trial programmes to be broadcast in Dortmund must not contain any advertising (Section 1(5)(2)). The rules governing the trials in Berlin (Section 51), Ludwigshafen Section 3(7)) and Munich (Section 9) permit advertising as a matter of principle.

In the case of the Ludwigshafen trials, advertising time must not account for more than 20% of total broadcasting time (Section 14(10)). The agreement on the Munich trials does not impose any such restriction (Section 9). In Berlin, advertising is to be permitted in continuous blocks lasting not more than nine minutes per hour of broadcasting time (Section 51(3)).

Under the draft Bavarian Act concerning the media,[5] cable companies are allowed to put together new radio and television programmes with local or wider coverage from contributions by (private) suppliers of material ("active" cable broadcasting). Advertising forming part of such new programmes must not account for more than a fifth of the supplier's broadcasting time (Section 30(2)). However, in the case of transmissions by suppliers with less than one hour's daily broadcasting time, the amount of advertising time may exceed the 20% ceiling (Section 30(4)(2)).

A 20% ceiling is also to be found in the draft broadcasting legislation for Lower Saxony,[6] Schleswig-Holstein[7] and Saarland[8] but not (as yet) in the

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[1] Landesgesetz über einen Versuch mit Breitbandkabel, 4 December 1980, Gesetz- und Verordnungsblatt Rheinland-Pfalz, p. 229.

[2] Grund- und Gesellschaftervertrag für das Kabelpilotprojekt München, 16 July 1982.

[3] Entwurf eines Gesetzes über die Durchführung des Kabelpilotprojekts Berlin, sent by the Berlin Senate to the Chamber of Deputies on 30 March 1984, Abgeordnetenhaus - Drucksache 9/1718.

[4] Nordrhein-westfälisches Gesetz über die Durchführung eines Modelversuchs mit Breitbandkabel, 20 November 1983, Gesetz- und Verordnungsblatt Nordrhein-Westfalen 1983, p. 640.

[5] Entwurf eines Gesetzes über die Erprobung und Entwicklung neuer Rundfunkangebote and anderer Mediendienste in Bayern, adopted by the Bavarian Council of Ministers on 24 January 1984, Media Perspektiven 1984, p. 140.

[6] Entwurf Landesrundfunkgesetz Niedersachsen, sent by the Land Government to the Land Parliament on 4 May 1983, Section 38(2), Landtags-Drucksache 10/1120 of 5 May 1983.

[7] Entwurf eines Rundfunkgesetzes für das Land Schleswig-Holstein, sent by the Land Government to the Land Parliament on 29 March 1984, Section 24(1), Landtags-Drucksache X/450 of 29 March 1984.

[8] Referentenentwurf eines Rundfunkgesetzes für das Saarland, 9 April 1984, Section 44(2).

somewhat older draft legislation for Baden-Württembert,[1] which is being examined at the moment by the Land Government. The legislative instruments in question will grant each private individual, as a matter of principle, the right to broadcast, on the basis of an authorization or concession, radio and television via ground transmitters and to finance the programmes broadcast out of advertising revenue.[2]

Advertising may also be transmitted in the evenings and on Sundays and public holidays. It must be kept clearly separate from the rest of the programme. Advertisements may be shown in blocks at appropriate times. However, advertising time must not exceed 15 minutes per hour in Schleswig-Holstein and 15 minutes in the case of television and 18 minutes in the case of radio in Saarland. Moreover, in Schleswig-Holstein and Saarland, advertising blocks may appear only at the beginning or the end of a transmission. A television transmission may be interrupted on one occasion at a pre-determined moment if it lasts more than 60 minutes (Schleswig-Holstein), 80 minutes (Saarland) or 100 minutes (Lower Saxony).

Transmissions financed by a third party (sponsor or promoter) will be permitted but, in the case of Schleswig-Holstein and Saarland, only if their content is unrelated to the third party's business interests.

In Lower Saxony and Schleswig-Holstein, local and regional advertising, i.e. advertising not broadcast country-wide, is to be banned even from local and regional programmes ("Fenster"), the aim being to protect advertising revenue accruing to the local and regional press.

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[1] Entwurf für ein Gesetz über die Neuen Medien, adopted as a discussion document by the Land Government on 16 March 1982, Section 26(1)(6), Media Perspektiven 1982, p. 202. Under this provision, advertising in any one hour may not exceed three minutes in the case of television and
[2] five minutes in the case of radio.
The draft acts also govern the re-transmission of existing programmes by cable ("passive" cable broadcasting).

France

The Act of 29 July 1982 on broadcasting and communications reorganized broadcasting as a whole and placed broadcast advertising on a new basis.

It permits broadcasting by private as well as by public organizations.

For public broadcasting organizations, the object, duration and conditions for broadcasting advertisements, and the permissible amount of advertising revenue are laid down in a so-called memorandum of conditions, which also sets the upper limit on the amount of advertising which can be accepted from the same advertiser (Article 66(1) and (2)). The memorandum contains the permanent provisions, laid down by decree, and the annual provisions, laid down by order (Article 32(1)). The new memoranda are to be published shortly; until then, the existing memoranda remain in force. The Régie Française de Publicité (RFP) is responsible for monitoring and implementing the provisions on broadcast advertising (Article 66(3)).

In addition, the Haute Autorité de la Communication Audiovisuelle, established under Article 12 of the Act, is responsible for ensuring that the public broadcasting organizations respect the fundamental principles governing the content of broadcast advertisements as derived from current laws, regulations and professional practice (Article 19(1)). To this end, the Haute Autorité recommends standards which it may publish (Article 19(2)). It also consults the Conseil National de la Communication Audiovisuelle on advertising decisions and recommendations (Article 27(2)). Should a national programme company seriously or repeatedly violate the memorandum of conditions or the acts, decisions and recommendations of the Haute Autorité with regard to broadcast advertising, the Haute Autorité requires the President of that company to take th necessary measures to bring such violations to an end (Article 26(3)).

With regard to the use of advertising revenue, each year when the Finance Act is voted, Parliament has to authorize allocation of the expected revenue from commercial television advertising (Article 62). Revenue is shared out between the domestic public radio and television broadcasting organizations (Article 63).

Private broadcasting companies require authorization (Article 78). However, for television broadcasting over the air to the general public, only public-law concessions can be awarded (Article 79). Local radio stations operating over the air are not allowed to carry advertising (Article 81(4)). They receive State support financed out of radio and television advertising revenue. The memorandum of conditions also determines the amount and object of the advertising which the applicant may carry on in order to finance the proposed service (Article 84(1)). Advertising revenue may not amount to more than 80% of total financing (Article 84(2)).

In April 1984, the President and the Government announced that the existing ban on advertising by local private radio (Article 81(4)) was to be lifted. Accordingly, a bill amending this provision of Article 81 will be laid before Parliament. If it is adopted, the close on 1 000 private local radio stations will then be able themselves to choose their statute and their broadcasting policy. If they opted for a non-profit-making status, they would undertake not to carry advertising. Instead, they would receive subsidies from a fund financed out of contributions from all public and private boradcasting organizations. If they opted for a profit-making status, they would not be eligible for public subsidies and would then be allowed to rely on advertising revenue. According to the Government, this is the only way to achieve the freedom of broadcasting provided for in 1982. The Government maintains that the ban on advertising had led to unsound practices, that those practices have become more widespread and that, in many cases, the press has meanwhile become involved in private local radio and has less need of protection.

Under the new legislation, advertising would be governed by the RFP's rules on radio and television advertising. Brand advertising is not broadcast on French radio, but it is possible to receive foreign broadcasts that carry advertisements.

According to the memoranda of conditions for the television stations TF 1 and A 2, brand advertising may be broadcast for an annual daily average of 18 minutes. However, on any particular day, up to 24 minutes of brand advertising is permitted. This does not include advertising transmitted between 1330 and 1900 hours or postponements caused by strikes. The FR 3 station is allowed to transmit up to ten minutes' brand advertising each day. No restrictions as to duration exist for "collective" advertising for, say, apples, milk and butter generally.

Commercials are broadcast in advertisement breaks between programmes, with each commercial lasting between 8 and 60 seconds and a break lasting up to 5 minutes. Television advertising is broadcast daily and is concentrated during evening viewing times. The organizations in France are not, therefore, subject to any restrictions as to the days on which, and the actual times at which, advertisements may be broadcast.

The 1974 Broadcasting Act stipulated that advertising revenue must not account for more than 25% of the total revenue accruing to any broadcasting organization. This provision has been superseded by the new Act of 1982, which does, however, impose a restriction of another sort that is spelt out in the memoranda of conditions (Article 66(2)), namely, that revenue accruing from a single advertiser must not exceed 7% of the advertising revenue of any programme company.[1]

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[1] In this connection, see the comparative report by the European Broadcasting Union (EBU), Synopsis of replies to a survey on television advertising rules conducted among EBU active members, EBU Review, Programmes, Administration and Law, No 5, September 1983, p. 25.

Greece

Until now, radio advertising has been broadcast by twenty ERT and YENED regional stations and three private regional stations; all radio stations are fed into the same network.[1]

Radio advertising can be broadcast in the form of advertisement breaks between or within programmes, and individual commercials within a sponsored programme. Commercials last between 10 and 60 seconds; sponsored programmes can last for between 5 and 30 minutes. Radio advertising may be broadcast daily from 07.00 to 18.00, except on four public holidays. There is no statutory limit on the total duration of radio advertising broadcasts.[2]

Both ERT 1 and ERT 2 carry television advertising. ERT 1 and ERT 2 currently obtain about 25% of their revenue from advertising. ERT is permitted to broadcast up to 30 minutes of advertising a day, with not more than 10 minutes per break. Individual commercials or advertisement breaks are permitted both between and within programmes. The same commercial may not be repeated within the same programme, but otherwise up to three repeats are permitted daily. Individual commercials can last between 15 and 60 seconds, and an advertisement break up to 10 minutes. ERT groups its advertising into two ten-minute breaks and two five-minute breaks, which must be separated by a programme at least 15 minutes long, or 40 minutes long between 21.00 and 22.00. Sponsored advertising is not permitted on television. Advertisements are carried between 13.30 and 24.00 on working days and between 13.00 and 24.00 on Sundays. Television advertising is not permitted on Good Friday. Advertising may not exceed 7% of total transmission time in any one month.[3]

There are no special controls on broadcast advertisements.

No private television companies nor, in particular, cable companies are as yet known to exist.

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[1] See report in Media Perspektiven 1979, p. 210 (pp. 214 et seq)
[2] See report in Media Perspektiven, loc. cit., p. 215.
[3] See the Order on television advertising which entered into force on 1 October 1979, amended in 1982; cf. also the time available for broadcasting advertisements, Official Government Gazette of 3 December 1976 and the report in Media Perspektiven, loc. cit., p. 215, and the EBU Report in EBU Review, loc. cit.

Ireland

About half RTE's revenue comes from braodcast advertisements. Section 20 of the Broadcasting Authority Act, 1960, and Section 14 of the Broadcasting Authority (Amendment) Act, 1976, contain more detailed rules on broadcast advertisements. The total daily and hourly time for advertisements is fixed by the Authority and is subject to the approval of the Minister for Post and Telegraphs. The Authority may not accept any advertisement which is directed towards any religious or political end or has any relation to any industrial dispute; the Authority may reject any advertisement presented for broadcasting in whole or in part.

"The RTE Code of Standards for Broadcast Advertising", May 1982, contains rules for broadcast advertising. No advertisement may include anything that states, suggests or implies, or could reasonably be taken to state, suggest or imply that any part of any programme has been supplied or suggested by any advertiser. This shall not apply to sponsored programmes (point 4). An advertisement must be clearly distinguishable as such and be recognizably separate from the programmes (point 5). Subliminal advertising is not permitted (point 6). In addition to general standards of behaviour, the Code contains special rules on advertising and children (Appendix 1), on the advertising of medicines and treatments (Appendices 2 and 3), on the advertising of alcoholic drink (Appendix 4) and on financial advertising (Appendix 5).

On the radio, advertisements are broadcast within and between programmes; the advertisement break may last between 2 and 3 minutes. Sponsored advertising is alos permitted for up to 15 minutes four times daily. Total advertising time is limited to 7 1/2 minutes in every hour or 10% of daily broadcasting time. Radio 1 advertising is broadcast daily, except on Sundays and on two public holidays, from 7.30 to 19.00 and from 23.00 to 23.45. Radio 2 broadcasts advertising on Sundays as well.

On RTE television, advertising time each day is limited to 10% of the total programme broadcast hours and there is a maximum limit of 7 1/2 minutes of advertising in any one clock hour. Advertisements are broadcast daily, except on Christmas Day and Good Friday, usually from 14.00 to 24.00 except during school holidays and when special events occur. The same product may not be advertised more than six times in any one day.

Advertisements are broadcast in the main at programme junctions and also at natural breaks in feature films, programmes of long duration (60 minutes or thereabouts) and in the ready-made "commercial breaks" in the popular TV series made and distributed internationally by major film companies. As a general rule programmes of 30 minutes duration are not broken for advertisements. It works out that normally there are three advertising segments per hour, either between programmes or at the natural breaks and the average duration is 2 1/2 minutes but may vary between 1 1/2 and 3 1/2 minutes. Slide advertising is used, but not sponsoring.

RTE also operates a local radio station in Cork, which broadcasts advertising for between two and three hours daily. Approximately one-half of the population of Ireland are now in a position to receive signals from all four British channels, including the advertisements broadcast by ITV.

Italy

The public service broadcasting authority RAI is financed from licence fees and radio and television advertising revenue.[1] Advertising carried by RAI is subject to limits determined by the Parliamentary Committee for the general guidance and supervision of broadcasting services in the general guidelines it issues on advertising and by the need to protect other spheres of information and the mass media.[2]

The Parliamentary Committee[3] is responsible for formulating general guidelines on broadcast advertisements for the purpose of protecting the consumer and ensuring the compatability of the requirements of productive activities with the objective of public interest and the responsibilities of public service broadcasting. Each year the Parliamentary Committee sets a ceiling on the RAI's advertising revenue for the following year. In order to do so, it takes into account the advertising revenue of the national press and the previous and current year's revenue from broadcast advertisements. The percentage changes in the revenue form the basis for setting the new ceiling, the intention being to guarantee the balanced development of the two media.[4] In 1980 advertising accounted for 21.66% of RAI's total revenue, and in 1981 for 21.80%.[5]

For RAI, advertising may not exceed 5% of transmission time both on radio and television.[6]

The Società Italiana Pubblicità Radiofonica e Televisiva (SIPRA) and the Società per Azioni Commerciale Iniziative Spettacolo (SACIS), two companies associated with RAI, are involved in the practical production of advertising carried on by RAI. Advertising time is sold by SIPRA. SACIS has produced a code of advertising standards and practice[7] which contains general provisions on advertising content and special rules on the advertising of specific goods and services.

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[1] Broadcasting Act, Section 15, first paragraph; Section 21, first paragraph, first sentence.

[2] Section 21, first paragraph, second sentence.

[3] Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi, see Section 4, seventh paragraph; see also Regolamento Parlamentare 13 November 1975 - Regolamento della Commissione parlamentare per l'indirizzo generale e vigilanza dei servizi radiotelevisivi, Section 17, point 3.

[4] Section 21, third and fourth paragraphs; Regolamento Parlamentare 13 November 1975, Section 17, points 1 and 2.

[5] See the EBU report in EBU Review, loc. cit., p. 26.

[6] Section 21, second paragraph.

[7] Norme per la realizzazione della pubblicità radiofonica e televisiva- edizione 1.1.1979.

The programming of advertising is at the discretion of RAI, which has adopted voluntary rules governing its practice.[1] With regard to radio advertising, commercials are broadcast by RAI in advertisement breaks and sponsored advertising is not permitted.[2] Both RAI radio programmes carry advertising from 06.00 to 23.30 and the regional RAI network from 12.00 to 15.00.

Television advertising is also broadcast in individual commercials which are brought together into advertisement breaks and transmitted between programmes. Commercials last between 15 and 60 seconds, and breaks between 30 seconds and 5 minutes. On both RAI channels advertisements are broadcast from 13.00 to 23.00. No advertising is broadcast on Good Friday and on 2 November.

The Act permits private broadcasting companies in the first instance to transmit local single-channel radio and/or television programmes via cable, subject to a licence from the State permitting operation of the network and transmission of programmes (Sections 24 and 30). Broadcast advertisements, which must be reserved for local services and products, may not exceed 5% of total transmission time, excluding the time used for programme repeats broadcast within the past six months, and may not exceed six minutes in each hour of broadcasting (Section 30, fifth paragraph, subparagraph (a)). If the overall limits on broadcasting advertisements are exceeded, or in the case of the hourly limits are repeatedly exceeded, the licence is forfeited (Section 30, fourth paragraph, subparagraph (2)). No licence is required for non-profit-making cable systems linking no more than 50 subscribers; such systems lay not broadcast commercial advertising (Section 37, first paragraph).

The Minister for Posts and Telecommunications may also authorize private relay companies exclusively to receive RAI television programmes and retransmit them simultaneously and in full (Section 43).

Lastly, the Ministry for Posts and Telecommunications may also authorize the installation and operation of private wireless apparatus used exclusively to receive and retransmit simultaneously and in full, in the national territory, the normal radio and television programmes broadcast by the public service broadcasting authorities of other States or by other organizations authorized by the laws of those States, which are not established for the purpose of broadcasting programmes in the territory of Italy (Section 38, first paragraph). The authorization obliges the licensee to remove from foreign programmes everything in the nature of advertising, in whatever form (Section 40).

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[1] EBU Review, loc. cit., p. 27.

[2] Media Perspektiven 1979, pp. 217 et seq.

In addition to the private cable companies and relay companies permitted by the law there are also the local private radio and television stations, permitted by a Constitutional Court judgment of 1976. In 1981 there were altogether 972 private stations, mostly financed from advertising revenue.[1] The carrying of advertising on private stations seems to differ in certain respects; there are virtually no statutory restrictions on advertising by local radio and television stations.[2]

As well as the Italian stations, we must also mention the foreign radio and television stations which broadcast direct to Italy (Monte Carlo, Capodistria/Yugoslavia, Malta, Lugano).[3] If the large number of private stations and foreign stations are also taken into consideration, it can be said that in Italy advertising is broadcast on a large scale and with virtually no restrictions.

[1] Rauen, Platz für zwei Networks: Medienkonzentration in Italien, in Media Perspektiven 1984, p. 161 (at pp. 162-165).

[2] Cf. report in Media Perspektiven 1979, pp. 217 et seq.

[3] Cf. Media Perspektiven loc. cit.

Luxembourg

RTL is financed primarily by advertising. According to the memorandum of conditions attached to the licence contract, RTL is allowed to organize advertising within the limits determined by the Government. As the Government has not determined limits, RTL runs its advertising on the basis of profitability. Voluntary self-restraint exists for television advertising (Code de Déontologie Publicitaire RTL-Télévision, June 1982). RTL also exercises voluntary self-restraint with regard to advertising time: advertising must not amount to more than 20% of daily broadcasting time.[1]

Radio advertising takes the form of individual commercials, advertisement breaks, sponsored programmes and special forms of advertising.[2] The French radio programme carries advertising daily from 05.30 to 03.00, the German programme from 06.00 to 19.00 and the English programme from 07.45 to 03.45, with the total duration of advertising broadcasts different for each of them.

The average number of commercial breaks in a day's broadcasting on the French-language programme is currently 18. A break lasts between 2 and 7 1/2 minutes, and 4 minutes on average. Individual commercials last between 15 and 60 seconds. The total time devoted to advertising averages 68 minutes daily. Broadcasting takes place between 12.25 and 23.00.

Sponsored programmes are no longer broadcast.

Since 2 January 1984 RTL also broadcasts a German-language television programme, "RTL-Plus". This programme can be received in areas in Germany close to the Luxembourg border (up to a distance of about 100 km from the transmitter). The programme, which likewise carries advertising, is broadcast between 17.30 and 22.45, or 17.00 to 24.00 at weekends.

Commercial breaks averaging 2 minutes are inserted between and during programmes. Individual advertisements last between 15 and 60 seconds. Most of the advertisements broadcast last 20 or 30 seconds. In March 1984 an average of 23 advertisements were broadcast daily, five of them before 19.00. Total advertising time averages 20 minutes a day on a week-round basis.

The voluntary self-restraint guidelines which govern French-language programmes are also applied to advertising on RTL-Plus.

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[1] EBU Review, loc. cit., p. 27.

[2] Media Perspektiven 1979, p. 219.

The Netherlands

Under the Radio Act of 1967 (Article 2(1), subparagraph (g) and Article 50), one public organization, the Reclamestichting (Stichting Ether-Reclame, STER), is solely responsible for the broadcasting of radio and television advertising. No other body may carry out radio or television advertising either at national, regional or local level. The revenue earned by the Reclamestichting provides a major source of radio and television funding.

The responsible Minister allocates broadcasting time to the Reclamestichting (Article 20). In the case of radio advertising this is a maximum of seven hours a week and in that of television advertising three hours a week (Article 32(1)). This figure may be expanded by up to 50% for supporting material between advertisements and the like (Article 32(1)).

Advertisements must be recognizable as such and be clearly distinguishable from the programmes of the other organizations allocated broadcasting time (Article 50(4)).

The responsible Minister lays down more detailed rules on the advertisements broadcast by the Reclamestichting after making due allowance for the responsibilities of the Reclameraad (Article 32(2)). After consulting the Ministers for Economic Affairs, Agriculture and Health and the Reclameraad, the Minister may stipulate that no advertisements may be broadcast for certain types of goods or services (Article 50(2) and (3)). The Minister lays down the statutes of the Reclamestichting and appoints the members of the foundation's administrative board (Article 50(5) to (8)).

The Reclameraad lays down rules governing the content of the Reclamestichting's radio and television advertisements and ensures that they are complied with (Article 49(1)) subparagraphs (a) and (b)). The Reclameraad must consult the competent bodies on matters relating to radio and television advertising on its own initiative or at the request of third parties (Article 49(1), subparagraph (c)). The Voorschriften voor de nederlandse etherreclame of February 1980 (reprinted in March 1982) contains the current rules. This booklet sets out the rules, lists the bodies responsible for implementing them, and describes the working methods of these bodies and decisions taken by the Reclameraad.

As regards the practical side, the position in 1984 is as follows:

Radio advertisements are broadcast on the three national radio programmes, Hilversum I, II and III, since 1 April 1984 every weekday from 07.00 to 19.00 hours on Hilversum I and from 07.00 to 18.00 hours on Hilversum II and III. The maximum advertising time is 8 1/4 hours a week including supporting material. Advertising takes the form of individual advertising spots put together in advertisement breaks before and after the news. The advertising spots are 10 to 80 seconds long and the breaks between 50 and 80 seconds long. There is no sponsor advertising.

From 1 January 1985 national radio advertising is also to be broadcast by the regional stations.

Television advertisements are broadcast on the two national television channels, Nederland 1 and 2, between 19.00 and 24.00 hours for a maximum of 18 minutes each day. Commercials of an average length of 15 to 60 seconds are transmitted in advertisement breaks before and after the news. Sponsor advertising is not accepted on television. From 1 January 1985 television advertising time is to rise to 3 hours 36 minutes weekly, excluding supporting material.

The Radio Act allows regional broadcasting (Article 47). Seven semi-local broadcasting stations in the proper meaning of the word have so far been set up. There are plans to extend them to 12. The Act also allows cable companies to transmit national, regional and foreign programmes (Article 48). Neither the regional stations nor the cable operators may transmit their own advertising. This is the responsibility of the Reclamestiching.

United Kingdom

The BBC does not broadcast advertisements either on radio or its television channels.

Advertisements are, however, broadcast by the 20 or so local radio companies which operate commercially under the Independent Broadcasting Authority (IBA) and the 15 national and regional television companies (Independent Television - ITV). The main legal basis is the Broadcasting Act 1981.

The programmes broadcast by the IBA are produced by the individual programme contractors. They may include advertisements as expressly stated in Section 2(3) and Section 8(1) of the Act.

The following of the general programme principles covering all broadcasts are of particular relevance to advertising:

(1) Nothing should be included in the programmes which offends against good taste or decency or is likely to encourage or incite crime or lead to disorder to be offensive to public feeling (Section 4(1), subparagraph (a)).

(2) Subliminal influences, particularly images of brief duration, of which viewers are not aware are forbidden (Section 4(3)).

(3) No prizes or gifts of significant value may be made available only to persons receiving the programme concerned (Section 4(4)).

(4) No religious service or propaganda relating to matters of a religious nature may be broadcast without the previous approval of the IBA (Section 4(5), subparagraph (a)).

(5) Advertising for charitable or benevolent purposes is also prohibited (Section 4(5), subparagraph (b)). Section 8(7), subparagraph (a), does, however, allow references to the needs and objectives of any association or organization conducted for charitable or benevolent purposes.

The Act also contains special provisions relating to the broadcasting of advertisements (Sections 8, 9, 13 and 16 and Schedule 2 in the Annex, which is referred to in Section 8(3) and which may be amended by the IBA after consultation with the Secretary of State responsible (Section 8(4)) (see also Section 8(10) as regards the procedure to be followed)).

Orders for the insertion of advertisements may be accepted by the programme contractors either through advertising agents or direct from the advertiser but neither the programme contractors nor the IBA may act as advertising agents (Section 8(2)).

The IBA is required to consult from time to time with the Secretary of State as regards the advertisements broadcast and to carry out any directions he may give (Section 8(5)).

Section 8(6) contains a general ban on sponsor advertising (with relaxations in Sections 8(7), 8(8) and 8(9)).

The IBA is required to draw up a code governing standards and practice in advertising prescribing the advertisements to be prohibited (Section 9(1), subparagraph (a)) and to ensure the provisions of the code are complied with (Section 9(1), subparagraph (b)). The most recently published version of the code is the IBA Code of Advertising Standards and Practice - May 1981, reprinted October 1982. The IBA may impose requirements as regards advertising which go beyond those of the code (Section 9(2)). The IBA may, in the exercise of its duties, give general or specific directions to programme contractors to not broadcast a specific advertisement or type of advertisement (Section 9(3)).

The IBA may also give general or specific directions with respect to the times when advertisements are to be allowed (Section 9(4)) and in particular the greatest amount of time to be given to advertisements in any hour or other period (Section 9(5), subparagraph (a)), the minimum interval between advertisements and the number of advertisements to be allowed in any programme, hour or day (Section 9(5), subparagraph (b)) and the exclusion of advertisements from a specified broadcast (Section 9(5)), subparagraph (c)). The IBA may lay down different provisions for different parts of the day, different types of programmes or for differing circumstances (final part of Section 9(5)).

Radio and television advertisements are broadcast every weekday. Radio advertising is allowed at any time of the day but limited to nine minutes in any hour.

Television advertising is broadcast for 12 hours a day, from midday on weekdays and beginning in the morning on Saturdays and Sundays, for a maximum of six minutes on average and in any event no more than seven minutes in any hour.

Advertising spots of 15 to 90 seconds are allowed on radio, and on television spots of seven to 120 seconds are grouped together in advertisement blocks.

Schedule 2 in the Annex to the Broadcasting Act 1981 lays down further provisions:[1]

(1) Advertisements must be clearly distinguishable as such and recognizably separate from the rest of the programme (1(1)).

(2) Successive advertisements must be recognizably separate (1(2)) and must not be presented in such a way as to appear to be part of a continuous feature (1(3)).

(3) Audible matter in advertisements must not be excessively noisy or strident (1(4)).

(4) The amount of time given to advertising in the programmes must not be so great as to detract from the value of the programmes as a medium of information, education and entertainment (3)).

(5) Advertisements may not be inserted otherwise than at the beginning or the end of the programme or in natural breaks in the programmes (4).

[1] See EBU report in EBU review - Programme Administration Law, No 5, September 1983, p. 25 (at pp. 26 and 27).

(6) Rules must be observed as regards the classes of broadcasts, e.g. religious services, in which advertisements may not be inserted and the interval which must elapse between any such broadcast and advertisements (5(1)).

(7) Rules may also be laid down as regards the minimum interval between advertisements (5(2)).

(8) There must be no unreasonable discrimination in the acceptance of advertisements (6).

(9) No advertisements of a religious or political nature or which has any relation to industrial disputes may be permitted (8).

There are a number of alterations applying to advertising on the Fourth Channel (Section 13 of the Broadcasting Act 1981). Channel Four has been transmitting since November 1982. It is run by a subsidiary of the IBA. A maximum of six minutes in any hour of advertising is allowed.

A Specialist Advisory Committee has been set up in the IBA to give assistance on matters concerning advertising. Organizations, authorities and persons who have experience in the assessment of advertising and representatives of the public as consumers are represented on the Committee (Section 16(2), subparagraph (b)). The Committee among other things suggests alterations to the advertising code (Section 16(3)). A special advisory panel has been set up to deal with the advertising of medicines and treatment (Section 16(5) and (6)).

The IBA must also ensure that advertisements are referred to these advisory bodies before they are broadcast (Section 16(7)).

(c) Comparative analysis

A comparison of the legislation on radio and television advertising - with the exception of rules governing the advertising content (see points 3 and 4) - of the Member States in which radio and television advertising is allowed reveals the following areas on which legislation concentrates:

The relationship between advertisements and the rest of the programme

In some Member States (in Germany the ZDF and draft Länder legislation on the media, Luxembourg, Ireland, the Netherlands and the United Kingdom) there must be a clear separation of advertisements from the rest of the programme. The EBU has also made provision for such a principle.[1]

In many cases advertisements must be clearly recognizable as such (Germany - draft legislation in Baden-Württemberg; Ireland; the Netherlands and the United Kingdom). Subliminal advertising is forbidden (Luxembourg, Ireland, the Netherlands, the United Kingdom, the EBU),[2] and in some cases an express and general reference to the broadcasting of advertisements is even required (Germany - draft legislation in Baden-Württemberg; Luxembourg).

Admissibility of sponsor advertising

Sponsor advertising is allowed on radio in Greece and Ireland, on local stations in Italy, and in Luxembourg. It is prohibited or not practised in Germany, on Greek and Irish television, on the RAI in Italy, in the Netherlands and the United Kingdom.

Interruption of programmes

In many Member States advertising spots or advertisement breaks may only be inserted between the programmes of the station, i.e. before or after but never during programmes. In other words, they must not interrupt programmes (television in Germany and in draft media legislation in some Länder, France and the Netherlands). In Ireland and the United Kingdom advertisements may be introduced into continuous programmes but only in "natural breaks", as with the EBU.[3] In Ireland, and under draft legislation governing the media in several German Länder, particularly long programmes may be interrupted by advertisements.

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[1] European Broadcasting Union, Declaration of principles regarding commercial TV advertising broadcast by DBS, 15.7.1983: point 12, EBU Review, No 5, September 1983, p. 31 (at 32). Likewise the Council of Europe Recommendation on principles on television advertising, R(84)3, 20.2.1984, point 7.

[2] EBU, loc. cit., point 11. Likewise Council of Europe, loc. cit., point 6.

[3] EBU, loc. cit., point 13.

Other Member States, however, allow programmes to be interrupted by advertisements (on radio in certain cases in Germany, on both television and radio in the pilot cable projects in Rhineland-Palatinate and Munich, and in Greece, Ireland and Luxembourg).

The arrangements applying in the different Member States are essentially based on the approach that commercial breaks should be integrated into programmes in such a way that the coherence, value and natural movement of programmes is respected. In practice this has produced the following typical arrangements:

- advertisements may interrupt programmes only at natural breaks;

- advertisements may be inserted before and after separate programmes;

- no advertising may be inserted in or around religious broadcasts (United Kingdom).

Advertising spots and advertisement breaks

In some Member States advertising spots are broadcast only in the form of advertisement breaks (Germany (television), France, Ireland (television), Italy (RAI), Luxembourg (television), the Netherlands, the United Kingdom (television). In other Member States both advertising spots and advertisement breaks are allowed (Germany (radio), Greece, Ireland (radio), Italy (local stations), Luxembourg (radio), the United Kingdom (radio)).

Total transmission time for advertisements

Transmission time for advertisements is restricted in most Member States, to a percentage of permissible broadcasting time for example (Germany: radio and television in Rhineland-Palatinate and draft legislation in Bavaria, Lower Saxony, Saarland, and Schleswig-Holstein, 20% of daily broadcasting time; Luxembourg 20% of television broadcasting time (self-restraint); Ireland 10%; Italy 5% for RAI and local cable operators; Greek television 7%); or to so much time in any hour (seven and a half minutes in Ireland; six to seven minutes for television and nine minutes for radio in the United Kingdom; up to ten minutes on German radio, nine minutes on radio and television in draft Berlin legislation), or so much time per day (Germany 20 minutes each working day for television; France, television 24 minutes daily, annual average 18; Greece, television 30 minutes daily); or so much time per week (in the Netherlands seven hours for radio and three hours for television).

There is no restriction on transmission time in Germany and Greece for radio, in Italy for private local radio stations, and in Luxembourg for radio and television.

The rules on advertising time in the Member States fall into three groups:

- a stated percentage of total broadcasting time;
- a stated length of time per day, per hour or per week;
- no limitation.

Ban on advertising on Sundays and public holidays

No advertisements may be broadcast on Sundays in Germany, or on television in the Netherlands or radio in Ireland. They are also prohibited on public holidays in Germany. In Greece no advertisements are allowed on radio on four public holidays and on Good Friday on television. In Ireland they are banned on two public holidays (in addition to Sundays) on radio and on Christmas Day and Good Friday on television. In the Netherlands there are no advertisements on television on Good Friday, Christmas or Ascension Day. In Italy no advertisements may be broadcast on Good Friday and on 2 November. Advertisements are permitted on Sundays and public holidays in the other Member States. In Germany, under the draft Land media legislation in Baden-Württemberg, Bavaria, Berlin, Lower Saxony, Schleswig-Holstein and the Saarland private broadcasters would be permitted to broadcast radio and television advertising on Sundays and holidays.

Daily transmission time for advertisements

There are three different sets of rules here. In some Member States advertisements are broadcast virtually throughout the overall transmission time (Greece (television), Ireland, Italy, Luxembourg and the United Kingdom); in others advertisements are transmitted solely during the evening viewing hours (the practice for television advertising in France, and the rule for television in the Netherlands), whereas in others no advertisements are broadcast in the evenings (there are no advertisements in Germany on radio between 2100 and 0500 hours, and on television after 2000 hours; on Greek radio after 1800 hours; and on Dutch radio after 1820/1830 hours).

Length of advertising spots and advertisement breaks

The rules relating to the length of advertising spots and advertisement breaks are to some extent related to those governing the total transmission time for advertising, although there is no necessary link.

According to the information received individual advertising spots are:

in Germany between 7 and 60 seconds long, in some cases even longer

in France 8 to 60 seconds long on television

in Greece 10 to 60 seconds long on radio
15 to 60 seconds long on television

in Ireland between 5 seconds and 3 minutes long on television

in Italy between 15 and 60 seconds long on RAI

in Luxembourg 15 to 60 seconds long on television

in the Netherlands between 15 and 60 seconds long on television
between 10 and 80 seconds long on radio

in the United Kingdom 15 to 90 seconds long on radio
7 to 120 seconds long on television.

Advertisement breaks are:

in the Netherlands 50 to 80 seconds long on radio

in Ireland 2 to 3 minutes long on radio
2 1/2 to 3 1/2 minutes long on television

in France an average of 3 minutes long on television

in Germany an average of 5 minutes long on television

in Italy between 30 seconds and 5 minutes long on RAI television

in Luxembourg 2 to 7 1/2 minutes long on television

in Greece up to 10 minutes long on television.

3. Bans on advertising for certain goods and services

(a) Tobacco

Radio and television advertising for tobacco, tobacco products and similar products is forbidden in Belgium under Section 2(1) of the Royal Decree of 5 March 1980.[1]

In Denmark the tobacco industry operates a voluntary restraint agreement

Under Section 22 of the German Foodstuff and Commodities Act[2] "radio or television advertising for cigarettes, similar tobacco products and tobacco products for the making of cigarettes by the consumer himself" is prohibited. Any infringement, whether intentional or the result of negligence, is punishable by a fine.[3]

In France, radio and television advertising for tobacco products is prohibited under Article 2(1) of the Act of 9 July 1976[4] and any contravention is punishable. Accordingly, Article 26 of the Rules governing the Régie Française de Publicité bans broadcast advertising for tobacco, cigars and cigarettes.

Advertising for tobacco products on Greek television and on the State-controlled radio stations is not allowed.[5]

In Ireland cigarettes and cigarette tobacco are excluded from broadcast advertising under Section 23(p) of the RTE Code of Standards for Broadcast Advertising.

In Italy, too, there is a general ban on advertising for tobacco products under Act No 165 of 10 April 1962, which stipulates that "advertising for any domestic or foreign tobacco products is prohibited". Any infringement is punishable by a fine. The ban is restated in the SACIS code of practice for radio and television advertising (Section 7(2)).

Luxembourg has no legal ban on tobacco advertising, which is allowed on the radio. On television, however, a voluntary ban is operated (Article X of the Code de Déontologie Publicitiare RTL-Télévision).

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[1] Arrêté Royal concernant la publicité relative au tabac, aux produits
[2] à base de tabac et aux produits similaires.
Gesetz über den Verkehr mit Lebensmitteln, Tabakerzeugnissen,
[3] kosmetischen Mitteln und sonstigen Bedarfsgegenständen, 15.8.1974.
[3] Section 53(2)(1c, subparagraph 3).
[4] Loi no. 76-616 du 9 juillet 1976 relative à la lutte contre le tabagisme.
[5] See the report in Media Perspektiven 1979, page 214 and 215.

In the Netherlands both radio and television advertising for tobacco products are prohibited under the Ministerial Order of 22 February 1980[1] pursuant to Article 50 of the Broadcasting Act.

Finally, in the United Kingdom, broadcast advertising for cigarettes and cigarette tobacco is regarded as unacceptable under Section 17(h) of the IBA Code of Advertising Standards and Practice (1981/82).

The picture is thus largely the same everywhere: apart from Luxembourg and Greece - where there are only partial restrictions - broadcast advertising for cigarettes and similar products is not allowed in any of the Member States. In Belgium, France, Ireland, Italy and the Netherlands the restriction on advertising covers tobacco products in general.

[1] See "Voorschriften voor de nederlandse etherreclame", published by the Reclameraad, Article 18 (page 13).

(b) Alcoholic drink

In Belgium advertising for alcoholic drink is neither specifically prohibited by law[1] nor is there any code[2] of practice governing it. On the other hand, there is a general ban on commerical broadcast advertising.

Denmark also has a ban on any kind of domestic broadcast advertising With regard to alcoholic drink in particular, a voluntary code of practice agreed by manufacturers and retailers for all the media includes provisions forbidding approval of excessive drinking, reference to alcohol as a remedy for psychological or social problems, and encouraging the consumption of alcohol by young people or in connection with sport or driving.[3]

In Germany, there is no legal prohibition of broadcast advertising for for alcoholic drink nor are any restrictions imposed by the broadcasting organizations. However, the industrial associations concerned, acting within the German Advertising Council (the Deutsche Werberat), have established a voluntary code of conduct concerning advertising for alcoholic drinks[4] The code covers all forms of advertising, not only on radio and television. It is, for example, forbidden to encourage excessive consumption or abuse or alcoholic drink, to minimize its dangers, to encourage young people to drink, to portray competitive sportsmen drinking, to encourage drivers to drink, to make claims regarding illness, to claim that alcohol releases inhibitions or can help overcome fear or resolve conflicts, and to deride abstinence. Failure to comply with the code does not entail any legal penalty as such, but may involve censure by the Council, which is a supervisory body set up on a voluntary basis by the advertising industry.

[1] The Act of 29 August 1919 (Loi sur le régime de l'alcool) does not contain a ban on advertising.

[2] Cf. Brandmair, Die freiwillige Selbstkontrolle der Werbung, Rechtstatsachen - Rechtsvergleichung - internationale Bestrebungen 1978, p. 237.

[3] Cf. Consumers' Consultative Committee of the Commission of the European Communities, Opinion concerning consumers, alcohol advertising and codes of ethics of 6 July 1982, Mitteilungsdienst der Verbraucherzentrale Nordrhein-Westfalen 1982/2, p. 3(7).

[4] Verhaltensregeln über die Werbung für alkoholische Getränke, adopted by the Deutsche Werberat in June 1976.

In France, by contrast, advertising for alcoholic drink is restricted by law.[1] It is allowed for drinks belonging to categories 1, 2 and 4 (non-alcoholic drinks; wine, beer and fermented fruit juice, liqueur, anisette, rum, cognac and certain other spirits); only certain types of reference are permissible for category 3 (liqueur-based aperitifs, liqueur wine and fruit liqueurs); advertising for category 5 (pastis, whisky, vodka and gin) is completely forbidden. In its judgment of 10 July 1980[2] the Court of Justice declared these provisions discriminatory. New rules are being prepared banning all radio and television advertising for alcoholic drinks by law.

In actual practice, broadcast advertising for alcoholic drinks is not allowed under Article 25 of the Rules governing the Régie Française de Publicité.

In Greece there are no restrictions on broadcast advertising for alcoholic drinks.

In Ireland broadcast advertising for "hard" spirits in prohibited (Section 23(q) of the RTE Code of Standards for Broadcast Advertising). In addition Radio Telefis Eireann has adopted a special code of practice governing broadcast advertising for alcoholic drink (appendix 4 of the RTE Code of Standards for Broadcast Advertising). This code of practice reiterates the ban on advertising for whisky, gin, vodka, brandy and similar drinks (Section 1). Advertising may not encourage people - particularly young people - to drink, and must not concentrate on brand advertising (Section 2). Any depiction of the consumption of alcohol in company may not involve excessive merriment, and no more than six people, including serving staff, may appear (Section 2). Advertising may not be addressed specifically to the young; no one shown may be under 25. Drinking may not be linked with sport. Sound effects of drinking are not allowed. Attention may not be drawn to especially potent drinks. The consumption of alcohol may not be linked with sexual attraction or physical strength. Advertisements may not claim that alcoholic drink acts as stimulant or tranquillizer. They must not give the impression that people can drink and drive a car or operate a machine safely (Section 3). In addition there are further specific rules.

[1] Articles L 1, L 14 and L 21 of the Code des débits de boissons et des mesures contre l'alcoolisme. See the Opinion of the Consumers' Consultative Committee, Mitteilungsdienst der Verbraucherzentrale Nordrhein-Westfalen 1982/2, page 3(7).

[2] Case 152/78 Commission v France [1980] ECR 2299. For clarification of the implications of the Judgment see joined cases 314, 315 and 316/81 and 83/82 Waterkeyn [1982] ECR 4337.

Advertising for alcoholic drink is not prohibited or restricted by law in Italy. However, Article 22 of the voluntary code of practice of the advertising industry (Codice di Autodisciplina Pubblicitaria, version in force since 1 January 1977) lays down rules, which apply to all the media, on advertising for alcoholic drinks. Advertisements may not depart from the basic principles of moderation, proprietary and responsibility. They may not, for example, encourage excessive and immoderate drinking, depict a dependency on alcohol, appeal to the young, associate drinking with driving, or suggest that drinking fosters mental lucidity or physical strength while a refusal makes for physical, intellectual or social inferiority.

Infringements are dealt with by a disciplinary board which can publish its decisions. Advertising associations which subscribe to the voluntary code of practice are bound by the board's decisions. Those belonging to the scheme include RAI, SIPRA and the Associazione Nazionale Imprese Pubblicità Audiovisiva. The board can publicly censure anyone who fails to comply with its decisions.

Luxembourg, too, has no legal ban or restriction on advertising for alcoholic drinks. Under the Code de Déontologie Publicitaire - RTL Télévision (Article XI) advertisements may not encourage excessive drinking; they may not depice drinking by young people, sportsmen or drivers of motor vehicles. Furthermore, in the case of broadcasts aimed at neighbouring countries RTL endeavours to follow the law of the country concerned (Article XI in conjunction with IX). For example, advertising for alcohol is not broadcast on the French language radio programme because of the legal ban in France.

Broadcast advertising for alcoholic drink in the Netherlands is again governed by a code of practice rather than by rules laid down by law. However, this code is regarded as having semi-statutory force, since the authority which adopts it and monitors its application - the Reclameraad - was established under the Broadcasting Act (Article 49). Under Article 16 of the "Voorschriften voor de nederlandse etherreclame"[1] adopted by the Reclameraad, the rules in respect of alcoholic drink include the following: advertising may not be aimed at increasing consumption as such; it must be for a specific brand or trade mark and not for a type of drink in general; alcoholic drinks may not be contrasted favourably with non-alcoholic ones; advertisements may not encourage immoderate drinking nor may they show abstinence and moderation in a negative light, while the consequences of drinking should not be played down; advertisements may not link drinking with driving or sport and may not aim to influence young people who are under age; it is forbidden to link drinking with health or suggest that it can help reduce anxiety and resolve conflicts.

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[1] February 1980 version, edition of March 1982.

Compliance with the rules is monitored in the first instance by the Reclamestichting; appeals against its decisions can be made to the Reclameraad.[1]

Finally, the United Kingdom also has no statutory ban on advertising for alcoholic drinks. Broadcast advertising is governed by the IBA Code of Advertising Standards and Practice.[2] The rules set out under Section 33(a) - (k) of the Code include the following: liquor advertising may not be addressed particularly to the young nor feature any personality who commands the loyalty of the young; advertisements may not imply that drinking is essential to social or sexual success or that it is especially masculine or that refusal is a sign of weakness; they may not foster immoderate drinking; they may not claim that drink has therapeutic, stimulating or tranquillizing qualities; they should not place undue emphasis on the alcoholic strength of a drink; they may not link drinking with driving and they may not suggest that regular solitary drinking is acceptable.

To summarize, then, advertising for alcoholic drinks is not prohibited by law in the Community, except in France. Restrictions do, however, exist in most of the Member States in the form of codes covering either advertising in general or specific media; these range from purely voluntary, non-statutory codes of practice to semi-statutory arrangements with a public law bias. In terms of their content, the restrictions are all basically similar, but they vary in detail and severity.

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[1] Articles 22 and 26 ff.

[2] Edition of May 1981 (reprinted October 1982).

(c) Advertising for other products and services

Tobacco products and alcoholic drinks are the two most important groups of products which are covered by a specific ban or restrictions on broadcast advertising. Detailed consideration of other groups of products and services is unnecessary in the present context.

Firstly there are products and services for which advertising is subject to general, sometimes very complex rules laid down by law - such as medicaments and medicinal products.[1] As stated in I.1 earlier, it seems inappropriate to consider harmonizing only radio and television advertising for medicaments; any harmonization should cover the entire field, which would imply rules for broadcasting advertising. The same applies to any ban or rules on advertising for the liberal professions. In practice the latter are of little relevance in terms of radio and television advertising.

Secondly there are products and services which are covered by statutory or voluntary advertising bans or restrictions, although on a rather haphazard basis and in only a few Member States, in respect of which appreciable impediments to supernational broadcasting are generally unlikely to occur, in view of their nature. For example,[2] there are bans or restrictions on advertising for the printed media, immovable property and margarine in France; for contraceptives and games of chance in the United Kingdom and Ireland; for arms, slimming preparations, recording tapes, motor cars and motor cycles, boats, jewellery and furs, games of chance and horse racing, money lending, marriage bureaux, holiday companies, the printed media and pet foods in Italy (RAI); and for correspondence courses and sugar confectionery in the Netherlands. For the moment we shall have to wait and see whether this will have an adverse effect on cross-frontier broadcasting.

[1] See the EBU comparative report in EBU Review, loc. cit., p. 29.

[2] See the reports in Media Perspektiven 1979, pages 212 ff, and in EBU Review loc. cit.

4. Advertising codes, advertising control and voluntary restraint

Repeated references have been made above to codes for radio and/or television advertising, to the control of radio and television advertising by bodies specially set up for that purpose and, in particular, to voluntary restraint. Leaving aside the regulations already covered for tobacco and alcohol advertising, the situation in each of the Member States is summarized below, with the accent less on general voluntary restraint systems than on regulations and control systems specific to the media.

Belgium

Since advertising is forbidden there are no regulation and control systems specific to the media. The general voluntary restraint in the trade[1] seems to have had no effect on advertising broadcast into the country and relayed by cable there.

Denmark

Broadcast advertising is not allowed and there are no media-specific controls.[2]

Germany

The general system of voluntary restraint, the German Advertising Council consisting of the joint associations of advertisers, advertising agents and advertising media, bases its work both on the legal provisions and directives of the central committee for the advertising trade (ZAW) and the International code of Advertising Practice of the International Chamber of Commerce.[3]

[1] Brandmair, loc. cit., p. 237.
[2] For general self-regulation: Brandmair, loc. cit., pp. 238-239.
[3] See Section 8 of the working principles of the German Advertising Council, 1979.

Only a relatively small percentage of the cases[1] treated by the German Advertising Board - following complaints and in some cases on its own initiative - comes from radio and television advertising.

Special mention must be made of the "Code of Practice of the German Advertising Board for Radio and Television Advertising with and in front of children", which came into force in January 1974.[2]

According to this Code of Practice, advertising must not contain presentation by children of special advantages and features of the product that is not consistent with the child's natural expressions (Sec. 1); or direct appeals to children to purchase or consume (Sec. 2), or direct appeals by children and/or to children to encourage others to purchase a product (Sec. 3); advertising must not abuse the special trust children usually associate with certain people (Sec. 4); the way advertising is presented must not be misleading, must not entice through exaggerated claims, must not take advantage of the child's natural playing instinct, nor put pressure on children (Sec. 5); finally, advertising should not make criminal offences or other forms of anti-social behaviour seem exemplary or justifiable (Sec. 6).

Mention has already been made (3b) of the non-media-specific Code of Practice of the German Advertising Board on the advertising of alcoholic beverages.

There are no special control systems for radio and television in Germany. Broadcasting companies and their advertising subsidiaries carry out a non-institutionalized, informal preliminary check on advertisements. Regulations exist within the ZDF (second channel) which are more or less generally observed.[3]

France

Under former legislation broadcast advertising, where organized by the ORTF, was subject to comprehensive and institutionalized prior control by the Régie Française de Publicité (RFP).[4] The RFP was established in 1968/69 through a Decree and took the legal form of a limited company with the ORTF as the majority shareholder. It has public-law status. A "Commission consultative technique" was responsible for selecting advertisers permitted to advertise on radio and television. The "Commission de visionnage" was instrumental in checking the individual advertisements and ensured, in particular, that advertising codes and standards were observed. The committee was made up largely of representatives from the ministries plus representatives from the advertising trade and the "Institut National de la Consommation". The decision as to whether an advertising spot was approved or rejected lay with the general manager of the RFP. Appeals against his decision could be brought before the chief general manager.

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[1] Only 27 of 325 cases handled in 1981, see ZAW, Werbung '83, p. 21.

[2] Reprinted along with brief explanations in "Spruchpraxis Deutscher Werberat", second edition - 1982, p. 250.

[3] Directives for Broadcast Advertising of the Second German Television Channel of 14.4.1967; see also 2b, bb - Germany.

[4] See Articles 15 and 22 of the Act of 7.8.1974 and Article 73, 72 and 53 of the specifications of the networks TF 1, A 2 and Radio-France.

A "Réglement de la Publicité radiophonique et télévisée" is used as a basis for control. This is a kind of code of practice based, in many of its parts, on the "Code de pratiques loyales en matiére de publicité" of the French general independent advertising control, which, in turn, is based on the international advertising directives of the International Chamber of Commerce.[1]

The content of this very detailed and comprehensive regulation can be briefly summarized as follows:

The fundamental rules of integrity, decency, morality and honesty must be observed; the public interest must be respected and advertisements must have maximum artistic, documentary and educational content (Article 3(2)). Advertising must inform the consumer and help to increase quality and reduce the prices of goods and services (Article 3(3)). Advertisements must not be vulgar, or in bad taste and must respect the proper use of the French language (Article 3(4)).

The content and wording of advertising must not contravene legal or other provisions, or decency (Article 5(1)).

There is provision for brand advertising for proprietary articles and services and for collective advertising in which individual types and makes cannot be mentioned (Article 5(2) and (3)).

Advertisements must contain no element likely to offend against the moral, religious, philosophical or political convictions of listeners and viewers (Article 5(1)) and must not appeal to charity (Article 7(1)). All subjects, arguments or allusions liable to damage respect for the state are prohibited (Article 8).

Trust and lack of experience must not be misused (Article 9). Advertisements likely to mislead are forbidden; advertisers and their agencies must, on request, substantiate the claims of the advertisements (Article 9(2-5)). (Articles 10-12, and Articles 20 and 28). In particular, certificates and recommendations must not be misleading and may not be used without approval (Article 10).

Copyright and a person's rights over his portrait must be respected (Article 13).

Articles 14 and 15 are concerned with the protection of children and adolescents: their right of privacy must be respected; they may only be used discreetly in advertising, their impressionability and credulity must not be exploited. Exaggerated sales appeals or appeals to make others purchase are forbidden.

Advertisements intended for women or in which women appear "must take account of the significant role they play in society and help to ensure their esteem and dignity" (Article 16).[2]

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[1] Brandmair, loc. cit., pp. 235-236.

[2] See Comparative analysis by Rie, Regelungen fur Kinder und Frauen im amerikanischen und französischen Reklamefernsehen, Film und Recht 1977, pp. 590 et seq.

Advertising may not contain games of chance, lotteries, or radio or television games (Article 17).

Defamation is forbidden, especially disparaging comparisons and advertisements causing confusion (Article 18).

Irrespective of the method of selling used, distribution companies may advertise only goods and services which they themselves produce (Article 19).

Particular discretion is required in the advertising of medicines and treatments (Article 22). Advertising for medicines and the like requires ministerial permission (Article 23), as do advertisements for personal loans (Article 24), vocational training courses and correspondence courses (Article 27). Finally, the advertising of motor vehicles is subject to special requirements (Article 29).

Under Law No 82-652 of 29 July 1982 on audiovisual communication, the "Régie Française de Publicité" is responsible for the control and implementation of the advertising provisions in the specifications of networks and stations (Article 66(3)). The "Haute Autorité de la Communication Audiovisuelle" is responsible, in public-law broadcasting, for the observation of the principles regarding the content of advertisements (Article 19(1)). In this respect it can recommend standards (Article 19(2)) although it has not yet done so.

Greece

There are no special control systems and standards for broadcast advertising in Greece. There is a general independent control system operated by the advertising trade, but this does not appear to have any real effect on broadcast advertising.

Ireland

In Ireland the Broadcasting Authority laid down the RTE Code of Standards for Broadcast Advertising in May 1982.

These involve minimum standards; Radio Telefis Eireann reserves the right to impose stricter standards (introduction). Advertising must comply with Irish Legislation (Section 2). Misleading advertisements are forbidden (Section 3). Subliminal advertising is forbidden (Section 6). Audible matter in advertisements must not be excessively noisy or strident (Section 7). Advertisements must not without justifiable reason appeal to fear (Section 8). The superstitious must not be exploited (Section 9). Advertising depicting situations showing dangerous practices is likewise forbidden (Section 10). Testimonials must be genuine, not more than three years old, and related to the experience of the person giving it; this will be strictly controlled (Section 11). Disparagement is forbidden; comparisons with other products or services must be fair, capable of substantiation and in no way misleading (Section 12). Special regulations exist concerning competitions, guarantees, the use of the word "free", inertia selling, homework schemes, instructional courses, mail order advertising, direct sale advertising, hire purchase, and intimately personal products. Unacceptable are advertisements for money lenders, matrimonial agencies and correspondence clubs, undertakers, bookmakers, unlicensed employment services, weight reduction products or treatment, hair and scalp treatment, contraceptives, contact lenses, cigarettes and cigarette tobacco, "hard" liquor and others (Section 23).

In addition, there is a general independent control system practised by the Advertising Standards Committee which uses the Code of Advertising Standards for Ireland (May 1982).

Italy

Advertisements broadcast in Italy by RAI, a public-law broadcasting company, are subject to the "Norme per la realizzazione della pubblicità radiofonica e televisiva"[1] published by the RAI subsidiary "Società per Azioni Commerciale Imitiative Spettacolo" (SACIS). Prior control of radio and television advertising is carried out within SACIS.

The content of the standards can be summarized as follows:

> Advertisements must be informative, and the information must be consistent, pertinent, clearly formulated and readily comprehensible (Section 1). Advertisements must in no way be misleading; any claims must be capable of substantiation and, on request, documented (Section 2). Comparisons in general and disparaging comparisons are prohibited; comparisons which illustrate specific and concrete differences in the products are permissible, but they must be apt and not controversial (Section 3). Advertisements must not lead to mistaken identity (Section 4).
>
> Advertisements may not offend against the moral, religious or political convictions of the public or against membership of ethnic groups and social or professional categories (Section 5(1)); no references to ideological, religious, political or economic problems are allowed (Section 6(1)). Advertisements must not create unease, fear or bewilderment; violence, aggressiveness, eroticism and vulgarity are prohibited (Section 5(2)(5)). The impression must not be given that anyone not using the advertised product is a social outcast (Section 5(4)). Advertisements must not depict model behaviour that conflicts with social values and the public interest (Section 7(1)) or cause the public to neglect its responsibility in terms of safety, health and physical and moral integrity (Section 7(2)). Advertisements must not show economic potential or a standard of living higher than that generally found among the population (Section 7(3)).
>
> Advertisements likely to be seen or heard by children and adolescents must not threaten their safety or disturb their development and behaviour. Advertisements must not be geared directly to children and adolescents, arouse in them the desire for consumption or possession, cause them to be a nuisance to adults or exploit their inexperience. There are also restrictions on the appearance of children and adolescents in advertisements (Section 8).
>
> In addition to the abovementioned advertising of alcoholic beverages, there are special rules for the advertising of foodstuffs, dietary products, cosmetics, medicines, publications and instructional courses (Sections 9-15).
>
> Finally, there are restrictions on advertising with sales promotion methods.

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[1] 1.1.1979.

In addition, and in particular with regard to advertisements broadcast by private radio and television companies, the general code of voluntary restraint by the advertising trade may be used,[1] which is based on the model of the international code of advertising practice issued by the International Chamber of Commerce. Although the code does not contain media-specific rules for broadcast advertising, Article 16 specifies that any judgment must be based on the respective advertising medium and that any advertisement that is acceptable for one medium need not be so for another.

Luxembourg

Television advertising in Luxembourg is subject to a voluntary restraint system ("Code de Déontologie Publicitaire RTL - Télévision - June 1982").

The code requires compliance with Luxembourg legislation (Article 1), the principles of decency, morality and honesty and the avoidance of vulgarity and bad taste (Article 2). Advertisements must take account of social responsibilities; they must be decent and not abuse the trust or lack of experience and knowledge of the consumer; they must not offend against moral or religious convictions, nor, without justifiable reason, play on fear , exploit superstitions or incite hatred and violence (Article III); Racial discrimination must not be encouraged (Article IV). Advertisements intended for women or advertisements in which women are presented must take account of the woman's role in society and must not suggest or imply the idea of inferiority (Article 5).

Special regulations protect children and adolescents (Articles IV to VIII). Advertisements must not exploit their natural credulity, lack of experience and loyalty; they must respect their right of privacy and not damage their development. Negative purchasing decisions on the part of parents must not be disparaged; nor must there be direct appeals to children to induce others to buy. Discretion is required for advertisements with low prices (Article VI). Advertisements must not put children or adolescents at the risk of mental, moral or physical damage or put them in dangerous situations (Article VI). Finally, advertisements must not be misleading (Article VIII).

Advertisements must be clearly recognizable and shown as such; confusion with other programmes must be avoided; subliminal advertising is forbidden (Article XIV). Advertisers must not allude to other programmes (Article XVI). The total duration of advertising must not exceed 20% of the daily broadcasting time (Article XVII).

Compliance with these rules and regulations is controlled before each advertisement by the advertising producer (Article 18). CLT has made arrangements for viewers' remarks on advertising to be received (Article XIX). A committee has been set up to adapt these rules to further developments (Article XX).

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[1] Codice di Autodisciplina Pubblicitaria - Version of 1.1.1977.

Netherlands

Broadcast advertising in the Netherlands, which is organized centrally by the Reclamestichting (Advertising Foundation), is subject to prior control on the basis of the "Voorschriften voor de nederlandse etherreclame"[1] issued by the Reclameraad. Since the Reclameraad's work is based on law (Article 49 of the Broadcasting Act), on the one hand, and involves independent control, on the other, it is regarded as "semiwettelig" (semi-legal).

The "Voorschriften voor de nederlandse etherreclame" contain general and special rules for advertising as well as provisions for bodies and procedures.

> Advertisements must not be contrary to the law, public order or morals; nor must they be at variance with the truth or offend against good taste or endanger the public's mental or physical well-being (Article 1). They must not, without justifiable reason, play on fear (Article 2). Advertisements must in no way be misleading (Article 4). Imitation of other advertisements that could lead to confusion is also forbidden (Article 5). Particular discretion is required in the use of scientific terms and statistics (Article 7(1)(2)). No reference may be made to comparative tests carried out by consumer organizations (Article 7(3)). On request, the advertiser must prove the correctness of his claims (Article 7(4)). The misleading use of certificates and the like is forbidden; there are further provisions on this (Article 8), as indeed there are for advertising with a "guarantee" (Article 9). Advertisements intended for children must not clash with parents' rights and must not exploit lack of knowledge and credulity (Article 10).
>
> In addition to the alcoholic beverages and tobacco sectors already covered, there are provisions for competitions (Article 12), mail order advertising (Article 13), cures and slimming aids (Article 14), dietary products (Article 15), sugary sweets and chocolates (Article 17), and instructional courses (Article 19). Non-commercial advertisements are permitted, but not ideological and political advertising (Article 20).

Advertising is controlled initially by the Reclamestichting (STER); appeals against its decisions may be brought before the Reclameraad (Articles 22 and 27). The latter can deal officially with the acceptability of an advertisement passed by the Stichting (Article 40).

Given the extensive regulations for broadcast advertising, the general independent control system is practically insignificant.[2]

United Kingdom

The Broadcasting Act of 1981 contains, in itself and in the appended Schedule 2, a number of provisions on broadcast advertising (see II a b above). It obliges the Independent Broadcasting Authority (IBA) to issue a code of

[1] Version of February 1980, edition March 1982.
[2] Brandmair, loc. cit., p. 238.

advertising standards and practice and to ensure that they are observed (Sec 9(1) (a) (b)). The May 1981 "IBA Code of Advertising Standards and Practice" (reprinted October 1982) is currently valid. In the foreword the IBA classes itself as a public board and one of the country's official instruments of consumer protection (p. 2).

Leaving aside the areas of tobacco and alcoholic beverage advertising already covered, the Code can be summarized as follows:

> As a general principle, advertisements must be legal, decent, honest and truthful (Sec. 1). Political advertisements or advertisements in relation to industrial disputes are forbidden (Sec. 9), as are religious advertisements (Sec. 10) and advertisements for charities (Sec. 11).
>
> Advertisements must not offend against good taste or decency or be offensive to public feeling (Sec. 12). No advertisement may include an offer of any prize or gift which is available only to television viewers or radio listeners (Sec. 13). Advertisements must not without justifiable reason play on fear (Sec. 15) or exploit the superstitious (Sec. 16). Advertisements for a certain number of products and services, such as matrimonial agencies, undertakers, betting shops and private investigation agencies (Sec. 17), are not allowed.
>
> There is a prohibition on advertising likely to mislead, especially in connection with scientific terms and statistics; advertisers and their agencies must be prepared to produce evidence to substantiate any descriptions, claims or illustrations (Sec. 18). Comparisons, especially price comparisons, are permissible in the interests of vigorous competition and public information (Sec. 20). Denigration, however, is forbidden (Sec. 21). There are special regulations on artificial aids in reproduction techniques (Sec. 22). Testimonials must be genuine and not used in a manner likely to mislead (Sec. 23). Special clauses cover advertisements containing the word "guarantee" (Sec. 24). No advertisements are accepted from advertisers who send the goods without authority from the recipient (Sec. 25). Any imitation likely to mislead is forbidden (Sec. 26). Further provisions cover competitions (Sec. 28), home work schemes (Sec. 29), instructional courses (Sec. 30), mail order advertising (Sec. 31) and direct sale advertising (Sec. 32).
>
> A comprehensive special regulation covers "Advertising and Children" (Appendix 1). Further special regulations deal with "Financial Advertising" (Appendix 2) and the "Advertising of Medicines and Treatments" (Appendix 3).

The general independent control regulations[1] are of secondary importance to the special regulations on broadcast advertising.

To sum up, a number of Member States operate different types of broadcast advertising control systems, which, at their most developed stage, guarantee a high measure of protection against unlawful advertising and, in addition, against advertising inconsistent with the standards through institutionalized prior control based on special detailed regulations. Particular exponents of this system are France, the Netherlands and the United Kingdom. A

[1] Brandmair, loc. cit., pp. 35-97.

practical precondition is that radio and television advertising activities are concentrated and can be centrally monitored. As broadcast advertising becomes freer, especially with the admission of regional and local private broadcasters, the system of uniform prior control will become more difficult. The general independent systems that will then be required for control have so far been of relatively minor importance in broadcast advertising.

II. The effects of national rules on freedom of broadcasting within the Community; need for harmonization

1. Broadcast advertising

From the survey of rules on broadcast advertising we may conclude that the differences in the law are substantial and that they at least tend to act as obstacles to cross-border broadcasting in the common market. These obstacles are more appreciable with some rules than with others.

The clearest case is that of a total ban on broadcast advertising as in Belgium: domestic cable firms, for example, may then be prevented from relaying foreign advertising. The effect is similar where domestic advertising is permitted but advertising must be blacked out if foreign programmes are relayed within the country (Italy): discrimination against non-nationals is an additional factor here.

But less sweeping rules can also be an obstacle to cross-border advertising. The distinction between advertising and programmes is emphasized to varying extents in the Member States; in particular, advertising by sponsors of sporting events and the like is permitted in some countries but forbidden in others. This may result in legal steps being taken to prevent programmes which include advertising by sponsors and which are legitimately broadcast in one Member State from being relayed in another where such advertising is forbidden.

Differences in the rules on the way in which advertising is inserted in broadcasts can have the same effect: broadcasts with individual advertising spots can run into legal difficulties in countries where advertisements must be grouped in blocks; the same applies to commercial breaks which interrupt programmes being relayed in Member States which allow advertising only in intervals between programmes.

Obviously the rules governing advertising time can be a special barrier in the way of cross-border broadcasting. We have seen that the rules on advertising time in the Member States are very different, both as regards the total broadcasting time and as regards advertising on Sundays and public holidays, on the times at which advertising is broadcast, and on the length of individual spots or commercial breaks. Every broadcasting organization must first and foremost ensure that the programmes it proposes to broadcast in its home country comply with the rules in force there. The broadcast can then be relayed without difficulty in another Member State only if that country's rules are compatible with those of the broadcasting State, which means they must be identical or more tolerant. Otherwise cross-border broadcast advertising - and even other broadcasts - may be blocked for

certain periods. For in Belgium it has already proved technically difficult, costly and impracticable for the cable companies to black out advertising. In early May 1984 the Munich pilot cable communications company was compelled temporarily to suspend the relaying of the entire Sunday programme of the British company Satellite Television PLC because the London Sky Channel also broadcasts advertising on Sundays (via the telecommunications satellite ECS 1).

The danger that broadcasts from other Community countries may be blocked grows where a transmission is to be relayed in several Member States; given the great variety of laws observable it appears practically impossible that a broadcast could at the same time satisfy the rules on advertising time in the State in which it is broadcast and in two or more others; advertising time would have to be cut drastically or the advertising simply omitted. Thus, it will hardly be possible, particularly for those broadcasting companies entirely dependent on advertising revenue, to observe one of the EBU declarations of principle, namely that they will endeavour to have full regard for the domestic law of foreign countries which can receive advertising broadcasts by the DBS they use, even if such advertising is not intended for the audience in those countries.[1]

The obstacles to cross-border advertising also depend on the type and legal status of the rules governing broadcast advertising. On the one hand there are legal rules which apply to national broadcasters and to broadcasts of every kind that are retransmitted within the country. We may mention section 3 of the Lower Saxony Broadcasting Bill, under which orders may be made applying domestic advertising restrictions to relayed foreign radio and television programmes that are retransmitted in Lower Saxony "where the protection of the economic basis of the media so requires".

On the other hand there are rules which are not general, which apply only to specified domestic broadcasters; these rules may be laid down by law, or by order, or in an organization's founding documents, or adhered to voluntarily by the organization itself; between the general law and the specific organization's founding documents there are a range of intermediate forms. Rules which apply only to the particular broadcaster tend to pose less of a problem for foreign broadcasters as their activities are not covered.

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[1] EBU, Declaration of principles of 15 July 1983, point 4(1), EBU Review, loc. cit., 31(32). See also the Council of Europe Recommendation on principles on television advertising, R (84) 3, 20 February 1984, point 3.

Countries tend to confine themselves to rules applying to a single broadcaster only where broadcasting, or at least broadcast advertising, is the subject of a monopoly. Once the licensing of broadcasters is liberalized, however, in particular where private broadcasters are licensed and authorized to transmit advertising, it is usually found necessary to establish a legal framework regulating broadcast advertising in general, and at that stage it is natural enough to include foreign broadcasts that are retransmitted within the country. The general trend in the common market, exemplified by developments in Italy and France, is to open up monopolies and to liberalize the licensing of private broadcasters.

We may therefore expect that advertising regulations which apply to a single broadcaster only will more and more be replaced by general legal arrangements which will also apply to cross-border broadcasts that are retransmitted within the country. The changes in prospect in Germany are perhaps a good example; while the rules on broadcast advertising in force hitherto applied only to the broadcasting organizations set up by public law, the only ones there were, and do not cover foreign broadcasts, the Land media bills now under consideration do make provision for the licensing of private broacasting companies, and therefore contain general rules on advertising, which may then apply also to the relaying of foreign broadcasts within the country.

The extent to which domestic rules on broadcast advertising impede cross-border advertising therefore depends on the method of transmission. As long as foreign broadcasts can be picked up over the air within a country, so that they can be received without difficulty in areas close to the border or with better aerials and equipment further away, domestic broadcasting legislation does not claim to be applicable to the intractable problem of foreign broadcast advertising, even where it does not comply with domestic rules on broadcast advertising (see above Part Five C III 3 (C) and V).

But the position changes drastically once the foreign programmes are received by domestic transmitters and relayed either as wireless signals or by cable. These relay firms are regarded as domestic broadcasters, even where they are distributing broadcasts originating abroad; they are subject to domestic broadcasting law, including the rules on broadcast advertising. They can be made to comply with domestic broadcast advertising rules in practice too, being based in the country; administrative measures, criminal proceedings and civil proceedings can all be taken against them, and judgments can be enforced. These firms have been the occasion of the recent disputes in connection with the broadcasting of foreign advertising, particularly in Belgium. Given the growing use of cables in the Member States, the liberalization of broadcasting, and the enactment of legal rules on advertising, the abolition of obstacles to cross-border broadcasting with cable relay has become an important and urgent necessity.

Developments in the field of direct broadcasting by satellite across borders are not as easy to judge. The ground has been cleared in international law, and there are plans for extensive cross-border broadcasting in the common market, in which broadcast advertising will certainly be applied if foreign satellite broadcasts are received and relayed domestically.

To sum up, the differences between the rules on broadcast advertising in the Member States are liable to place substantial restrictions on cross-border broadcasting activities, or even prevent cross-border broadcasting altogether. This can happen primarily where foreign broadcasts are relayed by wireless signals or by cable. We must begin looking for ways of removing these legal barriers to the free movement of broadcasting services. This will also be necessary in order to prevent the distortion of competition which is otherwise likely to arise; if broadcasts in the various Member States are subject to restrictions of varying severity, demand for advertising time will tend to be concentrated on certain countries, giving the broadcasting organizations located there an advantage over those located elsewhere.

2. Bans on advertising for drink and tobacco

What we have said under point (1) also applies to prohibitions or restrictions on the advertising of alcohol and tobacco: such restrictions may impede cross-border broadcasting. Within their particular field of application, bans on advertising which are confined to particular products have effects identical to those of general bans.

The differences in the law are not as striking in the case of alcohol as they are in the case of tobacco.

In the case of tobacco the principle of a total ban on broadcast advertising is the general rule in the Community, although in Luxembourg and Greece the ban is only partial. It applies primarily for cigarette advertising. In a large group of Member States there is a straightforward ban on advertising of any tobacco products.

In the case of alcohol, on the other hand, advertising may be broadcast in all Member States except France. But there are restrictions in most Member States, differing to some extent in their effect: for the most part they take the form of codes of practice applying to individual broadcasters, or voluntary rules of conduct adopted by the commercial groups concerned. It will be convenient therefore to consider drink advertising in the section dealing with advertising codes.

3. Advertising codes, supervision of advertisements, and voluntary self-discipline

The systems of voluntary control and self-discipline in advertising generally which exist in most Member States are of only limited relevance to broadcasting. Even where their place is not taken by supervision systems applying specifically to broadcasting, their effects are hardly felt in broadcast advertising. Thus they do not create serious impediments to cross-border broadcast advertising, and will not be considered further here.

Supervision systems applying specifically to broadcast advertising, however, such as those operating in France, the Netherlands and the United Kingdom, do merit attention. These systems can go as far as an inspection of all advertisements in advance, with any matter which does not comply with the rules being rejected. They need not however be expected to form any substantial obstacle to cross-border advertising. They apply to the broadcaster responsible for the first-hand transmission of an advertisement, or to institutions supplying or supervising advertisements to be broadcast first-hand by several different organizations. But they do not normally cover relays, and in particular relaying by the cable firms which distribute foreign broadcasts. These systems do not erect any specific barriers to cross-border advertising. If a television company in a particular Member State refuses an advertisement on the grounds that it does not comply with its rules, the item is not broadcast either at home or abroad; the question of free movement of services over the border does not arise. That question would arise only if a domestic self-restraint body were to take exception to advertising broadcast from abroad. Only a body supervising advertising generally might do this; but such bodies, as we have seen, are not usually very active in broadcasting.

However, apart from the question of the free flow of advertising across borders, there might be grounds for objection if a prior inspection system operating in broadcasting in one Member State were far less severe than one in force in another, so that advertising was encouraged in the first Member State and discouraged in the second; this could result in distortion of competition.

The specific supervision systems for broadcast advertising also merit attention in that they provide a suitable tool for aligning broadcast advertising in the common market on common standards so as to ensure that the liberalization of broadcasting traffic does not unduly damage the interests of business, consumers, or society as a whole. Those sections of codes of practice which lay down requirements for the form and content of broadcast advertising are particularly relevant here. As far as the rules of conduct for particular types of product are concerned, the main points of interest are drink advertising and the protection of children and young people.

III. The potential for approximating national laws

1. Rules governing broadcast advertising

(a) Starting point

As has been explained above in section II, the national rules governing broadcast advertising create major obstacles to the broadcasting of advertising across frontiers. With the further development of satellite and cable technology, these obstacles will make themselves increasingly felt. They threaten to hamper the development of cross-frontier systems and to discourage investments in this area. In addition, the legal disparities are liable to distort competition in the advertising industry and between broadcasting organizations, and to result in the various activities connected with broadcast advertising being attracted to certain Member States.

Under the EEC Treaty, all restrictions on freedom to provide services within the Community are to be abolished (Article 3(c), Article 59 and Article 62), and a system is to be instituted to ensure that competition in the common market is not distorted (Article 3(f)). In the light of the judgments given by the Court, these objectives are to be achieved through application of the prohibitions laid down in the Treaty (Articles 59 and 62) only in the case of rules which discriminate against foreign advertising. By contrast, in the case of restrictions on broadcast advertising that apply to domestic broadcasts as well, the objectives are to be pursued through harmonization of the various rules and regulations, since it is only in this way that legitimate interests of the general public (listeners, viewers, consumers) can be protected (Debauve judgment[1]). The aim of such harmonization is to facilitate

[1] Debauve at 856, ground 13 and at 857, ground 15.

the taking up (particularly establishment) and pursuit of activities as self-employed persons in the broadcast advertising sector within the Community (Article 57(2)), to eliminate distortions of competition in broadcasting and thus to allow the proper functioning of the common market in broadcast advertising (Article 3(h)).

In the light of the judgments given by the Court, liberalization through harmonization is therefore the task laid down by the Treaty as far as the law on broadcast advertising is concerned. "Either the other EEC institutions will ignore the Court judgments, or if they recognize them they will have no alternative but to adopt a directive".[1]

It remains to be examined, firstly, how this opening up of internal frontiers and this system of undistorted competition, i.e. conditions similar to those of an internal market, can be achieved in the Community through harmonization of laws and, secondly, what common level of protection such harmonization should aim to achieve for those on the receiving end of advertising and, above all, for the viewers and listeners of other programmes.

It is particularly on the second question regarding the level of protection that, understandably, opinions diverge. Thus, the European Bureau of Consumers' Unions expresses the following view in the abovementioned study:[2] "The only real protection faced with the reception of broadcasts from other Community countries, which is both inevitable and desirable, will be harmonization of advertising regulations at the highest level." The advertisers and the advertising agencies tend to some extent to take the opposite point of view. There is also an intermediate view, held in many quarters, not least by a large number of broadcasting organizations.

(b) Harmonization of the rules on conflict of laws by means of reference to the law of the broadcasting state, or harmonization of the substantive law of the broadcasting and of the receiving states?

One possibility would be not to harmonize the content of the law on broadcast advertising in the Community directive, but to specify that legal system which is to be applied by the courts and authorities to advertising from other Member States.

This type of conflict of laws solution would guarantee cross-frontier diffusion of broadcast advertising by making the advertising subject, also in the country in which the broadcast is received, solely to the law of the country of transmission; advertising lawfully broadcast in the country of transmission would accordingly have to be tolerated in all EEC countries in which it is received.

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[1] European Bureau of Consumers' Unions (EBCU), "The impact of satellite and cable television on advertising," final report prepared for the Commission, Brussels, August 1983, p. 69.

[2] EBCU, final report, loc. cit.

However, this sort of solution, which would make do with settling conflicts between two legal systems that claimed to be applicable, would not be sufficient in the light of the Court's decision in Debauve. According to that decision, advertising frontiers are to be opened up only when advertising rules have been harmonized, that is to say when they offer equivalent protection everywhere. Only then will reference to the general interests within the country no longer be justified and admissible.

In point of fact, a solution that was limited to opening up internal frontiers within the Community would not be capable of ensuring that cross-frontier broadcast advertising complied with certain basic rules that are generally regarded as particularly important. Simply suspending the applicability of national advertising rules to foreign broadcast advertising retransmitted within the country could jeopardize the maintenance of the standards to be applied to domestic broadcasts if the relevant standards in the other Member State were significantly lower. This would create a bias and pressure in favour of laissez-faire solutions.

Opening up frontiers for advertising simply by declaring that the law of the broadcasting state alone was applicable would also not be able to remove existing or potential distortions of competition between broadcasting organizations and within the advertising industry. Member States could allow a prohibition in principle of broadcast advertising to continue to apply or could introduce one; only advertising coming from other Member States would need to be admitted.

Cross-frontier transmission of advertising would moreover be channelled as if in a one-way street; the two-way freedom of movement of broadcast advertising services required by the EEC Treaty would not be realized.

The end result would be that advertising in the individual Member States would remain subject to widely varying restrictions; a common market in broadcast advertising services would not be created.

In this connection, the question also arises of the attainment of freedom of establishment for firms that broadcast advertising in the Member States, a freedom provided for in the Treaty. The pre-condition for freedom of establishment is that the transmission of broadcast advertising be permitted in every Member State: it is only then that the further objective can be pursued of allowing nationals of other Member States access to this economic activity.

The solution whereby broadcast advertising that is permitted under the law of the country in which it is transmitted must also be accepted in other Member States can, however, above all neither allow free cross-frontier provision of broadcasting services (Article 3(c), Article 59 and Article 52) nor permit the institution of a system ensuring that competition in advertising in the common market is not distorted (Article 3(f)). A directive of this type would therefore not lead to such an approximation of the laws of Member States, as is required for the proper functioning of the common market that is to be established in broadcast advertising as in other fields (Article 2, Article 3(h)). In other words, it would not be able to ensure conditions corresponding to those of an internal market for the transmission of advertising within the Community.

(c) Extent of the harmonization of rules for domestic and cross-frontier advertising

After this outline of the harmonization objectives provided for in the EEC Treaty, reference must also be made to the Commission's often declared policy of avoiding any perfectionism in the area of harmonization of laws. This includes the area of broadcast advertising. The aim should therefore be to achieve only the absolutely necessary minimum of harmonized rules.

There will therefore have to be careful examination of where this minimum lies, i.e. to what extent, if the Community objectives are to be preserved, and hence also the freedom of broadcasting, the Member States can be allowed national options to apply their own stricter rules. Such examination is begun, but not completed, in the following sections. One of the main purposes of the Green Paper is to promote discussion of these questions and, through the results of such discussion, to provide one basis for subsequent decisions on the extent of harmonization.

The Commission does, however, already take the view that the standard to be arrived at by harmonization does not need to be uniform in every detail but can confine itself to certain basic rules. It is sufficient if a framework is laid down which, if adhered to, will permit advertising to be transmitted across frontiers. In accordance with what was said under (b), national advertising must also be permitted within a similar framework. In general, as far as details are concerned, it can be left to the Member States to build on the framework by laying down individual rules governing national advertising. The latter must not, of course, in the light of the EEC Treaty, be placed in an advantageous position by comparison with advertising from other EEC countries so that such advertising is discriminated against. Thus, in practice, the only rules that would be possible would be those which restrict national advertising more stringently to a minimum standard of liberalization. It will be necessary to return to this in detail when discussing the content of the planned directive.

The degree of freedom on the one hand and restriction on the other to be realized on the basis of this minimum standard must be determined according to the legitimate interests of industry, the consumer and the public at large. Equivalent conditions must be guaranteed throughout the whole of the common market for the development and protection of these three groups of interests.

(d) Prohibition or authorization of broadcast advertising?

This question has political, legal, economic, financial and cultural ramifications that are discussed briefly below.

The European Parliament has come out in favour of permitting advertising on radio and television throughout the Community as a matter of principle but takes the view that the necessary arrangements, and in particular the duration of advertising, its relationship to other programme material and the forms of advertising to be allowed should be harmonized by the Community. It "considers that outline rules should be drawn up on European radio and television broadcasting, inter alia with a view to ..... establishing a code of practice for advertising at Community level".[1]

The opinion drawn up by the Political Affairs Committee for the Committee on Youth, Culture, Education, Information and Sport gives the following reasons why the law on broadcast advertising should be approximated:

"Unrestricted cross-border commercialization is dangerous, just as to ban certain broadcasts would run counter to the principle of free access to information. It is therefore necessary to formulate framework Community provisions ..... in order to preclude this danger. It will be very difficult for certain Member States to accept foreign satellites covering their territory and language area with programmes larded with advertisements. It would be totally unacceptable if the broadcasts consisted mainly of advertisements interspersed with the occasional programme. This could be prevented only by creating tight and harmonized Community legislation on broadcasting laying down arrangements for advertising for satellites used for broadcasting. ' The Political Affairs Committee gives its preference to a system .....: i.e. advertising spots at fixed times between programmes which do not interrupt broadcasts ... To ban advertising on satellite-broadcasts would be as unrealistic and perverse as to forbid advertisements in newspapers ... . Freedom of expression, however, cannot be the prerogative of the highest bidder and the Commission must therefore draw up a directive ensuring that commercial interests are channeled into a direction acceptable to the Community and made subject to certain conditions ... . Time is very short because the various Member States will undoubtedly take action which will make Community rules virtually impossible. At the same time such emergency national measures would make the chaos even worse because media policy can simply no longer be kept within a national framework."[2]

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[1] European Parliament, Hahn Resolution of 12 March 1983 on radio and television broadcasting in the European Community, OJ No C 87 of 5 April 1982, p. 110 (point 7).

[2] European Communities, European Parliament, Working Documents 1981-1982, Hahn report, doc. 1013/81 of 23 February 1982 (PE 73.271/fin.), p. 21.

In the two Resolutions which it adopted on 30 March 1984, the European Parliament once again called for broadcast advertising to be allowed everywhere in the Community and for it to be subject to legal regulation, by means of the approximation of legislation through Community directives.[1] The new technologies, it argued, required a reasonable degree of commercial support through advertising.[2] All television companies had to operate on an equal footing.[3] Distortions of trade and shifts in trade flows had to be avoided in order to ensure the proper functioning of the common market.[4] "If current codes of conduct and commonly accepted standards of practice /for broadcasting/ are pursued", allowing advertising would not pose "a threat to quality or diversity".[5] There should be harmonization, by Community directive, of "the duration and time of advertising, its position in the programme schedule /and/ restrictions to be imposed to safeguard public policy (protection of young people), security (violence, weapons) and health (tobacco, alcohol)".[6] The legal basis for such harmonization was Article 56(2), Article 57(2) and Article 66 of the EEC Treaty.[7] There was also a need for "rules for advertising to ensure that revenue is apportioned fairly between the public and private sectors and the various mass media".[8]

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[1] European Parliament, Arfé Resolution of 30 March 1984 on a policy commensurate with new trends in European television, OJ No C 117 of 30.4.1984, p. 202 (point 4); European Parliament, Hutton Resolution of 30 March 1984 on broadcast communication in the European Community (the threat to diversity of opinion posed by the commercialization of new media), OJ No C 117 of 30.4.1984, p. 198 (point 2); European Communities, European Parliament, Working Documents 1983-1984, Hutton report, doc. 1-1523/83 of 15 March 1984 (PE 78.983/fin.), p. 21.

[2] Hutton Resolution (point E), loc. cit.

[3] Hutton Resolution (point F), loc. cit.

[4] European Parliament, opinion of the Committee on Economic and Monetary Affairs (Draftsman: Mr E. Van Rompuy, PPE) delivered to the Committee on Youth, Culture, Education, Information and Sport and printed in the Hutton report, loc. cit., p. 46 (p. 48, point 15).

[5] Hutton Resolution (point G), loc. cit.

[6] European Parliament, opinion of the Legal Affairs Committee (Draftsman: Mr Marc Fischbach, PPE) delivered to the Committee on Youth, Culture, Education, Information and Sport and published in the Hutton Report, loc. cit., p. 49 (p. 56, point 4).

[7] Opinion of the Legal Affairs Committee, loc. cit., p. 60, point 3.

[8] Arfé Resolution (point 4(c)), loc. cit.

From a legal viewpoint, Article 10 of the European Convention on Human Rights has to be respected. This point is also emphasized by Parliament in the abovementioned opinions of the Political Affairs Committee and the Legal Affairs Committee and in the Hutton report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport. That Article guarantees the principle of freedom of expression, even in the form of commercial advertising, whether broadcast within countries or across frontiers (see Part Five, B.III.1(c)).

The EEC Treaty provides for the abolition of restrictions on freedom to provide services within the Community (Articles 59 and 62). Prohibitions on the domestic retransmission of foreign advertising are such restrictions. However, according to the ruling in Debauve, the Treaty has not itself made such prohibitions inapplicable. Instead, their removal has to be secured through the approximation of laws. The prohibitions do not, therefore, simply disappear with nothing taking their place. They are replaced by other, harmonized rules brought together in the form of a directive that must pave the way for establishment of the freedom to provide services and facilitate the taking up and pursuit of activities as self-employed persons in the field of broadcast advertising (Article 57(2)) and that is not, therefore, based on a general prohibition. As stipulated in the Treaty, such approximation must also create undistorted conditions of competition in broadcast advertising and, in this way also, establish a common market that embraces all Member States (see points (a) and (b) above).

Lastly, the legal position in Member States is of considerable importance. Eight of the ten Member States permit domestic broadcast advertising as a matter of principle. Nine of the ten Member States allow the retransmission of foreign broadcast advertising by cable systems. This includes Denmark, where only domestic broadcast advertising is prohibited. Belgium has outlawed both domestic and foreign broadcast advertising but, in practice, has always tolerated the retransmission of foreign advertising. Consequently, radio and television advertising is permitted in most Member States and in some cases has been for decades. For the rest, it has come to people's notice by way of foreign transmissions.

From an economic viewpoint, the fact that radio and television advertising is transmitted across frontiers makes it a particularly apt instrument for promoting the free movement of the goods that are advertised and for speeding up the merging of separate national markets into a single European market. As a branch of economic activity, radio and television advertising is not only important on the domestic market, but also of considerable significance for economic integration.

For industry and commerce, radio and television advertising is an important means of boosting sales of goods and services at home and abroad. This is particularly true of a large number of branded goods.

Radio and television advertising accounts for a sizeable share of overall spending on advertising. Moreover, in a number of Member States the demand for advertising time easily outstrips the supply, making what little time is available more expensive and hampering access to radio and television advertising, especially for small and medium-sized firms.

From a financial viewpoint, advertising revenue accruing to most public broadcasting organizations in the Community has risen inexorably and is the second leg on which they stand. Private broadcasting organizations depend for their financing almost entirely on advertising revenue. Where no licence fees are payable or where the fees are inadequate, advertising revenue alone provides the financial headroom necessary to provide programmes.

The importance of advertising for the financing of broadcasting organizations and for trade and industry in the Community was discussed earlier (Part Three, A.I and II, B.II.2, D (at the end) and E (at the end)). Further details are given below.

Advertising that is honest and fair is not only a service at the disposal of advertisers, but in general also represents a means of informing consumers, making it easier for them to meet their requirements in terms of goods and services. This is true just as much for radio and television advertising as for other forms of advertising. For this reason, consumers are not fundamentally hostile to broadcast advertising. Thus, the European Bureau of Consumers' Unions (EBCU) is in favour of a Community directive that permits radio and television advertising as a matter of principle but imposes strict criteria and a prior monitoring procedure.[1]

From a cultural viewpoint, the prime objective is to protect those listening to or watching other programme material. It is a moot point whether this requires a general ban on broadcast advertising or whether rules to prevent advertisements from disrupting unduly the transmission of cultural programmes will suffice. Most Member States are content for broadcast advertising to be subject to certain limitations and to a measure of supervision.

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[1] EBCU, Final Report, loc. cit., pp. 67-68, 69, 70, 72, 76-78 and 80. A similar view is taken in Pridgen, "Commercial Advertising on Television across National Frontiers: Issues and Strategies for Consumers", Report for the British National Consumer Council, London 1983, pp. 1, 4 and 33-34.

Taken together, these facts, considerations and viewpoints underscore the need for, but also the expediency and reasonableness of, the planned Council directive requiring Member States to permit radio and television advertising within certain limits. This would apply not only to the retransmission of broadcast advertising transmitted in another Member State but also to the initial transmission of broadcast advertising in the Member State concerned.

Authorization of broadcast advertising would apply to all broadcasting organizations that are not financed from public licence fees, payments or grants or from private contributions from their members (e.g. associations) or from payments from subscribers (pay-TV). In the case of such broadcasting organizations, many of which are private, a general advertising ban should not be authorized, since they cannot exist without advertising revenue.

In the case of the other broadcasting organizations, many of them public, each Member State would remain free to prohibit (or to continue to prohibit) advertising if sufficient advertising time is available via commercial channels.

This is the case with the BBC (advertising ban) and ITV (advertising permitted). No such alternative exists as yet in Belgium and Denmark, where the RTBF, BRT and BRF and DR respectively are not allowed to advertise. The advertising industry in those two countries (manufacturers and distributors advertising their goods and services, advertising agencies, producers of advertising media, advertising professions) is at a disadvantage compared with the advertising industry in the other Member States. This can result in advertising activity and the associated expenditure and revenue being switched to other Member States. An example of this is the transfer of broadcast advertising from Belgium to Luxembourg and other neighbouring countries. Conversely, the other Member States' advertising industries do not have the same scope for promoting their sales in Belgium and Denmark as they do in their home markets and as the Belgian and Danish advertising industries do there.

In the case of broadcasting organizations which (unlike the BBC, BRT, RTBF, BRF and DR) are financed not only from licence fees, but also from advertising revenue, each Member State would remain free to authorize (or to continue to authorize) advertising.

If broadcast advertising were authorize as a matter of principle, it would be necessary to lay down common rules governing a number of particularly important aspects of advertising. This question is discussed below. The directive would also have to stipulate that the Member States should not oppose the free broadcasting of such advertisements as satisfy the (minimum) requirements laid down in the directive. The following comment was made by the EBCU: "If the EEC directive does not arrive at an agreement on precise rules, it will have failed and opened the door to excessive competition for advertising revenue which could cause bad relations among the Member States."[1] The EBCU regards such precise rules as indispensable in view of the matters discussed at (e) and (g) to (k) and at points 2 and 3 above.[2]

For viewers and listeners, the main point of such harmonization is to ensure practical legal protection against a surfeit of advertising and against abuses in the domestic and foreign broadcasts which they are increasingly able to receive. For the advertising industry, the main point is to make possible and simplify the planning of advertising and to make the use of advertising cheaper in supra-regional and cross-frontier broadcasts, so that sales and in particular trade between countries in the goods and services advertised can be increased. For the broadcasting organizations, the main point is to allow the free flow of their advertising broadcasts and to secure their financial basis, which is dependent (or partly dependent) on advertising revenue, within the framework of a system which does not distort competition in the Community at their expense. For the press organizations, the main point is to maintain one of the main pillars of their activities and livelihood, namely their income from advertising.

(e) Extent of broadcast advertising

In almost all Member States, broadcast advertising time is restricted. Indeed, steps should be taken to ensure that radio and television, as important mass communication media, are not overloaded by advertising. Consideration for other advertising media, the press in particular, is another reason why broadcast advertising time should be limited.

On the other hand, broadcast advertising time should not be curtailed to such an extent that the role of broadcast advertising as a source of financial support for broadcasters is impaired, that advertising spots become too expensive in an unwelcome manner and that demand for broadcast advertising time becomes unreasonably excessive. It should be borne in mind that an undue shortage of broadcast advertising time usually results in extremely short advertising spots during which little detailed information of use to consumers can be given, over and above the sales pitch.

[1] EBCU, Final Report, loc. cit., p 72.
[2] EBCU, Final Report, loc. cit., pp. 72-74 and 76-79.

The fourth column of Annex 9 provides information on the percentage of finance which the television channels in Europe derive from advertising revenue. The figures show the economic importance of television commercials for the broadcasting organizations which are allowed to advertise.

The third column of Annex 9 shows the maximum amount of television advertising per day (in minutes) which the individual channels are allowed to carry. Annex 17 also shows the maximum permitted amounts of advertising time per day as percentages of total daily broadcasting time.

The demand for television advertising time is considerable and is increasing. In Germany, France and the Netherlands, it has for many years considerably exceeded the permitted amount of advertising time. In the ZDF, for example, the excess of demand over available broadcasting time has amounted to up to 200%.[1] A number of the ARD organizations have said they are in favour of an increase in television advertising time.[2] While advertising time has been and is being gradually increased in France and the Netherlands, it has remained unchanged in Germany since 1961. Moreover, broadcasting time was then significantly less than it is today. The German advertising industry in particular complains that the advertising time available on the ARD and ZDF is oversubscribed.[3] This is said to be the case in 1984 as well. The result, they argue, is that the meagre amounts of advertising time have to be allocated as in a centrally planned economy. Furthermore, they claim, the advertising log jam results in prices which are artificially inflated and not related to the service actually performed.[4] This aspect is also criticized by consumers.

Firms with well-known brand names see themselves as being at a particular disadvantage.[5] They argue that it has not so far been possible to make any additional advertising time available to them for new branded goods. If a firm wanted to introduce a new brand today, it had to withhold often indispensable broadcast advertising time from its other brands, resulting in lower sales for such other brands. Precisely in the markets which were the focus of attention in television, the introduction of a new brand was often impossible without television advertising. In view of the marked differences between the advertising media, it was in most cases not possible to rely on daily newspapers or other media instead of television advertising. The severe limits on television advertising time were at present creating a bottleneck in the economic expansion of the branded goods industry and the advertising industry.

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[1] This is reported by the Deputy Director of the ZDF, Harald Ingensand, in his article entitled "Partnerschaft und Konkurrenz", in Fernsehkritik, Werbung im Fernsehen, Mainz 1975, p. 53.

[2] Reports in Markenartikel 1983, p. 266; ZAW-service No 115/116, November 1983, pp. 25 and 42; No 117, January 1984, p. 19.

[3] See, for example, Markenartikel 1984, p. 8; ZAW-service No 115/116, November 1983, p. 25; Markenartikel 1983, p. 586; Wirtschaftswoche 1984, p. 54.

[4] Pridgen, Report for the British National Consumer Council, loc. cit., p. 32.

[5] Markenverband, Werbefersehen und Tageszeitungen, Wiesbaden, November 1978, p. 8.

Recent laws, regulations, conditions, other measures and draft laws in the Member States have all tended towards a gradual increase in advertising time (France, Greece, Italy, the Netherlands and Ireland) or to the establishment of new and ample amounts of advertising time (United Kingdom and Germany).

A possible upper limit that might be considered as an initial working hypothesis would be to restrict the total time for advertising to 20% of the total amount of broadcasting per broadcasting day. At the same time, any minor shortfalls or overruns could be allowed to cancel each other out on successive days.

Limiting advertising time to 20% in this way might be considered appropriate for a number of reasons:

- The 20% figure for advertising is already applied in two member countries (in Luxembourg and in Germany, in the pilot cable scheme in Rhineland-Palatinate). In Germany, several Länder are at present introducing laws imposing this restriction on private broadcasting organizations (see I 2 (b) above).

- New providers of programme services will as a rule have to be financed solely from advertising revenue. Consequently, comparisons with the amount of advertising time for broadcasting organizations which are simultaneously financed from licence fees tell us little. If they had no licence fees, the existing organizations would have to have a substantially higher proportion of advertising. For example, the proportion of advertising in the Netherlands would have to be about 60 minutes a day instead of 15 minutes a day if all of the financing were to be provided from advertising. In Germany, the ARD organizations would also need 60 minutes of television advertising a day instead of 20 minutes. In France, 36 minutes would be needed instead of the present 18 minutes.

- It is to be anticipated that the new programme providers will have to compete with the existing organizations for a largely constant number of viewers. The increase in competition will result in a decline in audiences for each broadcaster. In view of the fact that the costs of producing television programmes are independent of the number of viewers, lower audience figures would as a rule mean higher "prices per thousand"[1] for television advertising. This in turn would worsen the competitive chances of the new suppliers against competing advertising media. It would therefore seem necessary to set the upper limit for the proportion of advertising in such a way that a supply of advertising time is available which would allow the new suppliers to compete in terms of prices.

[1] "Price per thousand" is the price per minute for each 1 000 TV sets switched to the channel.

- There is no reason to fear that a 20% figure for advertising time would result in unacceptable conditions for viewers, since each programme supplier has a vital interest in attracting viewers and in not driving them away. Moreover, RTL's experience shows that a 20% figure for advertising time is in practice accepted. It must also be borne in mind that, in Germany, the ARD and the ZDF accommodate their total permitted advertising time of 20 minutes within a period of only 120 minutes, i.e. during the early evening programme between 18.00 and 20.00 (ARD) and between 17.30 and 19.30 (ZDF). In the spring and autumn, the organizations are allowed up to 25 minutes advertising time in order to balance out their figures for the year, so that at these times of the year, within the period of 120 minutes, the proportion of advertising works out at a little over 20%. Even so, no complaints from viewers have been reported.

The figure of up to 20% would mean that, if cross-frontier broadcasts from other Member States were transmitted in full, each Member State would have to accept a maximum level of 20% broadcast advertising. If broadcasts were transmitted not in full but only in part, the percentage of advertising in the part transmitted should not exceed the relevant total daily transmission time, so as to preserve balance and to prevent, in the extreme case, a situation where nothing but advertising is transmitted from abroad.

Of course, broadcasting organizations would not be obliged, for example, actually to transmit the full amount of advertising permissible. The scope available to broadcasting organizations for including advertisements in their programmes is limited, especially where viewers and advertisers alike have a large number of different programmes to choose from. There is no reason to doubt that a surfeit of broadcast advertising irritates many viewers, causing them to switch to other programmes where the opportunity exists. Programmes that carry advertisements are thus exposed to natural constraints where viewers are able to switch to other programmes that do not carry advertisements.

However, a uniform upper limit does not take account of the varying role which advertising plays in financing broadcasting organizations. The situation of broadcasting organizations that rely on advertising revenue alone is not necessarily the same as the situation of broadcasting organizations which are only partly financed from advertising, with the remainder of their income coming from public licence fees or from contributions from their members or from payments made by their subscribers. The problem arises here of the equivalence of the legal conditions governing competition between broadcasting organizations with mixed financing and broadcasting organizations financed solely from advertising.

In Germany, the response to this problem has been to set maximum advertising time at 20% of daily transmission time in the case of the broadcasting organizations financed solely from advertising revenue and at a little over 3% in the case of the broadcasting organizations which are also financed from licence fees (for details, see Annex 17). A comparable maximum amount of permitted advertising time, set at a similarly relatively low level (3% to 5%), applies to broadcasting organizations with mixed financing in France, Italy and the Netherlands, though the level is higher in Greece (7%) and in Ireland (10%) (see Annex 17).

A view held in some quarters in Germany[1] is that the public broadcasting organizations there enjoy a three-fold advantage over their competitors: in contrast to the private companies, they have considerable income from licence fees; they also have substantial income from advertising; and they are already established, i.e. they have great experience in programme production, skilled news services that report events very quickly and high quality equipment.[2] Accordingly, it is argued, private television will not have any chance unless the necessary additional broadcast advertising time is allocated to the private organizations alone. The proponents of this view concede that the often repeated claim that public broadcasting should be financed exclusively from licence fees is unrealistic. However, the status quo could be allowed to remain, they argue, i.e. the advertising time allowed to the public broadcasting services should not be extended. This view is reflected in the laws and draft laws of several German Länder, as discussed under point 2(b) above.

The press puts forward a similar argument.[3] Dual financing of public broadcasting from licence fees and advertising revenue protects it from economic risk. The press, by contrast, is entirely dependent on market prices. As a result, competition is already distorted even now. Any extension of advertising time for the public broadcasting organizations, it is argued, increases this distortion of competition and consolidates their monopoly. This makes it very much more difficult for privately operated electronic media, which have to rely solely on advertising revenue, to get themselves established and operating.

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[1] See, for example, Ernst Albrecht, Prime Minister of Lower Saxony, "Private Rundfunkprogramme durch Werbung finanzieren", Markenartikel 1983, p. 207; Bernhard Vogel, Prime Minister of Rhineland-Palatinate, Chairman of the Broadcasting Committee of the Prime Ministers of the Länder, Frankfurter Allgemeine Zeitung No 88 of 12.4.1984, p. 4.

[2] With regard to the third point, this view is also expressed in the Hutton report, loc. cit., p. 18, point 8.8.3.

[3] See, for example, the joint declaration by the Bundesverband Deutscher Zeitungsverleger (Federal Association of German Newspaper Publishers) and the Verband Deutscher Zeitschriftenverleger (Association of German Periodical Publishers) of November 1983, ZAW, Fakten, Dokumente, Analysen, Bonn, January 1984.

Opponents of this view point out that it is becoming increasingly difficult to introduce increases in licence fees in the Member States.[1] The public broadcasters must not, they claim, be deprived of the possibility of meeting cost increases through increased advertising revenue as well as by other means and of developing further with the help of advertising.[2] Dual financing from licence fees and advertising, it is argued, makes the public organizations more independent both from the State and from advertisers.[3]

The advertising industry points out that (in Germany and France) the privately operated electronic media would for years to come be able to gain access to only a very limited number of households.[4] They were therefore of only geographically limited importance for advertisers. The acute need for advertising time could for the time being be met only by the public broadcasting organizations. They must therefore be allowed more advertising time. The idea that advertising budgets could be set aside for the starting up of new media overlooked the fact that the real purpose of advertising was to promote the sale of goods and services. The major bottlenecks in television advertising created by the considerable restrictions on advertising time must not be maintained at the expense of advertisers.

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[1] See, for example, Hutton report, loc. cit., p. 17, point 8.8.2.

[2] See, for example, the observations of Saarländischer Rundfunk of 10.4.1984 on the officials' draft of a Broadcasting Law for the Saarland of 9.4.1984, SR aktuell, Informationen der Pressestelle des SR, Saarbrücken; Medienpolitisches Aktionsprogramm 1984 der SPD - Medienkommission vom 14.2.1984, Media Perspektiven 1984, p. 149.

[3] See, for example, Dieter Stolte, Director of the ZDF, "Ein Plädoyer für den öffentlich-rechtlichen Rundfunk" in Fernsehkritik, Werbung im Fernsehen, Mainz 1975, p. 247.

[4] See, for example, Arbeitskreis Werbefernsehen der deutschen Wirtschaft (German Industry Working Party on Commercial Television), Markenartikel 1984, p. 8. The Working Party comprises leading advertisers, the Trade Mark Association, the Federal Association of German Industry, the General Association of German Retail Trade and the Central Marketing Association of German Farming.

On 30 March 1984, the European Parliament called upon the Commission "to formulate rules to ensure that public broadcasting monopolies do not seek to prevent private broadcasters and programme makers from fully contributing to the future developments ...".[1] The harmonization of national legal provisions and coordination of the different systems should include "rules for advertising to ensure that revenue is apportioned fairly between the public and private sectors and the various mass media".[2] Parliament "believes that a decision must be taken at Community level regarding the limits applicable to the use of advertising by public and private television companies, so that all television companies operate on an equal footing".[3]

In fact, the activities of the Community pursuant to the EEC Treaty include, in the broadcasting field as well as in others, not only "the abolition, as between Member States, of obstacles to freedom of movement or persons [and] services ..." (Article 3(c)), but also "the institution of a system ensuring that competition in the common market is not distorted" (Article 3(f)). As Article 90 confirms, this also applies in particular in the relationship between public and private undertakings. Without such a system or concept underlying the individual measures of legislative harmonization, the harmonization objective laid down in the Treaty cannot be reached, i.e. "the proper functioning of the common market" (Article 3(h)) for broadcasting organizations, broadcast advertising and the advertising industry.

Consequently, in setting the maximum amount of advertising time, account will probably have to be taken of the need to avoid any appreciable distortions in competition between broadcasting organizations with mixed financing and those financed solely from advertising revenue. The Commission would welcome the views of interested parties on this question.

[1] Arfé Resolution (point 6), loc. cit.
[2] Arfé Resolution (point 4), loc. cit.
[3] Hutton Resolution (point F), loc. cit.

(f) Limitation of advertising revenue

In certain individual Member States, permissible advertising activity is also limited by restricting the maximum level of revenue that may be earned from advertising.

It is obvious that such a restriction cannot be contemplated in regard to transmissions coming over the frontier from other Member States since that would constitute an encroachment on the internal organization of broadcasting organizations subject to foreign sovereignty. In addition, it would be scarcely practicable to subject foreign broadcasters to financial controls.

As far as domestic broadcasters are concerned, such a restriction of income in the case of private broadcasting organizations could cramp the possibilities of forming such companies and their financial viability in a way which would conflict with their equal entitlement to play a role in the liberalization of broadcasting in the common market, which is laid down in the EEC Treaty.

However, a limitation of advertising revenue could continue to be permitted in the case of public broadcasting organizations if, overall, an adequate supply of advertising time is available in the Member State concerned. As has already been explained, in the case of public broadcasting organizations, the total advertising time allowed should be more severely restricted anyway (see above under (e)); consequently, a reduction of advertising activity by limiting revenue could also be permitted under the same conditions.

(g) Advertising on Sundays and public holidays

As far as the widely differing rules governing Sundays and public holidays in the Member States are concerned, account must be taken of the fact that they are based on deeply rooted religious traditions and cultural and educational policy objectives. On the other hand, freedom to provide services should allow people to become more aware of other customs and other mentalities obtaining in other Member States. The individual listener or viewer should be afforded the opportunity of choosing an "advertisement free" programme on Sundays and public holidays. He should not, however, be compelled to do so.

A possible solution to the problem, therefore, would be to allow each Member State to prohibit advertising in national programmes on Sundays and official public holidays, while it would have to tolerate cross-frontier broadcast advertising from other EEC countries on those days also. Each Member State could then weigh up the importance from a cultural policy standpoint of prohibiting advertising on Sundays and public holidays on the one hand against placing its own national broadcasters at a competitive disadvantage on the other. From the point of view of the Community, the possible distortion of competition here and the disparities embodied in the standard do not appear unacceptable.

(h) Times of the day at which advertisements may be broadcast

As regards the times of the day at which broadcast advertising should be allowed, here again the differing national habits and customs should be taken into account. In principle, therefore, each Member State should be allowed to lay down in respect of its national programmes the rules that appear to it to be reasonable as long as the Community rules governing total advertising time (see above under (e)) are complied with. Cross-frontier advertising from the Community should, however, be tolerated even if it is transmitted at times of the day other than those permitted for advertising at national level.

(i) The blending in of advertising

In order to promote broadcasting in its role as a service in the public interest, to enhance the integrity of individual parts of programmes and to foster the clear separation of advertising from other programme material, broadcast advertising should be compiled and transmitted in such a way that it neither impairs the integrity and value of programmes nor disrupts their natural continuity and sequence. This dual requirement would protect the special character of certain transmissions (e.g. political speeches, religious events, funeral services) and would, by requiring that advertisements were blended in only where there was a natural break in the programme, ensure the continuity of all transmissions. The Member States should in particular authorize such cross-frontier advertising as is not transmitted too frequently and does not disrupt programme continuity.

(j) Individual spots and advertising slots

Under existing rules in the Member States, individual advertising spots are allowed in the case of radio, but in most cases only advertising slots made up of several spots are allowed in the case of television. The question of whether this distinction is in keeping with practical requirements needs to be examined further.

As far as the length of individual advertising spots is concerned, the practice of the Member States hitherto has been to lay down a maximum duration of between one and three minutes. It appears desirable that the individual advertising spots should not need to be made too short but that it should be made possible to provide interrelated information with some explanatory content. The Member States should therefore have to tolerate spots lasting up to three minutes.

Common rules on the minimum duration of spots do not perhaps appear appropriate; here, the requirements of advertisers and cost factors should govern the time limits.

With regard to the length of advertising slots, only a maximum limit should be contemplated, designed to prevent impairment of the rest of the programme material through excessively long advertising periods and upsetting the balance of broadcasts. If the maximum time limits applied hitherto are taken as a guide and if account is taken of the trend towards increasing advertising time, a maximum slot duration of 12 minutes would appear appropriate.

(k) Separation of advertising and other programme material; sponsored advertising

It is consistent with fundamental requirements relating to the protection of programmes, listeners and viewers that particular care should be taken when separating advertising from other programme material, a point borne out by the existence of appropriate rules in most Member States. The directive should therefore stipulate that advertising and other programme material must be kept quite separate and that advertising must be clearly recognizable as such and must not contain any reference to other programme material or appear in a form which blurs the dividing line betwen the two.

These rules should be binding for domestic advertising and for cross-frontier advertising transmitted from other Member States. As far as domestic advertising is concerned, each Member State could lay down further detailed rules aimed at keeping advertising separate and rendering it recognizable, including, say, an obligation to include a declaration concerning advertising in the subscription terms.

A question needing special attention is that of the sponsoring of broadcast programmes. Already business undertakings in the Community contribute to financing certain programmes or parts of programmes of the Community broadcasting organizations sometimes directly (by providing benefits to the broadcasters), sometimes indirectly (by providing benefits to independent programme producers, to the organizers of cultural, artistic or sporting events, or to listeners and viewers, for example in the form of prizes donated for guessing games etc.).

This applies both to private and to public broadcasting organizations and seems in most cases to be independent of the question whether or not the particular programme is also financed by advertising. Thus in France the new television programme on a subscription basis, Canal Plus, may obtain supplementary finance not from advertising but from sponsorship. Other Member States too are devoting increasing attention to the question of the conditions on which the assumed financing potential of sponsoring can be used to a greater extent than hitherto in the creation of new cable and satellite programmes.

The forms of sponsoring already known are numerous, and additional forms will develop. Any definition would involve the danger of excluding a priori certain important examples. The most important forms of sponsoring carried on at present include:

- Sporting events that are broadcast or televised. One or more business firms will place advertisements on hoardings in sports stadiums or sports halls, on the clothing of the players or on the sports equipment, so that they are clearly visible during the event. In these cases the amounts spent on the advertising go direct to the organizer, but they are often spent because the event is expected to be televised. Many kinds of sporting event (tennis, football, ice hockey, horse trials, motorcar and motorcycle racing etc.) could not take place without some outside financial assistance. The public seems to have largely accepted this situation.

- Cultural, artistic and entertainment events such as exhibitions, concerts, opera or theatre. In the last two cases in particular, sponsoring is much less common than in sport. Some such cases are only thinly differentiated from patronage, in which the patron does not seek any direct reward. The sponsor's name is mentioned discreetly either in announcements or in programme magazines.

- Fixed events like time signals or weather forecasts, provided by specific firms.

- Co-productions in which firms give material or financial assistance with the production of films or documentaries. In most cases the reward for the co-producing firm is the presence of its goods or services in a natural context, without any discussion or evaluation of them. In other cases, for example where the co-producer is a publishing firm, the film itself contains no express reference to the co-producer but deals with subjects chosen for their relevance to a book or other works. In both cases the co-producer is mentioned in the credit titles in the usual manner.

- Programmes, for example of an entertainment or educational nature in which prizes donated by specific firms are to be won (example: RTBF's "Visa pour le Monde", in which travel with a named airline is offered).

- Advertising spots in which several (three or four) products are combined under one heading (gardening, cooking, holidays, fashion) and presented in say three minutes by a commentator. This special form of advertising is designed to lift the advertising out of a series of unrelated individual spots which might be irritating and of limited efficacy. The three minutes could also be used by a single firm to present one or more of its goods or services.

- Programmes produced independently of the broadcasting organizations and offered to them for transmission. The essential point here is that the decision on acceptance and transmission of such a programme must remain fully under the editorial responsibility of the broadcasting organization. As the demand for new programmes increases it may be expected that the broadcasting organizations on purely financial grounds will be tempted or compelled to use such offers increasingly.

An absolute prohibition of all these and similar forms of sponsoring would not be in keeping either with present-day practice in most Member States or with the practical requirements of broadcasting as a medium of expression, information, education and entertainment. The broadcasting organizations' brief as a medium of information extends also to providing information on economic matters. This may well include information on the latest developments from individual firms, or in special circumstances on specific products and services made available by the manufacturers. Popular sporting and cultural events do not lose their informative value for the public simply because particular firms contribute to their financing in a way acceptable to viewers. The same applies in principle to good films and interesting documentaries in which products or services are shown in a natural context or form the starting point for further publishing or artistic activities. It would, for example, be totally unrealistic to prohibit the use of cars in television films or programmes because the spectator can easily identify them as the product of a specific manufacturer, even if the latter pays something for the advertising value.

A further point is that the broadcasting organizations are generally bound by the principle that programmes should pay for themselves. In some cases they are even bound by law to make use of all possibilities of saving costs. The production or acceptance of sponsored programmes is one element in reducing costs, an element likely to grow in significance as more and more programmes become available.

On the other hand sponsoring conceals certain dangers for the integrity of broadcasting programmes. For this reason rules should be worked out for inclusion in the planned directive which will ensure that broadcasting can continue to fulfil its task as a medium of expression, information, education and entertainment.

The starting point is the abovementioned principle of the separation of advertising from the rest of the programme. This means that advertisements must be clearly recognizable as such and must not appear to be a part of the rest of the programme. But in this context the only material to be regarded as advertising should be that prepared on the sole responsibility of the advertiser, and examined by the broadcasting organization only for observance of legal provisions and voluntary self-regulation, for the transmission of which the advertiser pays the insertion fee. In this way broadcast advertising contributes generally to the financing of the other programmes of the broadcasting organization.

In contrast, the benefits provided by a sponsor are directed to quite specific parts of the rest of the programme that are suited to his advertising objectives. It is the link of subject matter between the advertising interest of particular firms and the editorial interest of the broadcasting organization that constitutes the essential characteristic of sponsoring.There may thus be a need for special provisions to protect the other programmes of the broadcasting organization in order to counter the possible danger involved in this form of financing, namely that of the influence of external commercial interests on the formation of programmes by the broadcasting organization. It is also necessary to ensure, in the interest of broadcasting as a medium of expression, information, education and entertainment, that listeners and viewers are protected from a surfeit of advertising interests within the programmes.

In order to counteract this danger, a number of rules could be laid down to prevent the intermingling of editorial and advertising interests in the formation of broadcasting programmes. A particularly important principle must be the confirmation that the responsibility for the content and the transmission of the whole programme remains with the broadcasting organizations. They alone must decide, by reference to their task as programme producers from an editorial and journalistic point of view, whether particular programmes to which sponsors have contributed in one way or another are to be broadcast or not. Obviously these decisions will have to be taken in the light of the financial resources of the broadcasting organization. In no case, however, must there be any justification for an impression that the broadcasting organization allows advertisers to influence the programme content or accepts financial advantages in return for accepting specific programmes or parts of programmes.

Further principles would be that

- reports on happenings, events, places or things should not refer to specific firms, products or services in a way not strictly necessary for the report;

- business firms may be named as producer or co-producer of programmes only in the form of a credit title at the end and in suitable cases also at the beginning of the programme;

- the sponsor's products or services may not be advertised within such programmes or in immediately preceding or following programmes.

On the other hand it does not at present seem necessary to prohibit generally the transmission of sponsored broadcasts whose content has any relevance to the business interests of the sponsor. Such a prohibition would decisively weaken the financial potential of sponsoring since it would affect precisely those broadcasts in which the sponsors might be assumed to be most interested. Furthermore, if this were done the sponsor's special expertise could not be tapped and placed at the service of the public. The sponsor would be restricted to fields in which he is no more competent than other people. Above all, however, such a prohibition would disregard the responsibility of broadcasters in providing programmes. They have to decide by reference to editorial and journalistic criteria whether and how far sponsored films or documentaries meet the requirements imposed by the programme maker's brief in terms of quality, objectivity and balance. There may even be circumstances where the broadcaster's task as a provider of information imposes the duty to broadcast specific material. Thus, for example, an advertising spot in the making of which a famous pop star was burnt was shown by American television as part of the evening's news.

2. Restrictions on the advertising of specific products?

(a) Tobacco advertising

As indicated above, there is an almost total ban in the Member States on cigarette advertising on radio and television. It would be consistent with the consumer and health policies of the Community to make this prohibition general and binding on all Member States. Exceptions should not be permitted even in national advertising, in order to avoid distortions of competition.

Since substitution between tobacco products is a feature of the market, the advertising ban should cover tobacco products of all kinds as is already the case in a majority of the Member States.

(b) Alcoholic beverages

A total prohibition on the advertising of alcoholic beverages exists only here and there in the Community; however, most Member States have special rules governing the advertising of alcoholic drinks. This approach to regulation would seem the right one to take at Community level as well. This would mean that the advertising of alcohol would be permitted in principle in supranational broadcasting, but Member States would be free to impose tighter controls on alcohol advertising in national broadcasts or to ban it altogether. The important thing is that a move towards a general ban in the future should not be prevented by the regulations in individual Member States. As things stand at present, it would seem to be sufficient at Community level to have a code of conduct imposing certain restrictions on alcohol advertising in order to prevent abuse. This will be dealt with in the next section.

3. Control of broadcast advertising?

(a) Present position

As shown earlier at I.2(b), the trend in many Member States is to lay down a special code of practice for broadcast advertising and to introduce special monitoring arrangements to ensure compliance with its rules. The forms this can take range from statutory provisions through a variety of intermediate arrangements to systems of voluntary restraint.

It would probably be expedient to take up this approach. Such control would provide the necessary counterweight to the liberalization of broadcast advertising. The directive should, therefore, stipulate that Member States must introduce certain controls (see (b) below). A code of practice governing radio and television advertising which would have to be observed in all cases should also be established. The code should embrace general rules (see (c) below), special regulations relating to children and young people (see (d) below) and, finally, separate rules for the advertising of alcoholic beverages (see (e) below).

Such a code would thus cover the main common areas of regulation dealt with by Member States. The code of practice established at Community level would constitute a minimum standard. Cross-frontier advertising that met this standard would be permitted provided it was not in breach of general legislation. Member States would be able to lay down wider-ranging or more detailed rules for national broadcasts.

(b) Structure of controls

In considering the scope for controls at national level, a distinction must be made between original transmission and re-transmission of advertising. Monitoring prior to first transmission is feasible and already practised in many Member States. It is relatively simple to apply and highly effective and should be made binding by the directive. If monitoring reveals that an advertisement infringes the code of practice, its transmission would be prohibited.

In the case of re-transmission over the air or by cable, especially at the same time as the original transmission, prior monitoring is difficult or quite impracticable. Controls and sanctions can at best be imposed after the event. Once prior monitoring is established througout the Community, the need for ex post controls should be considerably reduced; in practice, such controls would be important only in the case of programmes transmitted from third countries. In such cases, however, general legislative provisions and voluntary restraint by advertisers would probably be sufficient, although Member States should still be at liberty to impose additional special controls on transmissions of this kind.

Accordingly, the need for rules at Community level is confined to the prior monitoring of advertisements to be broadcast for the first time in a Member State. The directive should make such monitoring binding on Member States. The practicalities should be left to the Member States themselves; in particular, they would be able to rely on existing monitoring arrangements. Controls might, therefore, be the responsibility of a statutory government body or take the form of voluntary arrangements. They could be centralized or implemented by individual broadcasters. The essential is that any spots found to infringe the rules should not be broadcast. Advertisements would be measured against the general and specific standards set out below.

(c) General standards

A comparison of the general standards included in Member States' advertising codes and in the International Chamber of Commerce's codes of conduct for advertising practice shows the following rules to be common to all of them. These rules could form the basis for prior monitoring, under the directive, of the primary transmission of broadcast advertising in all Member States:

- broadcast advertising must not infringe the law in the country where the broadcast originates;

- it must not offend against public morals or basic good taste;

- it must not be offensive to religious, philosophical or political beliefs;

- it must not play on fear without justifiable reason;

- it must not encourage behaviour prejudicial to health or safety.

It would be open to Member States to impose stricter and more detailed standards for advertisements broadcast for the first time within their territory. Advertisements transmitted from other Member States would be permitted if they complied with the above standards and did not infringe general legislation.

(d) Standards relating to children and young people

The codes of practice which exist in several Member States in relation to children and young people generally cover two overlapping areas: firstly, protection of children and young people against advertising aimed specifically at them and, secondly, the participation of children and young people in advertisements and the protection afforded to them and/or to those at whom the advertising is aimed. The latter may themselves be children or young people.

The following standards make up the core of the national rules and could be included in the directive:

- broadcast advertising must not directly exhort children to buy a product or exploit their immaturity of judgment and experience;

- it must not encourage children to persuade their parents or other adults to purchase the goods or services being advertised;

- it must not exploit the special trust children place in parents, teachers or other persons;

- children appearing in advertisements must not conduct themselves in a manner inconsistent with the natural mode of behaviour in their age group;

- advertisements featuring children must not abuse the feelings which adults normally have towards children;

- the above standards also apply to young people in so far as is necessary for their protection.

(e) Standards relating to alcoholic beverages

Most Member States have introduced special rules of practice for the advertising of alcoholic beverages. The basic aim of those rules, which the Community could incorporate in the directive, can be summarized as follows:

- broadcast advertising must avoid anything that might prompt or encourage young people to consume alcohol;
- advertisements must not link the consumption of alcohol to the practice of sport or to driving;
- they must not create the impression that the consumption of alcohol contributes to social or sexual success;
- they must not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- they must not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- they must not place undue emphasis on the alcoholic strength of drinks.

As mentioned at 2(b), Member States would be free to impose stricter limits on national broadcast advertising of alcoholic beverages or to prohibit the advertising of alcohol altogether at national level.

B. Public order and safety, protection of personal rights

I. Introduction

Sound and television broadcasts, as well as being subject to advertising and copyright laws in the Member States, are governed by a further body of national laws which can be subsumed under the general heading of public order and safety. It consists mainly of provisions in criminal and administrative law to safeguard rights which are considered, in the interests of society, to be particularly worth protecting. These can be summarized in the following main divisions:

- Laws to protect the integrity of the State, particularly with regard to treason and the betrayal of state secrets; protection of national flags and emblems as well as the organs of the State, especially the Head of State;

- Laws to protect public peace and order within a country and in relations with other countries, in particular relating to sedition, breaches of the peace, public condonement of criminal acts, the glorification of violence, incitement to racial hatred and revilement of religious communities;

- Laws to protect public morals in the sexual sphere, especially prohibitions on pornography;

- Special laws to safeguard minors, especially in the sphere of sexual morals, and to protect them against being brutalized by representations of violence.

To these can be added provisions to protect personal rights, particularly reputation, sometimes in the form of prohibitions carrying penal sanctions and sometimes in the form of civil law provisions to protect an individual's subjective rights. These include:

- Provisions under criminal and civil law to protect reputation, particularly in respect of libel, slander and defamation of character;

- Laws to protect privacy, particularly secrecy, confidentiality and the secrecy of the mails as well as of personal records;

- Laws to protect the use of one's own likeness, particularly the unauthorized use of pictures for commercial purposes;

- Laws relating specifically to the media, particularly the press, giving an individual who feels he has been misrepresented a right of reply.

The practical relevance of the abovementioned provisions to sound and television broadcasts, and specifically broadcasts emanating from another country, has so far been slight in most cases. These laws are mainly applied in other areas; it is rare for them to be applied to broadcasting. This is obvious, to take only one example, in the case of laws protecting the State. Since such provisions impinge only marginally on broadcasting, there is good reason not to pursue harmonization in this area, with one or two exceptions discussed below. Generally speaking, these laws are not likely to be a significant obstacle to the provision of broadcasting services between countries, or to distort competition.

There is also one further consideration. In nearly all cases these laws represent complex clusters of rules which only function properly when taken together. It would be difficult to separate out a number of provisions applying only to the media. It would thus not be appropriate to create, for example, a body of law protecting the State solely in sound and television broadcasting or to distinguish, in criminal libel, between "broadcasting offences" and other assaults on honour and good repute. Nor does it seem necessary or opportune to tackle the enormous problem of harmonizing such essential and substantial parts of the penal codes of the Member States as have been referred to here simply as the result of the institution of a free exchange of broadcasting services.

Greater relevance in media terms attaches to laws designed to protect public morals, in particular bans on pornography. These have mostly been applied, however, to cases involving the printed media, films, audio and video cassettes, stage performances and the like. Cases in the area of broadcasting have been very rare. For the reasons already outlined above, it does not seem necessary to harmonize laws to protect public morals specifically for the broadcasting sector or to approximate law in the whole of this field. A further factor is that each country's laws are closely bound up with national custom and ethical values. The trend in many Community countries at the moment is towards liberalizing current legal standards and dismantling statutory checks. In view of this change taking place in legal thinking on public morals, it seems reasonable to wait and see whether the different levels of restriction in general law will have a significant impact on supranational broadcasting in the Community. As things look at present, this can be considered unlikely.

There is, however, one area worth closer examination from the point of view of Community-level harmonization, and that is the law protecting children and young people against broadcasts which may be damaging to their moral

and intellectual well-being. Here it should be possible to identify an area within the general law on minors which is specific to the media and to produce separate harmonization proposals. Some kind of standards in this field could serve to back up the advertising rules protecting minors (see A.III.3.d above). A law protecting minors in relation to broadcasting with a European-wide minimum standard could prove to be a necessary corollary to liberalizing the provision of broadcasting services between Community countries. The subject is dealt with further under II below. This leaves the area of personal rights, particularly character and reputation, in civil law. The law in the various Member States has developed in different ways. Potential breaches of the law usually arise as isolated cases. A radio commentary, a critical television programme or a news broadcast may, as a result of incorrect and disparaging statements for example, damage the reputation and good standing of a particular person without being a repeated or continuous denigration. Legal remedy will not therefore consist of seeking an injunction but rehabilitation and compensation for damages. There is a correspondingly small danger that action for infringement of personal rights would impede the dissemination of programmes. With regard to damages, while compensation for material loss resulting from defamation of character is granted in all Member States, there are differences in the pecuniary compensation awarded for purely non-material loss.

Apart from the entitlement in civil law to the retraction or correction of defamatory statements, a remedy peculiar to the media has developed in the right to publication of a reply. Whereas the usual sanctions in the general field of personal rights - injunctions, abatement and damages - present wide differences and have wide-ranging implications which stand in the way of harmonization, an approximation of laws in respect of the right of reply seems feasible. This question will be discussed in III.

II. Protection of minors

1. National law

National law to protect minors in the Member States of the Community is primarily concerned with the dissemination of harmful books and periodicals, the projection of films and the access of young people to public bars and places of entertainment. Special provisions in the area of sound and television broadcasting do not exist in all countries; Denmark and Luxembourg, for example, do not have such laws. Where laws do exist, they deal with the problems in different ways. The different types of regulation are described below.

Some Member States have taken the general provisions to protect minors and extended them to cover broadcasting. For instance, Sect. 5 of Italy's Film and Theatre Censorship Act (No 161) of 24 April 1962 stipulates that films may be passed for public exhibition with restrictions on young people under 14 or under 18; under Sect. 11 of the Act, young persons under 18 may also be excluded from theatre performances. Sect. 13 extends this provision to broadcasting and provides that films and theatre performances forbidden to young people under 18 may not be broadcast on radio or television. A similar though less stringent approach is taken in the Netherlands. Under Sect. 12(2) of the Broadcasting Act of 1 March 1967 in the version of 13 September 1979, an indication must be given before a programme that it is forbidden to young persons under 12 or under 16.

In Germany, by contrast, the Young Persons (Protection in Public Places) Act in the version of 27 July 1957, regulating the exhibition of films to minors, does not apply to television broadcasts. It is still being argued whether the Act on the Dissemination of Publications Harmful to Young Persons, which also covers audio and audio-visual media, can be applied to radio and television programmes.[1] However, there are two provisions in the German Penal Code that protect young people and specifically include broadcasting. Under Sect. 184(1) of the Penal Code it is forbidden to make pornographic publications or pornographic audio and audio-visual products available to persons under 18; under Sect. 184(2) a penalty is similarly imposed on anyone disseminating pornographic material through the broadcast media. By analogy, Sect. 131(1)(3) makes it an offence to make available to persons under 18 any publication, audio or audio-visual product which represents cruel or otherwise inhumane violence against human beings, and thereby glorifies or trivializes such violent acts, or which incites to racial hatred. Sect. 131(2) imposes the same penalty on the dissemination of such representations through the broadcast media.

Some Member States have introduced provisions to protect young people which apply specifically to broadcasting. Normally these set out general principles, designate the authority which is to monitor compliance with the law and specify, where relevant, which body may issue more detailed regulations. Thus, France's Act No 82-652 on Audio-Visual Communication of 29 July 1982 provides in Sect. 14(1) that it is the responsibility of the High Authority for Audio-Visual Communication to cover the "protection of children and young people" in its recommendations affecting public service radio and television broadcasting. In making its decisions and recommendations, the High Authority is to consult the National Council for Audio-Visual Communication (sentence 2 of Sect. 27(3)).

In the United Kingdom, under Sect. 5(1)(a)(b) of the Broadcasting Act 1981, it is one of the responsibilities of the Independant Broadcasting Authority to draw up, and from time to time reivew, a code of rules to be observed in the showing of violence with particular reference to times of day when "large

[1] See Engle/Eckardt/Markert, Umfang und Genzen des Jugendschutzrechts für Neue Medien, in: Expertenkommission Neue Medien - Baden-Württemberg, Final Report Vol. II, Stuttgart 1981, pp. 88, 92 ff. The Act definitely does not apply to live broadcasts.

numbers of children and young persons may be expected to be watching or listening". The Authority is also to give special regard in regulating other matters to the timing of broadcasts in relation to children. The Independent Television Authority had already drawn up a code on violence in October 1971 under earlier statutes, after other similar codes had gone before.

Alongside general and specific restrictions on certain kinds of programme content, there are rules in some Member States that programmes potentially harmful to children should be broadcast at such a late hour that young viewers or listeners are less likely to see or hear them. Thus Sect. 12(2) of the Broadcasting Act in the Netherlands provides that television broadcasts which are unsuitable for children under 12 should not begin before 20.00 in the evening and those considered unsuitable for young persons under 16 not before 21.00. In Germany the broadcasting companies must observe the rule that "programmes of which the content or form, in whole or in part, are likely to be harmful to the physical, mental or moral upbringing of children and young persons" may not be broadcast before 21.00 in the evening.[1]

With regard to the ages and age groups on which protection of children and young people is based, the Member States seemed to concur that a special need for protection ends at the latest at 18.[2] In the age groups up to 18, the divisions vary. In Germany, "children" are considered to be those who have not yet become 14, while "young persons" are those of 14 or more but

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[1] See Sect. 31 of the Act on Broadcasting Companies Governed by Federal Law of 29 November 1960 and Sect. 11(1) of the Broadcasting Act of the Saarland of 2 December 1964. A similar provision is contained in Sect. 10 of the Inter-State Agreement on a Second Television Channel (ZDF) of 6 June 1961; under II.4 of the programming guidelines for the ZDF, broadcasts not suitable for children and young persons must be clearly identified as such. The draft Media Act for Baden-Württemberg contains a complete ban on "programmes likely to be harmful to the physical, mental or moral upbringing of children and young persons" (Sect. 62(1)). The draft of a Broadcasting Act for Lower Saxony of 1982 falls between these two extremes: broadcasts with pornographic content are prohibited (Sect. 11(2)) while programmes likely to be harmful to the physical, mental or moral development of children and young persons are only forbidden "if no steps are taken, by timing of broadcasts or in another way, to ensure that children and young persons of the age groups affected do not hear or see the programmes". The draft goes on: "A broadcaster may assume this to be the case for programmes broadcast at times when children and young persons are not allowed to attend the public exhibition of films unaccompanied by a parent or guardian" (Sect. 11(1)).

[2] Apart from examples cited below, see Sect. 234 of the Penal Code of Denmark in the version of 1967.

not yet 18; the statutory divisions are set at ages 6, 12, 16 and 18.[1] In France a distinction is made for cinema admissions between minors not yet 13 and those not yet 18;[2] in Italy the division is between those not yet 14 and those not yet 18.[3] The television regulations in the Netherlands distinguish between those not yet 12 and those not yet 16;[4] in Belgium there is a single limit for films at 16 years of age.[5]

All these rules are primarily aimed at protecting children and young people in the area of sexual morals (pornography, obscene representations). The other emphasis is on the harmful effects of representations of violence.[6] In a number of Member States, a more general desire is expressed to protect children and young people against harmful influences on their development, which might be physical, mental or moral.[7]

2. Necessity and scope for approximation of laws

Do these provisions need to be approximated? The European Parliament "considers that outline rules should be drawn up on European radio and television broadcasting, inter alia with a view to protecting young people ...".[8] In this connection, the opinion of the Legal Affairs Committee given to the Committee on Youth, Culture, Education, Information and Sport contains the following:[9] "Community legislation on the media ... could not merely prevent distortions of competition [stemming from differences in the rules on broadcast advertising], regulate the freedom to provide services in this field [broadcast

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[1] cf. Gesetz zum Schutz der Jugend in der Öffentlichkeit in the version of 27.7.1957, Sect. 1(3) and Sect. 6.

[2] Décret No 61-63 du 18.1.1961, Art. 1er.

[3] Legge 21.4.1962, No. 161 - Revisione dei film e dei lavori teatrali, Art. 5.

[4] Omroepwet Art. 12 Nr. 2.

[5] Loi du 1.9.1920 interdisant l'entrée des salles de spectacles cinématographiques aux mineurs âgés de moins de 16 ans, Art. 1er. Other provisions are based on reaching the age of 18, cf. Sect. 386 bis of the Penal Code (obscene pictures or objects) and Loi 15.7.1960 sur la préservation morale de la jeunesse (access to certain places of entertainment).

[6] cf. Kunczik, Media Perspektiven 1983, p. 338 ff., giving further references.

[7] A comparative survey of the latest research is given in Bonfadelli, Kinder/Jugendliche und Massenkommunikation, Media Perspektiven 1983, p. 313 ff., giving further references.

[8] European Parliament, point 7 of the Resolution of 12 March 1983 on radio and television broadcasting in the European Community, OJ No C 87 of 5 April 1982, p. 110.

[9] European Communities, European Parliament, Working Documents 1981-1982, Document 1-1013/81 of 23 February 1982 (PE 73.271/fin.), p. 28.

advertising/ and lay down provisions for the protection of consumers or the guarantee of copyright. It would also have to contain at the least ... provisions for the protection of youth." Such approximation is seen as a politically necessary counterpart of the opening up of frontiers to broadcasting in the Community.

From a legal viewpoint, national rules on the protection of youth that are not matched by similar rules in the broadcasting country (see Part Five, C.III.2) are, according to the case law, rules whose application to transmissions from other Member States that are re-transmitted in the receiving country can be justified "on the grounds of the general interest" (see Part Five, C.VI.1, and in particular at (b) and (c)). In such cases of divergent legislation, Member States remain free, therefore, to prohibit as an exceptional measure the re-transmission of foreign broadcasts within their territories, to require cable companies to black out programmes, or themselves to monitor transmissions.

First, this would pose technical, financial and practical problems for cable operators and for the authorities, who would have to insist that cable operators continually monitored programmes transmitted from abroad for compliance with the national rules on the protection of youth, that competent and trained personnel took the decision whether or not the programmes transmitted could be shown and that the decision taken was immediately implemented, where appropriate, by blacking out parts of programmes deemed inadmissible.

Secondly, such measures would impair the freedom of broadcasting within the Community.

Thirdly, the legal conditions governing the production, transmission and re-transmission of programmes would continue to differ from one Member State to another. A common market in broadcasting characterized by conditions similar to those obtaining on the domestic market, and by equivalent legal conditions governing competition in respect of programmes, could not be said to exist.

The conditions under Community law necessary for an approximation of such divergent provisions by way of a directive pursuant to Article 57(2) accordingly exist (see Part Five, C.VI.2(a)).

The object of approximating laws on the protection of minors would be that programmes meeting a minimum standard of protection applicable throughout the Community might be freely broadcast in all Member States. National legislatures would remain free to impose stricter rules for broadcasts within the country. However, supranational broadcasts from other Member States would be permissible if they meet the Community standards.

In deciding the content of a possible Community minimum standard, it would be necessary to take into account the different traditions and attitudes in the Member States. The various models from national legislation could be used, and combined into a Community code of practice.

The directive could embody the principle that broadcasts which might seriously harm the physical, mental or moral development of children or young people should not be permitted. This should include broadcasts involving "hard" pornography, cruel and inhuman violence or incitement to racial hatred.

Broadcasts of a less harmful kind, but which might still impair the physical, mental or moral development of children and young people, should be permitted only late in the evening.

The Member States should be left to deal with the practical implementation of the few rules in the directive. It would be necessary only to require them to arrange for their implementation in such a way that programmes infringing the rules would not be broadcast. For that purpose they could rely on existing broadcasting institutions or voluntary self-regulation.

III. Right of reply

1. National provisions

The legal situation in the Member States may be summarized as follows:

Belgium

Under the Act of 23 June 1961[1] any natural or legal person or group of persons to whom explicit or implicit reference has been made in the course of a broadcast has the right, provided that their personal interests are shown to be involved, to require that a reply (réponse) be broadcast free of charge, either to put right one or more incorrect statements relating to them or to reply to one or more statements or affirmations likely to damage their reputation (Section 7(1)). This right may be exercised on behalf of deceased persons by their relatives (Section 7(2)). Applications for a reply must be submitted within 30 days of the broadcast, must name the applicant, must identify the broadcast in question and the offending parts thereof, and must be properly justified. The time allowed for reading the reply may not exceed three minutes and the reply must not exceed 4 500 typographical characters in length (Section 8). Transmission of the reply may be refused if the latter bears no direct relationship to the offending broadcast or if it is itself offensive, illegal or immoral or involves third parties unnecessarily (Section 9). The right to reply lapses if a satisfactory correction has been made by the broadcasting body acting on its own initiative (Section 10). The reply should be broadcast during the next programme of the same series or of the same type, and at the scheduled time as far as possible. The reply is read, without comment or contradiction, by a person designated by the broadcasting body (Section 11(1)). If the broadcasting body does not agree with the text of the reply, it may make counter-proposals. Notice of the application's rejection should be given within four working days (Section 11(2) and (3)). An appeal against such rejection may be lodged with the judge presiding at provincial level, whose decision in the matter is final (Section 12). A recording of the broadcast must be kept until the period for replies has elapsed and for the duration of any legal proceedings (Section 13). Unlawful refusal to broadcast a reply is a punishable offence (Section 15). Exercise of the right to reply does not affect other legal remedies (Section 7).

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[1] Loi du 23 juin 1961 relative au droit de réponse, modifiée par la loi du 4 mars 1977.

Denmark

Complaints against "Danmarks Radio", and requests for corrections in particular, are handled under Sections 16-19 of Act No 421 of 15 June 1973 concerning Danish radio and television. The competent body in the first instance is the Radio Council and in the second and final instance a Legal Commission under the auspices of the Ministry of Culture (Radionaevnet). Appeals against the Radio Council's decisions may be lodged with the said Commission within four weeks. The latter may instruct "Danmarks Radio" to broadcast corrections of any erroneous information which it may have transmitted. The Commission may determine the content, the form and the timing of such corrections. It may also deliver opinions and require them to be broadcast.

Germany

The right to reply is governed by various legal texts. The provisions invoked depend on the broadcasting body against which the complaint is lodged.[1]

The following arrangements[2] apply broadly speaking to the Zweite Deutsche Fernsehen and the federally-controlled broadcasting bodies: If a factual statement has been made in the course of a broadcast, the person or body directly concerned may request that a reply to this statement should be issued; this must be done without delay and in writing. The reply must be purely factual, may not contain any material which could give rise to prosecution and may not be substantially longer than the offending part of the broadcast in question. There is no obligation to broadcast a reply unless the person or body to whom the programme in question related has a justified interest in having this done. The reply must be broadcast without delay, over the same range as the offending programme, at an equivalent time and without insertions or omissions. No statement to counter this reply may be broadcast on the same day. The right to reply may be enforced through the ordinary courts of law.

Where the broadcasting bodies of the Länder are concerned, there used to be some controversy as to whether the Land legislation governing the right to reply to press publications could apply by analogy to broadcasting. This matter has now been settled and in most cases there is legal provision for the right of reply. The provisions in force differ in certain respects but they are essentially the same as the arrangements described above.

In its ruling of 8 February 1983,[3] the Federal Constitutional Court stated, referring to Section 12(2)(1) of the Staatsvertrags über den Norddeutschen Rundfunk, that it was incompatible with Sections 2(1)

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[1] See Wenzel, Das Recht der Wort- und Bildberichterstattung, 2. Aufl. 1979, p. 400 et seq., for a summary and further references.

[2] Section 4 of the "Staatsvertrags über die Errichtung der Anstalt des öffentlichen Rechts Zweites Deutsches Fernsehen, 6 June 1961." Section 25 of the "Gesetzes über die Errichtung von Rundfunkanstalten des Bundesrechts, 29 November 1960."

[3] Gewerblicher Rechtsschutz und Urheberrecht 1983, 316.

and 1(1) of the Constitution, whereby the general rights of the individual are guaranteed, that a reply could only be requested within two weeks of the offending broadcast. The shortness of this period was an excessive restriction of the individual's rights under the Constitution, since, even if due consideration had to be given to the interests of the broadcasting authority, it presented an unreasonable obstacle to the exercise of the individual's right to reply as a means of effective protection for persons affected by broadcast material.

France

The right to reply (droit de réponse) is governed by Section 6 of Act No 82-652 of 29 July 1982 on audio-visual communications.

Any natural or legal person has the right to reply if, in the field of audio-visual communications, any statement is broadcast which might impeach their honour or damage their reputation (Section 6(1)). The complainant must specify the statements to which he wishes to reply and must provide the text of his reply (Section 6(2)). The reply must be transmitted under technical conditions equivalent to those for the broadcast containing the statements in question and in such a way as to ensure an equivalent audience (Section 6(3) and (4)). Applications to broadcast a reply must be lodged within 8 days of the date on which the statements in question were transmitted (Section 6(5)). If the application is refused or goes unanswered, summary proceedings may be instituted before the presiding judge of the Tribunal de grande instance (Section 6(6)); the latter may order a reply to be broadcast and may declare that the order should be enforced irrespective of any appeals (Section 6(7)). Each broadcasting body must appoint a person responsible for the broadcasting of replies (Section 6(9)). Specific rules are to be laid down by decree of the Conseil d'Etat (Section 6(10) and (11)); implementation is the responsibility of the Haute Autorité de la Communication Audiovisuelle (Section 14(III)).

Greece

The Greek law on the press provides both for the right of reply and for the publication of corrections; this does not apply to broadcasts, however. It is thought that the courts could order a reply to be broadcast for the protection of the individual under Section 57 of the Greek Civil Code.

Ireland

There is no special legislation on the right of reply.

Italy

Section 7(2) of the Broadcasting Act (No 103 of 14 April 1975) enables any person who considers his tangible or intangible interests to have been damaged by an untruthful radio or television broadcast to demand transmission of an appropriate correction (rettifica).
Application should be made to the director of the broadcasting station (Section 7(3)). The latter is obliged to have the correction broadcast without delay, provided that the correction contains no material which could constitute a criminal offence Section 7(4)). Except in cases of special importance, the corrections are broadcast in programmes specifically intended for this purpose (Section 7(5)). It is a punishable offence to refuse to broadcast a correction (Section 7(6)). The broadcasting of a correction does not rule out prosecution under the civil or criminal law. Section 34 provides for a similar entitlement to correction at the expense of local radio and television cable stations.

Luxembourg

There is no legal provision for the right of reply where broadcasting is concerned. The broadcasting body, the CLT, does however grant such a right on a voluntary basis under its own code of conduct, pursuant to Council of Europe Resolution No 74/26 of 2 July 1974.

The right of reply is granted to individuals who consider that their honour has been impeached or that their reputation or rightful interests have been damaged by a radio or television broadcast. Application should be made within 8 days of the broadcast in question. If the reply is accepted, it is read out by an announcer at the station when the next instalment of the programme in question is broadcast. The CLT may suggest changes in the text submitted; the complainant must take his decision on these changes within 4 days. If the application for a reply is rejected or if no agreement is reached on the text, the matter may be taken to a conciliation board, to which each party concerned appoints a member. This has no effect on civil proceedings. Applications are rejected if the reply does more than make the relevant correction, if it constitutes a criminal offence, if it damages the legally protected rights of a third party or if the applicant cannot show his justifiable interests to be involved.

Netherlands

Under Section 38 of the Broadcasting Act of 1 March 1967, as amended on 13 September 1979, any body which has been granted broadcasting time and which has transmitted an incorrect or misleading incomplete version of factual material may be required to broadcast a correction, on application by the party directly affected by the broadcast in question provided that the said party has sufficient grounds for requesting a correction (Section 38(1)). Summary proceedings are instituted before the presiding judge of the Amsterdam regional court who rules on the application as regards the nature and timing of the correction, having consulted the Government Commissioner and given the latter the opportunity to deliver his expert opinion (Section 38(2)). The broadcasting of the correction does not preclude criminal or civil prosecution for the original broadcast (Section 38(3)).

United Kingdom

According to Sections 53 and 54 of the Broadcasting Act 1981, the functions of the Broadcasting Complaints Commission include the handling of complaints of unjust or unfair treatment in sound or television programmes (Section 54(1)(a) or infringement of privacy (Section 54(1)(b)). A complaint may be made by an individual or by a body of persons, whether incorporated or not (Section 55(2)). Complaints may also be made on behalf of deceased persons (Section 55(3), (4)(a) and (b)). The Commission does not handle complaints which are the subject of proceedings in a court of law (Section 55(4)(b)) and may not entertain complaints in cases which could be taken to court (Section 55(4)(c)). The Commission does not accept frivolous complaints (Section 55(4)(d)) or complaints which it would seem inappropriate to entertain for any other reason (Section 55(4)) or complaints which have not been made within a reasonable time (Section 55(5)). Detailed rules govern the procedure to be followed by the Commission (Section 56). If the Commission considers a complaint to be justified, it may give directions to the broadcasting body concerned to publish, in any manner specified in the directions, a summary of the complaint together with the Commission's findings or a summary thereof (Section 57(1) and (2)). The Commission itself is also required to publish reports concerning its findings (Section 57(3)).

2. Necessity and scope for harmonization

Do the above rules require approximation? Our analysis shows that most Member States make provision for replies or corrections in the broadcasting sector, but that the rules take a variety of forms.

Secondly, there seems to be no explicit treatment of the question whether foreigners or persons resident abroad can demand a reply or correction.

Thirdly, however, as international broadcasting arrangements are liberalized, it becomes increasingly likely that citizens of other Member States will demand the right to reply to broadcasts. It would help to protect the interests of Community citizens if they could have recourse to uniform rules on the right of reply, applicable to all broadcasting organizations in the Community.

Fourthly, it would certainly "make it easier" for the broadcasting organization "to take up and pursue" their activities (Article 57(2)) if they had to comply throughout the Community with equivalent safeguards governing good repute.

On the other hand, these rules do not restrict international broadcasting or distort competition between broadcasting undertakings or programmes. Nor are the rules governing the right of reply made on "grounds of the general interest". They are intended to protect the good repute and personal credit of individuals, with the result that they cannot be relied on where they would act as an impediment to the re-transmission of foreign broadcasts nationally (see Part Five, C.VI.1, in particular at (b)).

The Commission doubts whether, at this stage in the establishment of the common market, equivalent safeguards are nevertheless needed in this field but it would like this matter to be discussed before taking any decision.

If this discussion were to show that harmonization is desirable, the directive pursuant to Article 57(2) might be on the following lines:

- The right of reply would be available to all natural or legal persons or associations of persons who are nationals of a Member State or who are established in a Member State. National legislation governing the rights of other complainants would not be affected.

- The right of reply would extend to all broadcasting organizations established in the territory of the Community.

- The right of reply would be exercisable only if the complainant's justified interests, and in particular his honour and reputation, have been damaged by a statement made during a radio or television broadcast.

- Application for a reply would have to be made in writing within 30 days of the broadcast concerned.

- The application would have to identify the complainant, specify the broadcast and the offending part thereof, show how the complainant's interests have been damaged and contain the text of the reply.

- The text of the reply would have to be as concise as possible and not normally require more than three minutes of broadcasting time. It would have to relate directly to the offending statement.

- The broadcasting organization would be entitled to reject the reply if its content might give rise to criminal proceedings, if the broadcasting organization would incur civil liability by transmitting the reply, or if the reply would violate standards of propriety.

- Otherwise, and if the above conditions relating to the reply and the application are fulfilled, the broadcasting organization would be obliged to transmit the reply using its own facilities and at its own expense.

- The reply would have to be transmitted, wherever possible, in the next broadcast of the same type, at the same time and with the same audience as the broadcast in question, but in any case within 30 days of the application being submitted.

- The reply would be broadcast in its entirety, without any comment or contradiction.

- The civil courts would settle any disputes between the complainant and the broadcasting organization concerning the reply.

- The right of reply would not affect any other legal remedies against the offending broadcast.

C. Copyright

I. Introduction

1. Nature and function of copyright

Copyright forms the basis for intellectual and cultural creativity in the field of literature and art. Its aim is to ensure for an author the economic fruits of his labour and to protect his moral interests in the work. The traditional means of affording such protection is to grant an exclusive right: the law confers on the creator of the work an absolute right to his intellectual property. As in the case of material property, the use of it is restricted to the owner of the right; he can exclude anyone from unauthorized use. The exclusive right makes it possible for the creator to market his work for reward. The author of a book, for example, concludes a publishing contract which permits the publisher to copy and distribute the work in return for payment; a playwright grants a television undertaking the right to broadcast a performance in return for payment.

Copyright thus also creates the basis for the development of an "economy of culture" concerned with the marketing of works of the intellect. Newspaper and book production, the recording and film industries, radio and television and many other branches of the economy are dependent upon an effective law of copyright.

Copyright as an institution also serves the public interest. It makes possible a varied, fruitful and innovative production in all branches of culture and intellectual life. The creative work of writers puts flesh on the skeletons represented by the freedom of the press, of broadcasting and of exchange of information and views. The availability of cultural goods is increased and improved - an objective entirely in accordance with that of the accelerated raising of the standard of living mentioned in Article 2 of the EEC Treaty.

The interests affected by copyright are complex and do not always converge. Thus on the one hand copyright facilitates cultural progress but on the other hand it must not impose such severe restrictions on the use of a work that the public cannot enjoy it to the extent desirable. The law of copyright achieves the necessary balancing of interests by a graduated system of rules. Where, for instance, it is thought necessary to restrict exclusive rights so that other undertakings may compete in marketing a work, provision is made for compulsory licences, as occurs in the record industry. In other spheres the free use of a work is made possible by a system of statutory licences, the author being compensated by a claim for remuneration, as occurs in many countries in the broadcasting sector. Finally the limit is reached where the right of the author ceases and the free use of the work without payment, especially in private, begins.

The following reflections on the creation of a free broadcasting system in the common market will take full account of this situation. The system of copyright protection must be maintained, and not modified any further than appears indispensable for the attainment of the objectives of Community law. From the range of possible restrictions, the one selected is always that which involves the least interference with the present system compatible with a practical implementation of Community policy with due regard to all the interests affected.

For the principle of a free broadcasting system to be applied in the common market, it is essential that authors and performers receive appropriate remuneration. In the long run, any disproportionality between their works or performances and the increasing scale on which these are marketed will have adverse effects on the number and quality of broadcasts available in the Community. As the audio-visual media expand further, the problem of providing them with programmes will become increasingly acute. If the Community countries do not possess the creative authors and skilled artists they increasingly need, the majority of programmes will come from outside the Community. This would increase our cultural dependence, accentuate the balance-of-payments disequilibrium and in no way alleviate the plight of those culturally creative individuals who are out of work.

Radio and television are nowadays among the most important media for marketing works protected by copyright. Every part of a broadcast may have copyright implications, whether it consists of speech, music, dance, pictures or a cinematographic projection of film or of a succession of individual images. In addition to copyright in the strict sense in such works, several Member States also recognize so-called "related rights" which arise from the work of performers, manufacturers of audio material and broadcasting undertakings. These related rights, which create either an exclusive right or a claim to remuneration in respect of the reproduction of works, must be taken into account in addition to any existing copyright. The most important such right in the present context is that enjoyed by broadcasting undertakings, which covers the whole field of radio and television irrespective of whether or not works protected by copyright are being transmitted.[1]

2. International copyright

Viewed from an international standpoint, the dominant feature of the law on copyright and related rights is the principle of territoriality; it is recognized in all Member States and forms the basis of the relevant international treaties. The principle of territoriality states that the copyright protection conferred in each state is limited to the territory

[1] See, on an international basis, Article 3(f) of the Rome Convention on the protection of performers, producers of phonograms and broadcasting organizations; Article 5 of the European Agreement on the Protection of Television Broadcasts.

of that state and its prerequisites and effects are determined by the law of that state. If an author enjoys protection in other states, this simply means that he has acquired a bundle of territorially limited rights of copyright for all states in which he enjoys protection. This national restriction of rights applies even to the Member States; in the present state of development there is no uniform law of copyright for the common market.

An additional feature of the territorial limitation of copyright is that in practice rights of use are also usually granted only on a territorial basis. In the case of broadcasting rights this situation is already implicit in the fact that the author usually has to deal with broadcasting undertakings with a national or even a merely regional scope. There is however no legal necessity for authorization to use a work to be territorially restricted. Just as an author can enjoy a bundle of national rights, so the user can be granted a bundle of rights of use extending over several States, or indeed throughout Europe or throughout the world; such worldwide rights do in fact exist in practice in publishing and in the film industry. But the more extensive the territory over which the rights of use extend, the higher will be the payment demanded for granting them.

The protection of foreign authors is nowadays ensured by international treaties which apply in numerous States. The most important of these is the Revised Berne Convention for the Protection of Literary and Artistic Works of 1886, of which all the Member States are signatories, but the more recent revisions of the Convention do not apply in all Member States.[1]

Under the Berne Convention citizens of other Union countries are to enjoy the same protection as nationals (principle of national treatment). The Convention also lays down a minimum standard for the protection to be afforded (minimum rights). In relation to broadcasting this is to be found in Article 11 bis.

The Berne Convention has been supplemented by further international agreements. Those most relevant in the present connection[2] are the Rome Convention of 1961 on the protection of performers, producers of phonograms and broadcasting organizations, of which, among the Member States, Denmark, Germany, Ireland, Italy, Luxembourg and the United Kingdom are signatories, the European Agreement of 1960 on the Protection of Television Broadcasts, among the signatories of which are Belgium, Denmark, Germany, France and the United Kingdom, the Agreement of

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[1] In Denmark, Germany, France, Greece, Luxembourg and Italy the version in force is the Paris version of 1971; in Belgium, Ireland, the Netherlands and the United Kingdom (at any rate so far as the substantive law is concerned) the Brussels version of 1948; see the summary in Copyright 1983 8/9 (position at 1.1.83). See also Dietz, Copyright in the European Community, a study undertaken for the Directorate-General for Research, Science and Education of the Commission of the European Communities, Baden-Baden, 1978, pages 35 et seq.

[2] Another one which might be mentioned is the European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories. This however is not relevant to the questions now under discussion.

1974 on the transmission of programme signals relayed by satellite, to which Germany and Italy are signatories, and the European Agreement of 1958 concerning Programme Exchanges by means of Television Films, to which Belgium, Denmark, France, Greece, Ireland, Luxembourg, the Netherlands and the United Kingdom have acceded.

3. Copyright and freedom of broadcasting

Generally speaking, the principle of territoriality, international agreements and national law makes it possible for an author to conclude separate marketing agreements for each national market and thus improve his chances of obtaining appropriate remuneration. This partioning on a national basis of copyrights and rights of use may come into conflict with the objective of securing freedom to provide services across the internal frontiers of the Community.

As regards the direct transmission of radio and television programmes across national frontiers - which is already carried on to a substantial extent in the form of ordinary conventional wireless transmission - the copyright barriers have however been scarcely discernible. This is due to the fact that for reasons of practicability it was decided - albeit not without some dissentient voices - to regard only the act of transmission of the broadcast as the decisive event for the application of the principle of territoriality.[1] If an author has permitted a transmitter in country A to broadcast his work he cannot take action on grounds of copyright if the transmitter transmits it directly also into frontier regions of country B, since according to the prevailing opinion the event occurring in country B is not a broadcast but merely a reception, and this is irrelevant for purposes of copyright.

The situation is different however if transmissions by wire or cable are made across the national frontier and distributed in another country. In this case not merely the initial transmission but also the dissemination of the radio signals by means of wire or cable forms part of the act of broadcasting: hence the question of copyright arises not merely in country A, the country of transmission, but also in country B, the country of reception.[2]

The same applies when the broadcast transmitted in country A is picked up in country B and relayed, whether by wireless or by means of wire or cable, in country B. The retransmission is a new act with copyright implications, occurring in country B.

The link between the transmitter in country A and that in country B may also be created by means of a point-to-point satellite without the copyright situation being affected. A different conclusion would be possible only if the transmitter in country A was not transmitting the programme to the general public but only to the satellite, which then fed it into the tramsitter in country B. In that situation broadcasting would occur only in country B and not in country A, and only in country B would any question of copyright arise.

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[1] See, among other works, von Ungern-Sternberg, Die Rechte der Urheber an Rundfunk- und Drahtfunksendungen, Munich, 1973, 101 et seq. with further references.

[2] Von Ungern-Sternberg, loc.cit. page 111.

No clear conclusion is possible on the effects of direct broadcasting via satellites. One widely held opinion is that the satellite must be regarded merely as an "extended antenna" of the transmitter which transmits the radio signals to the satellite; the only relevant country for copyright purposes is thus the one in which that transmitter is situated. According to another view the transmission of the radio signals to the satellite cannot be regarded as a broadcast in the sense relevant for copyright, since it is aimed only at the satellite and not at the general public; a relevant broadcast takes place only from the satellite. On this view the principle of territoriality can have no application, since the satellite is in outer space, which is not subject to the jurisdiction of any state, and it is difficult to treat such a satellite according to the "law of the flag" like a ship on the high seas. It has therefore been suggested that in such a case not only the law of the transmitting country but also the law of the receiving country should be applied, but this raises the question whether, in a case where there are several receiving countries, broadcasting is to be deemed to have occurred in each of them or only in one of them.

To sum up, it is clear that conflicts can arise, at any rate in the case of transmission across national frontiers by means of wire or cable and in the case of relaying of foreign broadcasts whether this is done by wireless or by means of wire or cable, whilst the situation in the case of direct broadcasting via satellite appears to be still unclear. Copyright is in conflict with freedom to provide services when the broadcasting undertaking which carries on the transmission by means of wire or cable, or the retransmission abroad, has not been authorized to do so by the copyright owner. The owner of the copyright or right of use for the territory of the state in which the broadcast has been disseminated without his consent can take action against such broadcasting by the means provided under the copyright laws. As a rule he can seek an injunction to stop the broadcast, and an award of damages; in some circumstances even criminal proceedings may be possible.

It is obvious that the exercise of powers under the copyright laws can thus restrict freedom of broadcasting within the Community. The Court of Justice, in its Coditel judgment,[1] has held that where the right to show a cinematograph film has been assigned to different persons in different Member States, the provisions of the EEC Treaty relating to freedom to provide services do not preclude an assignee of the performing right from relying upon his right to prohibit the unauthorized cable diffusion of a foreign transmission, provided that copyright is not used as a means of arbitrary discrimination or a disguised restriction on trade between Member States.

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[1] Case 62/79 Coditel v. Ciné Vog Films (1980) ECR 881. See also the second Coditel judgment, Case 262/81 (1982) ECR 3381, in which it was held that an agreement whereby the owner of a copyright in a film grants exclusive rights to show the film in the territory of a Member State for a fixed period does not in itself infringe the prohibitions in Article 85 of the EEC Treaty. The judgment given on 30 June 1983 by the Belgian Court of Cassation, which had referred the question, (Revue de Droit Intellectuel 1983, p. 261) sends the case back to the Court of Appeal for an examination of whether the accompanying economic or legal circumstances permit application of Article 85. However, this examination is unlikely to take place, since the agreement on the cable transmission of television programmes in Belgium, which has since been concluded, contains agreed rules having retrospective effect.

The inference from this decision is that the exercise of copyright concerning the use of a work in a non-material form, especially broadcasting, is subject under Community law to different rules from those applicable to the use of a work in material form by the dissemination of copies, since the latter falls under the rules on free movement of goods.[1] If, for example, a copyright owner assigns to firm A the rights, limited to one Member State of the Community, to broadcast a work and also to record the broadcast on a cassette and market the cassettes in that state, and then assigns to firm B the corresponding rights in another Member State, firm A may take action to prevent the broadcast made by firm B from being retransmitted in the area for which firm A has the broadcasting rights, but cannot take any action to prevent the marketing in A's territory of the broadcast recorded on cassettes by B.

The purpose of the following reflections is to consider how the obstacles to the free dissemination of radio and television broadcasts arising from the territorial assignment and enforcement of copyright can be dismantled. In doing this it is essential to bear in mind both the Community law objective of attaining freedom to provide services and the interests served by copyright which are worthy of protection. The main subjects of concern are direct broadcasting across frontiers, especially by means of satellites, and the simultaneous and unaltered wireless or cable retransmission of foreign programmes. In the latter case the retransmission will not always comprise the whole programme. This study does not however extend to the transmission of modified versions, or any transmissions at a different time, since such practices have even more far-reaching copyright implications.

The first question to be examined is the ingredients of copyright under the various national legal systems (Section II.1), and who usually enjoys them (Section II.2). Possible solutions will then be discussed (Section III.1-4) taking into account both the existing national rules (Section III.5) and the law under international agreements in the copyright field (Section III.6). Finally a suggested solution will be advocated (Section IV).

II. National legislation and the law of international agreements

1. Synopsis of rights affecting radio and television

The first such right is copyright in its strict sense. The range of works enjoying statutory copyright protection differs to some extent from one Member State to another. However, the essence of the matter is similar, a situation reinforced by the definition in Article 2(1) of the Revised Berne Convention, which applies in all Member States.[2]

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[1] Compare, on the freedom of movement of physical copies of a work, Deutsche Grammophon (1971) ECR 487; K-tel International (1981) ECR 147 (at 161); Imerco Jubiläum (1981) ECR 181 (at 197).

[2] cf. Dietz, loc. cit., pp. 60 et seq.

Accordingly, so far as radio and television are concerned, the following categories of works protected by copyright must be considered:

- Speech (e.g. speeches, talks, sermons, commentaries, reports, other documentary material, novels, stories, poems, radio plays, television plays, drama, quiz programmes, linking comments accompanying radio and television announcements, etc.
- Musical works (serious and light music in all its forms)
- Works comprising both speech and music (e.g. operas, operettas, musical comedies, serious and popular songs, etc.)
- Choreographic works and pantomimes, especially when linked with musical works (e.g. dancing, revues, pantomimes, etc.)
- Works of pictorial art, including photography (e.g. stage settings, paintings, graphics, sculptures, individual photographs on television)
- Films and (recorded or live) television programmes, i.e. a continuous series of pictures, usually in conjunction with speech and music.

Composite works usually give rise to several forms of copyright of equivalent ranking. A number of rights which are to some extent interdependent arise in connection with adaptations.[1] If for example a novel is dramatized by somebody other than its author and a translation of the drama is televised, copyright is enjoyed by the author of the novel, the author of the dramatic version, the translator and the maker of the television film.

In most Member States copyright lasts for 50 years after the author's death, but in Germany for 70 years after the author's death.[2]

In all Member States the rights of the author of the abovementioned protected works include broadcasting rights, in other words he has the right to prevent the works from being made the subject of (primary) wireless or cable broadcasting or television transmissions without his consent.[3] This right is partially diluted in Denmark, Italy and Luxembourg by the system of statutory licences; in the Netherlands the authorities have power to make regulations to similar effect. Copyright protection normally extends also to retransmission by wireless and public relay of broadcasts. The author as a rule also enjoys the right of retransmission by cable. This question has not however been finally clarified in all Member

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[1] cf. Article 2(2) Revised Berne Convention; Dietz, pp. 68 et seq.
[2] See on this and the problems arising Dietz, op.cit., pp. 213 et seq.
[3] See Dietz, loc. cit. pp. 147 et seq. especially page 155.

States and some of them have modified it by legislation.[1] Differences mainly concern the distinction between collective aerials, against which there is no copyright protection, and cable transmitters and the treatment of the simultaneous retransmission by cable within the reception area of the original transmitter. On the whole however it must be assumed that where an independent cable undertaking in one Member State picks up and retransmits a broadcast from another Member State, this generally gives rise to questions of copyright in the original broadcast.

So far as international law is concerned, Article 11 bis (1)(i) of the Berne Convention (in the Brussels version) confers on the author of literary and artistic works the exclusive right to permit wireless broadcasting (original transmissions). In the case of original transmissions by wire, authors of dramatic, dramatic-musical and musical works are protected by Article II(1)(ii) of the Brussels version, authors of literary works by Article II ter (1)(ii) of the Paris version, the holders of copyright in films by Article 14 bis (2)(b) and the authors of filmed works by Article 14(1) of the Paris version.

The (secondary) rebroadcasting of works broadcast by wire or by wireless, that is to say the retransmission (whether contemporaneous or otherwise) by an institution other than the original broadcasting organization, is reserved to the author by Article 11 bis (1)(ii). Article 11 bis (2) provides that, within certain limits, national legislation may lay down the conditions for the exercise of broadcasting and rebroadcasting rights.

So far as related rights are concerned, the rules in the common market are less uniform. As stated above under I.2, the relevant international agreements do not apply in all Member States. In particular, among the Member States only Denmark, Germany, Ireland, Italy, Luxembourg and the United Kingdom have acceded to the fundamental Rome Convention on the protection of performers, producers of phonograms and broadcasting organizations.[2] The Rome Convention, like the Revised Brussels Convention, is based on the principle of national treatment (see Articles 4, 5, 6). The minimum rights of performers include that of preventing the broadcasting of their performance without their consent, except

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[1] See for further details Ulmer, Die Entscheidungen zur Kabelübertragung von Rundfunksendungen im Lichte urheberrechtlicher Grundsätze, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1981, 372 et seq; Walter, Telediffusion and Wired Distribution Systems, Berne Convention and Copyright Legislation in Europe, Copyright 1974, 302-315; Fuhr, Urheberrechtliche Probleme bei Übernahme von Rundfunkprogrammen in Kabelanlagen, Film und Recht 1982, 63 et seq; Dietz, loc. cit. 155 et seq; see also the contributions to the Symposium on Cable Television - Media and Copyright Law Aspects, Amsterdam, 16-20 May 1982 and the resolution adopted there, which advocates that copyright should in all cases apply to public cable transmission by anyone other than the original broadcaster. See also the synopsis of national laws given in the observations of the Commission in the Coditel case, [1980] ECR 881, at 894-896.

[2] Position as at 1 January 1982, see Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1982, 272 et seq.

where the performance used in the broadcasting is itself already a broadcast performance or is made from a fixation (Article 7(1)(a)). If however the performer has consented to the broadcast it is for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting (Article 7(2)(1)). If a phonogram is used for broadcasting, the user must pay a single equitable remuneration to the performers or the producers of the phonogram or both (Article 12).[1] Broadcasting organizations have under Article 13 the right to authorize or prohibit the rebroadcasting (defined in Article 3(g)) of their broadcasts; rebroadcasting however includes only wireless retransmission, not retransmission by cable.

The convention on the dissemination of programme signals relayed by satellite of 1974, to which among the Community Member States only Germany and Italy have acceded, does not substantially affect the transmission of broadcasts by cable undertakings. Putting it in a somewhat simplified form, the Convention affords protection only against the unauthorized retransmission of point-to-point broadcasts via satellites. If a broadcast is directed to a satellite and is intended to be retransmitted thence to a specific broadcasting organization, the Convention is intended to prevent a broadcasting organization for which the broadcast is not intended from "tapping" the satellite.

There is no protection however for the broadcasts transmitted from the original broadcasting organization, for broadcasts transmitted from the satellite to the general public, or for broadcasts picked up from the satellite by the organization for which they are intended and diffused by that organization. The prohibition on "tapping" of point-to-point broadcasts should not pose any problem for cable undertakings since, after all, broadcasts transmitted to the general public can always be picked up and fed into the cable network.

Of greater importance in this connection is the European Convention on the protection of television broadcasts of 1960. Among the Member States, it is in force in Belgium, Denmark, France, Germany and the United Kingdom. It protects the picture and sound (but not the sound alone) of all television broadcasts by broadcasting organizations which are established under the law of a Contracting State or transmit broadcasts in its territory (Article 1(1), Article 5). The protection extends inter alia both to wireless retransmission of broadcasts and to public transmission by means of wire. Under the original version of the Convention the protection against transmission by wire could be entirely excluded by means of a reservation. The amended version of 1965 provides that each Contracting State may exclude the protection against cable transmission for broadcasting organizations in its own territory and restrict such protection for broadcasts from another Contracting State to broadcasts lasting up to 50% of the average weekly transmitting time of the original transmitter (Article 3(1)(a), Article 10). Under Article 2(4) of the Protocol to the European Convention on the protection of television broadcasts of 22 January 1965 each State which has made

[1] Article 16 permits certain reservations concerning Article 12; such reservations have been made by Denmark, Germany, Ireland, Italy, Luxembourg and the United Kingdom.

use of the possibility of totally excluding the protection of broadcasts by means of wire may continue to do so. Belgium has made use of the reservation under the present version of Article 3(1)(a); the United Kingdom has made use of the reservation under Article 3(1)(a) in the original version.[1] The protection of the Convention may also be restricted by reservation to those broadcasting organizations which are established in the territory of a Contracting State under its law and carry on broadcasts there (Article 3(1)(f), Article 10)); Denmark and the United Kingdom have made such a reservation. The Contracting States are entitled to specify an institution for their territory to receive notification of cases where the right of public transmission by wire has been refused in an arbitrary manner by the authorized broadcasting organization, or has been granted on unreasonable conditions.

The significance of the Convention in the present connection lies primarily in the protection of the broadcasting right against cable transmission. On this point the European Television Convention goes further than the Rome Convention. But the protection it affords extends merely to the related right of the broadcasting organization; it does not affect the right of third parties, especially those of authors, performers and manufacturers of audio material. Any Contracting State may denounce the Convention by giving one year's notice.

National laws differ more markedly in the field of related rights than in that of copyright.[2] The protection afforded by the German Copyright Act of 1965 is relatively far-reaching. Under Section 76(1) the performance given by a performer[3] may as a rule be broadcast only with his consent; this applies also to retransmission.[4] If the performance is produced by an undertaking (e.g. theatre or concert promoter) the consent of the producer is also necessary.

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[1] cf. Announcements of 14.2.1968 and 31.7.1969, Deutsches Bundesgesetzblatt 1968 II 134 and 1969 II 1471.

[2] See on the protection of performers the study prepared by Gotzen at the request of the Commission, Performers' Rights in the European Economic Community, doc. XII/52/78; see also on the right of manufacturers of audio material and performers, Davies/v. Rauscher, Challenges to Copyright and Related Rights in the European Community, 1983.

[3] E.g. singers, soloists and orchestral musicians, conductors, actors, dancers, producers; see the definition in Section 73 Copyright Act.

[4] Under Section 76(2) however the performer's right is limited to a claim to reasonable remuneration if his performance is broadcast not live but with the help of lawfully produced audio or video material. In the case of members of groups of performers such as chorus, orchestra, ballet and stage groups not involving soloists, the consent of the group committee or the leader of the group is sufficient, Section 80(1) Copyright Act.

Protection in principle for performers against the broadcasting of their performances is provided also by the Danish Copyright Act,[1] the Luxembourg Act of 23 September 1975 on the protection of performers, manufacturers of phonograms and broadcasting organizations,[2] the Italian Copyright Act,[3] Irish law[4] and the law of the United Kingdom.[5] In the other States protection may be available in certain circumstances under general legislation.[6]

There are substantial differences between national laws on performers' rights. Thus in several Member States the performer's right consists merely in the right to give or withhold consent to the retransmission of his performance, especially by cable - and consent to the latter is sometimes presumed from consent to the broadcast - while in other countries the retransmission is expressly declared to be free.[7]

Attention must also be drawn to the performing right of the broadcasting organization. Like the Rome Convention, the German Act confers on broadcasting organizations the right to permit or to prohibit the rebroadcasting of their broadcasts.[8] Protective rights are also conferred on broadcasting organizations in Denmark,[9] Luxembourg,[10] Ireland,[11] Italy[12] and the United Kingdom.[13]

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[1] Reproduced in Gotzen, loc. cit. page 152.
[2] Reproduced in Gotzen, Annex V, page 154.
[3] See Gotzen, Annex VI, page 158.
[4] See Gotzen, Annex VIII, page 167.
[5] See Gotzen, Annex VII, page 161.
[6] See Gotzen, points 31 et seq.
[7] See on the individual laws Gotzen, points 79 et seq., where a Community solution in the form of the grant of a right to remuneration is proposed, see points 83-84.
[8] Section 87(1) Copyright Act. The term "rebroadcasting" is used in different senses. In the Rome Convention it means only wireless broadcasting (as also Article 11 bis (1)(i) revised Berne Convention) whilst under German copyright law it generally includes also the retransmission of a broadcast by cable.
[9] Section 48 of Danish Act No 158 relating to copyright in literary and artistic works of 31.5.1961.
[10] Sections 9 and 10 of the Luxembourg Act on the protection of performers, producers of phonograms and broadcasting organizations of 23.9.1975.
[11] Section 19 of the Copyright Act of 8.4.1963.
[12] Section 79 of the Copyright Act of 1941, which expressly confers protection against rebroadcasting by wireless or by wire.
[13] Section 14 of the Copyright Act 1956; see on this point also III.5.

Finally, as regards the manufacturers of audio material (records, tapes, cassettes, etc.) the United Kingdom is the only State of the Community which grants them the exclusive right to permit or to prohibit a broadcasting using the audio material.[1] The German Act confers on the manufacturer, in the case of broadcasting or rebroadcasting, merely a right to a share in the remuneration due to the performer whose performance is recorded on the material (Section 86). The Italian Copyright Act also gives as a general rule merely a claim to remuneration (Section 72 et seq.) as also do the Danish[2] and Irish Laws.[3] In Luxembourg law on the other hand, in the case of a broadcast involving the use of audio material, the manufacturer of the material has no claim to remuneration.[4] Here, as also in Belgium, France and the Netherlands, the only claims which might arise would be those based on general principles of law, such as the law on unfair competition.[5]

As regards cross-frontier broadcasting in the common market, it may be said in general that related rights are not likely to amount to obstacles to the same extent as does copyright in the strict sense, as was noted under I.3. Those least likely to pose any problem are the rights of manufacturers of audio material, since the latter enjoy - except under the law of the United Kingdom - no right to prohibit cross-frontier broadcasting but at most the right to claim remuneration. Performers on the other hand may in certain circumstances have the right to take action against broadcasting and rebroadcasting which they have not authorized. So far as broadcasting organizations are concerned the main factor to be considered is the European Convention on the protection of television broadcasting.

The right of performers and broadcasting organizations to prohibit broadcasting or rebroadcasting which they have not authorized is limited by the fact that some of the Member States have not acceded to the relevant international agreements, or have made reservations, and also do not accord such rights under their domestic law. As regards cross-frontier broadcasts which are picked up in a Member State which does not confer any protection on the performance involved, such rights cannot be enforced whether the broadcast originates from a Member State which grants such protection or from one which does not, since the principle of territoriality applies also to this type of rights. The rights in question are relevant only when the broadcast or retransmission is picked up in a Member State which confers protection on them, and the holder of the right enjoys this protection there either by international treaty law or under the domestic law applicable to aliens.

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[1] Section 12 of the Copyright Act 1956; cf. Davies/v. Rauscher loc.cit. point 240.

[2] Section 47 of Act No 158 relating to copyright in literary and artistic works.

[3] Section 17(1)(b) of the Copyright Act of 8.4.1963.

[4] Sections 7 and 8 of the Act on the protection of performers, producers of phonograms and broadcasting organizations of 23.9.1975.

[5] cf. Davies/v. Rauscher loc.cit. point 284.
cf. Davies/v. Rauscher loc.cit. point 249 et seq.

2. Ownership of rights and the law of contract

Where copyrights in a Member State are affected by a broadcast or retransmission - whether direct or via satellite or cable - it is necessary for the owner of the copyright to permit such broadcasting for this Member State, which is usually done by granting the corresponding rights of use. The copyright owner under the laws of all Member States is normally the creator of the work.[1] The position concerning films is not completely uniform: according to the law of some Member States copyright does not in this case arise in the natural persons who participated creatively in the making of the film but in the film producer.[2] Similarly the laws of several Member States provide that in the case of employed authors the copyright originally arises in the employer, but the majority of Member States regard the employee as the author subject to a presumption that he grants the employer appropriate rights of use.[3] Owners of businesses, even when they are corporate bodies, may sometimes be the original owners of rights, particularly in the field of related rights and especially in the case of the performing right of broadcasting undertakings and of manufacturers of audio material.

As mentioned above under II.1, radio and television broadcasts can affect a wide range of protected works and performances, and the field of possible owners of rights whose consent to the broadcast must be sought is correspondingly large. Only a limited number of such rights are in the hands of the original owners or their heirs, since frequently such rights will have been granted to third parties to use or to protect. Depending on the facts of the particular case, it may therefore be necessary to approach third parties. Usually these are collecting societies, publishing houses or other users of works.

Thus the major part of the repertoire of copyright music likely to be considered for broadcasting in the Member States is entrusted to collecting societies, which also cooperate on an international basis.[4] This simplifies the situation for the user of the work. The collecting societies do not however usually manage the so-called "major rights" to the stage presentation of musical-dramatic works;[5] these, like the stage rights of verbal material, are often held by music or theatrical publishing houses - either for several countries or worldwide or simply for individual countries - in so far as the author himself has not retained them. In the case of cinematograph films the broadcasting rights usually remain in the hands of the film producer, who will grant broadcasting rights only in such a way that

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[1] For a comparative survey see Dietz, loc. cit. pages 75 et seq., points 96 et seq., with references.

[2] See Dietz, loc. cit. pp. 85 et seq.

[3] See Dietz, loc. cit. pp. 100 et seq. who also refers to the frictions arising from a European point of view, page 103.

[4] See on this point and the following points Dietz loc. cit. pp. 271 et seq. and the same author, Das Primäre Urhebervertragsrecht in den Mitgliedstaaten der Europäischen Gemeinschaft. Legislatorischer Befund und Reformüberlegungen. Studie erstellt im Auftrag der Europäischen Gemeinschaften, 1981, SG-CULTURE/4/81, pp. 5, 193 et seq.

[5] Compare Dietz loc. cit. page 277.

they have no detrimental effect on other forms of marketing, particularly the showing of the film in cinemas. In the field of verbal material, works of pictorial art and related rights, the collecting societies are less highly developed than in the musical sphere; the rights of use now under discussion are often retained by the authors themselves.

It may well be however that the holder of the rights has already granted the broadcasting rights in question to a broadcasting organization in the Member State in which the broadcast coming from another Member State is intended to be picked up and retransmitted. A conflict of rights then arises between the broadcasting organizations concerned. In practice such conflicts might be expected to arise fairly frequently since broadcasting organizations, which mostly operate on a national basis, usually seek rights of use only for their own territory.[1]

The inconvenience of having to deal with numberous holders of rights and reach agreements with them if it is desired to pick up and retransmit a radio or television programme is only partially mitigated by the European Agreement concerning programme exchanges by means of television films of 1958. The Agreement has not entered into force for Germany and Italy. It is concerned only with the right to grant or withhold consent for the use of television films, a right usually recognized as being held by the broadcasting organization which made the film. But this applies only subject to any contrary agreement with those who worked on the film and does not affect the copyright in works of literature, drama or art on which the television film was based. Nor does it affect the copyright in accompanying music or any copyright in films other than television films.

3. Summary

The transmission of broadcasts usually affects a number of copyrights and, in most Member States, also related rights. The rights of use are only sometimes held by the original owners of the rights; sometimes they are granted to marketing undertakings or collecting societies. On the international level protection is granted in all Member States, with certain differences particularly as regards related rights. The rights are split up on a territorial basis; rights of use may be granted on the footing of territorial limitation to individual States. This situation can give rise to legal obstacles to cross-frontier broadcasting in the common market.

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[1] On the law of broadcasting contracts in the Community see Dietz, Das primäre Urhebervertragsrecht in den Mitgliedstaaten der Europäischen Gemeinschaft, loc. cit. pp. 149 et seq.; compare, for a comprehensive survey of German law, Ulmer, Gutachten zum Urhebervertragsrecht, insbesondere zum Recht der Sendeverträge, compiled in response to a request by the Federal Minister of Justice, pp. 57 et seq.

III. Alternative models

The following section discusses several possible ways of resolving the problems arising from this situation for the cross-frontier transmission of radio and television programmes in the Community. In each case, it also examines the repercussions this has on the creativity and legitimate economic interests of authors and of the culture industries. After weighing the pros and cons, the Commission puts forward for discussion a model suited, in its opinion, to reconcile the freedom to broadcast across frontiers and the legitimate interests of authors.

1. Unrestricted re-transmission after legal primary transmission?

In considering ways of dismantling the copyright barriers to the free exchange of sound and television broadcasts within the Community, the first solution that suggests itself is the treatment of a similar problem in connection with the free circulation of goods, where the principle has of course been established that books, gramophone records, musicassettes and similar physical reproductions must be allowed to circulate freely within the common market in accordance with Articles 30 and 36 of the EEC Treaty provided they have been placed on the market of a Member State with the permission of the holder of the rights of exploitation (cf. I.3 above). It is argued that the work protected by the copyright is not affected by regulating the exercise of exclusive rights in this way. One could go on to suggest that it must therefore also be permissible to re-transmit broadcasts throughout the common market once they have been broadcast in one Member State with the approval of the copyright holder.

This line of reasoning was not followed by the Court of Justice in its "Coditel" judgment,[1] however, where it pointed out the special nature of protected works exploited in non-material form as distinct from those exploited in material form. A feature of exploitation in non-material form is that works are made available to the public by performances which may be infinitely repeated; in the case of a cinematographic film (as in the case at issue) the owner of the copyright and his assigns had a legitimate interest in calculating the fees due for authorization to exhibit the films on the basis of the actual or probable number of performances, and in authorizing a television broadcast of the film only after it had been exhibited in cinemas for a certain period of time. The rights of the copyright owner and his assigns to require fees for any showing of the film was part of the essential function of copyright in this literary and artistic work. While Article 59 of the EEC Treaty prohibited restrictions on the freedom to provide services, the Court said in summing up, it did not cover limits on the exercise of certain economic activities which had their origin in the application of national legislation to protect intellectual property, save where this constituted a means of arbitrary discrimination or a disguised restriction on trade between Member States.

[1] Case 62/79 /1980/ECR 4, p. 881, at 902-903 (grounds 13-15).

The scope open to a copyright owner to secure adequate remuneration for the exploitation of his work is different depending on whether it takes material or non-material form. In the case of books and records, for example, the fees can be based on the number of copies produced or sold and it does not matter ultimately where in the common market these copies are marketed. Where a contract is made for the broadcast of a protected work or performance, broadcasters normally pay the copyright holder on the basis of the potential audience they are in business to reach or the geographical area in which their programmes can be received. Broadcasting companies are usually financed in the first instance from the licence money collected from their audience but, where they depend on advertising revenue, fees are based on the number of households receiving the advertising. If other broadcasters were free to take a programme without payment for re-transmission outside the original reception area, the copyright holder would lose the chance of obtaining a fee covering the new audience. The fundamental principle that copyright holders should be able to obtain remuneration wherever their work is commercialized would be breached.

The problem is compounded by competition between different types of exploitation in non-material form. In the "Coditel" case an important factor was that the commercial return on exhibiting a film could be seriously impaired if it was shown at an early stage on television.

2. Conclusion of contracts on direct broadcasting by satellite?

An alternative to the approach described in 1 above (unrestricted re-transmission of legal primary broadcasts) would be to rely on current copyright laws in the hope that cross-frontier broadcasting can develop within the framework of private contracts. The chances of achieving regulation in this way vary depending on the type of broadcasting involved.

The most promising field for this would seem to be direct broadcasting by satellite (DBS). If it is accepted that satellites are merely an extension of the transmitter ("extended antenna"), conflict over copyright will be ruled out automatically, just as it is in cases where a transmitting station can be received directly through the ether in parts of another country outside the normal reception area it is intended to serve.

Yet even if DBS is thought to affect copyright in the receiving country, contractual solutions are conceivable. Broadcasters, if they do not want to be in breach of the law, would ensure that the holders of copyright and related rights grant them permission to broadcast to the additional areas they are able to reach directly with their programmes as the result of new technologies or new broadcasting strategies. The number of copyright holders they would have to sign contracts with is of course large; but broadcasting undertakings generally have to do this anyway for the "normal" reception area they serve. The only significant difference would be in the size of the area covered by such contracts.

Much the same applies to programmes distributed by wire or cable to neighbouring countries by the original broadcaster.

Nevertheless, difficulties could arise for broadcasters operating on the basis of statutory licences of national application who would have to enter into contracts covering other countries that do not have the statutory licensing system. Conflicts could also arise in cases where the copyright protection in the different Member States concerned is not identical; for example, a performing artist might not have his performance protected in the country of the original broadcast but be protected in a country which can receive the relevant programme via satellite. Complications could also arise between several broadcasting undertakings or similar programme presenters. Where a copyright holder, for instance, had assigned exclusive broadcasting rights to a broadcaster in one Member State for the area it serves, the same holder would no longer be able to grant a broadcaster in another Member State the right to broadcast to the first area; only the original broadcaster would be able to give such permission.

In addition to changes in the contractual relationships of broadcasters that intend to extend the geographical area they serve, particularly via satellite or cable, it will be important for there to be more collaboration between broadcasting companies themselves in the different Member States. Where authors and copyright holders do not retain broadcasting rights for themselves, it will be necessary for those exploiting the rights to agree among themselves. Standard forms of contract specifically designed to cover cross-frontier broadcasts are likely to play an important role and should be encouraged by the Community.

All in all, however, the difficulties and added complications do not seem to be either unreasonable or unamenable to solution. It would only be necessary to legislate if the contractual approach fails.

3. Conclusion of contracts on re-transmission by other undertakings via broadcast or cable?

Contracts are less likely to be a sufficient solution in cases where it is not the primary broadcaster which decides to transmit programmes to another country but a secondary undertaking, in particular a cable company. If it were accepted that transmission by cable is affected by a copyright, cable companies would typically be faced by the situation in which they do not hold the relevant broadcasting rights and will often not be able for practical reasons to acquire them in time.

Contractual agreements with the primary broadcaster will be of use only where the primary broadcaster itself holds the rights for the area concerned, that is its own and any other rights it has acquired, in advance, for the Member State in which the cable company is operating. Where the primary broadcaster has not been granted such rights, the cable company must turn to the copyright holders in each case whose rights are affected by a broadcast. This is potentially a large number of holders.

Acquiring their rights might be feasible if it is done through a collecting society but not if separate contracts have to be signed with each copyright holder. Since cable transmissions usually go out at the same time as the primary broadcast, it will be almost impossible to secure individual rights in this way. Usually the schedule of the primary broadcaster will not be known early enough to the cable company to give it time to find out who the holders of the rights are, to negotiate with them and to acquire the rights (leaving aside the problem of last-minute changes in programmes). Cable companies would be totally dependent on the readiness of several copyright holders to cooperate.

If the negotiations with just one were to fail, this could hold up the re-transmission of whole programmes. It is technically difficult to black out single programmes or parts of them; but the schedules of even the most earnestly dedicated cable company would inevitably contain almost more blackouts than programmes. This would certainly not help to create a free exchange of broadcasts within the Community.

The same considerations apply to stations picking up broadcasts from other countries and re-broadcasting them in the traditional way.

From the above it is clear that drawing up model contracts between primary broadcasters and collecting societies on the one hand and cable or other broadcasting undertakings on the other can only be a limited answer. Primary broadcasters can only grant rights they already hold and are allowed to transfer to others, while collecting societies are confined to the rights they represent. Even a standard contract would not give the re-broadcaster a guarantee that no third party will take proceedings to protect its copyright, by stopping re-transmission with an injunction or even prosecuting the secondary broadcaster.

A contractual solution offering more security would involve very complex collective agreements. Some attempts at this are already being made in some Member States (see, for example, supra., Part Five, AII4). One way would be for primary broadcasters to try to acquire Community-wide broadcasting rights so that they can make agreements with the secondary broadcasters. Additional problems might still arise in the not infrequent cases where a copyright holder has contracted with several primary broadcasters. Another enormous difficulty is how to determine, at the time the rights are acquired, what the remuneration of the copyright holder for the re-transmission is to be, since the new technologies are only just being introduced and traditional broadcasting, satellite broadcasting and cable transmission are likely in future to be overlapping and competing in constantly changing combinations.

In the final analysis, the most practical solution might be to concentrate all rights to re-transmission with a single Community collecting society or with a central association of all the national collecting societies supported by all primary and secondary broadcasters. Such a major concentration of power would be a cause for some concern in terms of competition law. In fact, however, experience has shown that it can be decades before a majority of all copyright holders in a given field can be persuaded to subscribe to a national collecting society. A comprehensive structure for the whole of the Community is a remote prospect at present. In the area of broadcasting rights particularly, fully-fledged collective exploitation of rights is a long way off. The necessary individual contracts will only accumulate slowly.

4. Obligation to use collecting societies, or statutory licensing?

It would seem, therefore, that there is no alternative to legislation. Several possibilities are open. One way would be to continue to grant exclusive broadcasting rights but to regulate their exploitation by statute. Another approach might be to impose statutory licensing on broadcasting rights or to reduce them to the status of a simple entitlement to remuneration. Features of both solutions could also be combined. The different possibilities are looked at in more detail in what follows, with special reference to cable re-transmission as being the most important aspect in practical terms.

The first possible solution would concentrate on collecting societies. If all rights affected by cable transmission in each Member State were placed in the hands of a single collecting society or a small number of such societies, it could be expected that agreements would be made with cable companies which gave adequate protection to the interests of both copyright holders and cable undertakings. The concentration of rights with the collecting societies could be achieved by introducing a provision that the right of an author to permit re-transmission by cable can only operate through a collecting society.[1]

As against offering simply an entitlement to remuneration through the compulsory use of a collecting society, a system of exclusive rights in full form would have the advantage that the level of remuneration could be negotiated between the parties without having to be laid down by statute or by the courts. Collecting societies would then be in a better negotiating position. The exploitation of rights solely through collecting societies would ensure that third parties are not able to stop a programme from being broadcast. They would have an incentive to transfer their rights to a collecting society.

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[1] A solution of this kind, with collective multilateral contracts at national and international level, centralized exploitation of rights and obligatory use of a collecting society, is proposed in the resolution passed by the Cable Television Symposium held in Amsterdam between 16 and 20 May 1982.

Achieving free exchange of broadcasting services under this model, however, would mean that the competent collecting societies and the cable undertakings would have to agree among themselves. When one considers the variety of different types of rights involved and the fact that agreements would have to be made with the collecting societies of several Member States, some of which will still have to be set up, there is a danger that the desired freedom of broadcasting would not be attained until some remote time in the future.

The same objection could be made to a solution based on contractual relationships in the first instance, backed by legislation only if this approach fails.[1]

The second alternative would be to downgrade the power of holders of copyright and related rights to authorize re-transmission by cable so that it was merely an entitlement to remuneration, or to impose on broadcasting rights a statutory licensing requirement that permits cable transmission. Statutory licences would be preferable to the more complicated system of compulsory licensing, under which an entitlement to a licence has to be enforced, usually by a time-consuming procedure. Statutory licensing would have the advantage over the previous model discussed that cable transmission would become permissible on the basis of a simple change in the law, even if the question of fees would still have to be clarified.

It would probably be impossible to lay down the level of remuneration in legislation. The rights affected are too different and cable broadcasting is still very much in its infancy. Any legislation would therefore have to be confined to specifying "equitable remuneration" and giving criteria on which to calculate it, the hope being that fees would be negotiated collectively among the parties concerned; provision could be made for arbitration by the public authorities, the courts or an arbitrator if such negotiations failed.

If fees were fixed by collective agreement the problem of third parties would arise again, as well as the difficulty of including a wide variety of different types of work and performance and their related rights. The problem of those not party to such agreements could be resolved by making the claim to remuneration dependent by law on using a collecting society. A less acceptable solution would be to make the collective agreements binding on everyone since, in practical terms, it would mean that a substantial share of the rights in a given field would first have to be assigned to collecting societies so as to confer on them an official status.[2] This degree of organization has not yet been reached either for all types of rights or in all parts of the Community. Making collective agreements generally binding would also leave open the problem of actual payment. Cable companies could well be faced with claims from a large number of individual holders of rights.

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[1] Cf. in this connection a draft set of model regulations drawn up under the Revised Berne Convention, the Universal Copyright Convention and the Rome Convention by ILO, WIPO and the Secretariat of UNESCO (Document BEC/IGC/ICR/SC. 2/CTV4 of 15 November 1982).

[2] Cf. Sect. 22 of Denmark's Copyright (Works of Literature and Art) Act No 158.

5. Models in internal law

Turning to current practice, one finds that in the United Kingdom the re-transmission by cable of broadcasts of the domestic broadcasters (BBC, ITV) is permitted virtually without restriction (Sect. 40 of the Copyright Act 1956). A similar provision has been made in Ireland (Sect. 52 of the Copyright Act of 1963). The re-transmission of foreign broadcasts requires a licence granted by mutual agreement. In the event of disputes, the terms of licences can be laid down in the United Kingdom by the Performing Rights Tribunal, which may determine that no remuneration is to be paid at all (Sect. 28).

The introduction of statutory licensing is being discussed in the Netherlands.[1] Under Sect. 17a(1) of the present Copyright Act, the Government may issue an order introducing statutory licensing for the wireless or cable re-transmission of sound and television broadcasts of literary, artistic and/or academic works. Moral rights must be observed and authors must receive equitable remuneration, to be determined by the courts in cases of disputes. No such statutory order has yet been made, however.

Similar draft legislation has been laid in Belgium, for example a bill amending the Copyright Act of 1886 to introduce licensing for the transmission of broadcasts by wire or cable, brought before the Senate on 18 June 1981 (Documents parlementaires, Sénat 1980-81, No 678/1). This bill was overtaken by the dissolution of Parliament at the end of 1981. A corresponding bill was presented again to the Senate on 3 March 1982 (Documents parlementaires, Sénat 1981-82, No 147/1, see also Chambre des Représentants 508 (1982-83) No 1 of 19 January 1983). This bill permits public transmission by wire or cable of broadcast works of literature and art at the same time as the original broadcast (Section 21b). The simultaneous, complete and unaltered transmission of national broadcasts is to be free of claims for remuneration (Section 21c). In all other cases, the courts are to fix the level of remuneration where mutual agreement cannot be reached (Section 21d).

A further example from outside the Community which might be mentioned is the 1980 amendment to the Copyright Act in Austria. This allows unrestricted re-transmission by cable of programmes of the "Osterreichischer Rundfunk" (ORF) within Austria. Cable re-transmission of programmes of foreign broadcasters is subject to statutory licensing. In the latter case, authors are to receive "equitable remuneration" which they can cliam only through a collecting society. The Act lays down guidelines for calculating remuneration.

[1] Cf. Eindrapport van de Commissie Incasso, Beheer en Repartitie Auteursrechtgelden, Ministry of Justice, The Hague, May 1982.

IV. Compatibility of the Directive with international law and Article 222

1. International copyright law

Whatever solution is chosen, it must be compatible with the international agreements to which the Member States are party, in particular Article 11 bis of the Revised Berne Convention for the Protection of Literary and Artistic works, which remains in force unchanged since the Brussels version and is binding on all Member States. Of special importance in this connection is Article 11 bis (2) regulating the scope of reservations entered by the signatories. This stipulates that the author's personal rights, especially the right to mention of his name and his protection against distortion of his work, may not be restricted.

This would be guaranteed pertinent national provisions were confined to rights of commercial exploitation and did not affect personal rights at all. The exercise of personal rights is unlikely to be a seriousobstacle to cross-frontier broadcasting anyway.

An author would also be assured the right to "equitable remuneration", to be determined in the first instance by mutual agreement. In the absence of agreement, remuneration would be fixed by the "competent authority". The introduction of a requirement that copyright can only be exercised through collecting societies would not conflict with the Convention[1] as long as an author can be sure that a "competent authority" (which may be a court or arbitration tribunal[2]) is able to determine whether the remuneration offered is equitable.

There is broad agreement, however, that Article 11 bis (2) in principle allows the introduction of statutory licensing in the law of countries of the Union in respect of cable undertakings,[3] although there is argument about some of the details. Arrangements of this kind would also be compatible with the Rome convention (cf. I.2 above).

Conflict with the Convention on the Dissemination of Programme Signals Relayed by Satellite could be avoided by stipulating that the freedom granted to cable undertakings to retransmit broadcasts would not include unauthorized "tapping" of point-to-point broadcasts via satellites. Should this way of "acquiring"

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[1] See Nordemman/Vinck/Hertin, Internationales Urheberrecht, Art. 11 bis RBU, Rdz. 6.

[2] See Masouyé, Kommentar zur Berner Verbandsübereinkunft, Art. 11 bis, Nr 16 (S. 78); Bappert/Wagner, Internationales Urheberrecht, Art. 11 bis RBU, Rdz. 11.

[3] Nordemann/Vinck/Hertin, Art. 11 bis, Rdz. 6; Masouyé, Art. 11 bis, Nr. 15, S. 77; Bappert/Wagner, Art. 11 bis, Rdz. 8; Dittrich, Copyright 1982, 294 et seq with further references. See also Desbois/Françon/Kerever, les Conventions internationales du droit d'auteur et des droits voisins, 175, No 156.

broadcasts come to be of more practical significance in the future, especially as the result of technological progress, it would be worth considering whether the directive should require the two Member States party to this Convention (Germany and Italy) to give a year's notice to end it, as provided for in Article 11. It would then not be necessary to introduce the appropriate restriction.

The only major barrier in international law to the liberalization of broadcasting exchange is the European Convention on the Protection of Television Broadcasts. It applies only to television and not sound broadcasting and, rather than protecting copyright proper, is designed to protect related rights held specifically by broadcasters. Curiously, this protection of the technical and commercial aspects of broadcasting in the area of cable transmission is more developed than the protection afforded to the author of a creative production under the Berne Convention.

The Member States signatories to the television convention are Belgium, Denmark, Germany, France and the United Kingdom. Belgium and the United Kingdom have made the reservation permitting them to allow unrestricted cable transmissions from other countries, although Belgium has adopted the 50% solution allowed under the revised version of the relevant provision.

The other countries are no longer able to claim exceptions for themselves under the version which they have signed, since Article 10 of the Convention stipulates that this must be done at the time of signature or deposition of the ratification/accessior document.

Under the Convention, broadcasters are protected across the whole gammut of broadcast television regardless of whether copyright and/or related rights are affected. This gives broadcasters a commanding position. By not giving permission for cable retransmission, they can stop free broadcasting altogether even where there are no copyright barriers to a retransmission by cable.

Article 3(3) of the Convention allows the contracting parties to designate a body to consider, for their own territory, any casesin which cable rights have been arbitrarily denied by a broadcaster or granted only on unreasonable terms, but this does not seem to answer the problem. Even if this provision is interpreted to mean that contracting parties which are also Member States could designate a single body common to them all - such as the Commission - and a Directive were adopted committing them to do so, it would still be unclear what the powers of such a body would be. It is not even clear from the wording of Article 3(3) whether such a body is meant only to lend its good offices or whether it can regulate general as opposed to individual cases, such as by introducing a system of statutory

licensing.[1] In addition, it would always be necessary to await the outcome of negotiations between individual parties and these might be time-consuming.

Unless general agreements between primary broadcasters and cable undertakings are arrived at within a reasonable period, the only way to eliminate the barriers created by the Convention would be for the Member States which are parties to it, and have not availed themselves of the facility to liberalize cable transmission completely, to denounce the Convention. Under Article 14, one year's notice is required. Of course, the Community countries would be free to accede to a new Convention that made allowance for the free exchange of broadcasting within the Community. Indeed, under Article 14(2), the Convention will expire on 1 January 1985 for those countries which have not signed the Rome Convention and do not join it by that date. Belgium and France are currently the only Member States party to the television convention that have not signed the Rome Convention.

Apart from the restrictions imposed by the European Convention on the Protection of Television Broadcasts, there is nothing in international law to prevent the Community from introducing a Directive requiring the Member States to regulate cable retransmission at national level.[2]

2. Article 222 of the EEC Treaty

Since the individual rights of authors of literary or artistic works rank as property in all Member States, the solution chosen must also be consistent with Article 222, which reads as follows: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

The Commission has already examined in depth the significance of Article 222 in relation to the rights of a trade mark proprietor.[3] Its observations apply *mutatis mutandis* to copyright. The following points may be made.

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[1] Nordemann/Vinck/Hertin, loc. cit., p. 379 f. This is in contrast to the report of a Working Party of the Council of Europe (Comité Directeurs sur les Moyens de Communication de Masse - Comité d'Experts Juridiques en Matière de Média, 12 August 1982 - MM-JU (82) 4, p. 38) which seems to attribute the same weight to Article 3(3) as to Article 11 bis (2) of the Berne Convention.

[2] See Dietz, loc.cit., p. 157 et seq.

[3] Commission of the European Communities, "The need for a European trade mark system. Competence of the European Community to create one", doc. III/D/1294/79, Brussels, October 1979, pp. 11-14; Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1980, p. 33 (pp. 36-37); International Review of Industrial Property and Copyright Law 11 (1980), p. 58 (pp. 68-71); Révue internationale de la propriété industrielle et artistique 1979, p. 339 (pp. 344-347); Rivista di diritto industriale 1980, p. 162 (pp. 171-174).

It will be seen from the wording of Article 222 that the EEC Treaty does not itself regulate the systems of property ownership in the Member States nor does it empower the Community institutions to do so. It leaves the national systems of property ownership as they are and accepts them.

Article 222 is similar to Article 83 of the Treaty establishing the European Coal and Steel Community and to Article 91 of the Treaty establishing the European Atomic Energy Community, but it is not restricted, as they are, to specific items of property. Article 222 therefore also covers the rules governing the system of ownership of literary and artistic property.

A study of the historical background to Article 222 shows that the Contracting Parties wished to protect themselves from interference by the Community in the matter of property ownership, which is of importance to their economic systems. Each Member State wished to retain the power to decide for itself whether the various means of production should be publicly or privately owned, or both. In particular, questions of expropriation of property so that it is held in public ownership and of transfer of property into private ownership were to remain the preserve of the Member States.

This is the meaning of Article 222 and of the words "rules governing the system of property ownership" used in it. This is a reference to the way in which property is owned and to the structure of ownership. Each Member State is to continue to decide whether literary or artistic works are to be private and/or public property, whether copyright should be expropriated or put into private ownership and, if so, for whose benefit and at whose expense.

"Rules governing the system of property ownership" are not the same thing as "ownership" or "proprietary rights". The latter are by no means unaffected by the EEC Treaty. On the contrary, a number of provisions of the Treaty and of the Community law derived therefrom govern the rights and obligations arising from ownership of movable and immovable property. They extend or limit not only the enjoyment or exercise of proprietary rights but also their scope and content.

The most noteworthy example is that of proprietary rights in undertakings. Under Article 54(3)(g), the Council and the Commission are obliged among other things to coordinate "the safeguards which, for the protection of the interests of members ....., are required by Member States of companies or firms ...". The purpose of this coordination by means of directives, which has already been partly achieved, is, in particular, to "make equivalent" the rights - including the proprietary rights - and duties of members of the various types of companies which exist in the Member States. The aim is to promote freedom of establishment, free movement of capital, investment in companies, their growth and undistorted competition between companies in the common market.

Articles 54(3)(g) and 222 show how the EEC Treaty itself delimits the powers. The content of certain proprietary rights and the limits to, or scope, of the protection afforded to them may be laid down by the Community to the extent required by its objectives, and in particular to the extent required for the proper functioning of the common market. On the other hand, the assignment of property to private and/or public owners, and hence the question whether property is to be expropriated from private owners or to be transferred from public into

private ownership, remain the preserve of the Member States. The established practice of the Commission and the Council in the field of company law confirms this interpretation of Article 222.

It can scarcely be that a different rule should apply to the field of copyright law. The free movement of broadcasting services and a common market in broadcasting are to be established by approximating the content of and limits upon the ownership of certain copyrights and performing rights. Following the ruling in Coditel, there is no other way in which the copyright restrictions on intra-Community broadcasting can be progressively abolished. Even in the field of literary and artistic property, Article 222 is not designed to prevent the Community from attaining its objectives. It merely obliges the Community in the course of its activities to respect property ownership in the Member States.

The planned directive must not, therefore, encroach upon the essence, substance[1] or existence of copyright ownership in the Member States. That would be an action analogous to expropriation and would prejudice the rules in Member States governing the system of property ownership.

In well-established case law, the Court accordingly distinguishes between the existence of intellectual property rights and the exercise of those rights. The exercise of proprietary rights is covered by the Treaty whereas the existence of them is not. In Consten/Grundig, the Court ruled that:[2]

"Article 222 confines itself to stating that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise ...".

Since then, the Court has not had occasion to consider Article 222, but it has stated, relying on Article 36, "that, although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty".[3]

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[1] Case 4/73 Nold [1974] ECR 491, at 508, ground 14; Case 44/79 Hauer [1979] ECR 3727, at 3747, ground 23, and at 3749, ground 30.

[2] Joined Cases 56 and 58/64 [1966] ECR 299, at 345.

[3] In the first place, Case 78/70 Deutsche Grammophon [1971] ECR 487, at 499-500, ground 11, together with four other rulings, and then Case 3/78 American Home Products [1978] ECR 1823, at 1840, ground 9.

In Coditel II, it was held that "the distinction, implicit in Article 36, between the existence of a right conferred by the legislation of a Member State in regard to the protection of artistic and intellectual property, which cannot be affected by the provisions of the Treaty, and the exercise of such right, which might constitute a disguised restriction on trade between Member States, also applies where that right is exercised in the context of the movement of services."[1]

The Court also distinguishes in relation to the Community's law-making powers between acts depriving owners of the right to property and acts restricting the exercise thereof;[2] moreover, it places the following limits on restrictions on the use of property introduced by legal acts of the Community: "Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property ..., it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property."[3]

Transforming the exclusive right of cable re-transmission into a right to remuneration enforceable only through collecting societies could not be regarded as an act depriving the holder of his copyright. This is because, first, it would not affect an author's moral rights, and in particular the right to be named and the right to protection against distortion. Secondly, the author's right to the economic exploitation of his creation would be guaranteed because he would be entitled to remuneration in respect of each performance of his work.

Such a provision would, therefore, relate to the exercise of copyright but would not encroach upon its substance. The Court takes the view that "the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright"[4] in so far as it involves the right to exploitation in non-material form (performing right). Such persons "have a legitimate interest in calculating the fees due in respect of the authorization to exhibit the film on the basis of the actual or probable number of performances and in authorizing a television broadcast of the film only after it has been exhibited in cinemas for a certain period of time".[5]

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[1]
[2] Case 262/81 /1982/ ECR 3381, at 3401, ground 13.
[3] Hauer at 3746, ground 19.
[4] Hauer at 3747, ground 23.
[5] Case 62/79 Coditel/Ciné Vog /1980/ ECR 881, at 902, ground 14.
Coditel/Cine Vog at 902, ground 13.

A statutory licence to re-transmit by cable simultaneously and without changes radio and television broadcasts in the Community would not interfere with these interests. It would not impinge upon the right of authors to primary transmission and would thus leave them free to decide whether and when they wished to exploit their works on television. For every cable re-transmission in the Community, they would have a right to remuneration that could be enforced by means of a practicable procedure.

An arrangement of this kind is also necessary in order to attain the EEC Treaty objectives of general utility, in the case in point the cross-frontier movement of services. The principle of territoriality, international treaties and national law impede the re-transmission by cable of foreign radio and television programmes in the Community (see I.3 above). Contracts in themselves are not sufficient because they do not have the necessary coverage and are unable fully to resolve the practical problems that arise (see III.3 above).

Lastly, in view of the objective pursued, a statutory licence conferring entitlement to equitable remuneration would not place a disproportionate burden on the owner of the cable re-transmission rights. This is because an arrangement of this kind would expressly recognize the cable re-transmission of foreign programmes as involving questions of copyright and would thus remove the justification for certain transmission practices.

Naturally, in giving permission for the initial broadcast, a copyright holder would have to consider the possibility of re-transmission within the Community and arrange his marketing strategy accordingly.

In the final analysis, the disadvantages a copyright holder may suffer as a result of conflict between different forms of exploitation derive from the way the associated rights are segmented nationally; the need for this cannot be justified solely by technical imperatives such as different languages, patterns of viewing and listening, the organizational structure of broadcasting companies, etc. It should surely be the Community's appointed task to work against the commercial segmentation of markets in all fields, including the exploitation of intellectual property rights, and to promote a free exchange of services in the media industry so that in this area, too, a common market can be achieved.

As to the amount of such remuneration, there would have to be adequate protection of the interests of authors, with provision being made in particular to deal with the reduction in the market value of supplementary rights (such as film rights) which might ensue under a system of statutory licencing of cable transmissions.[1]

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[1] See the critical remarks of Dietz in loc. cit., p. 162, although his attitude seems generally more positive in loc. cit., p. 268.

For the rest, the introduction throughout the Community of a right to remuneration for the cable re-transmission of radio and television programmes would enhance the chances that the owner of a right had of receiving equitable remuneration for each performance. In all the cases where it has not as yet been possible to conclude contractual agreements with cable companies, rapid enforcement of the right to remuneration could be expected if an arbitration procedure were introduced. Lastly, according to copyright experts, a central arbitration body with a highly qualified staff that kept under close review the growth of cable television in the Community, could be expected to consider as equitable a higher remuneration for the owners of rights than the owners themselves have been able to obtain in decentralized negotiations.

V. Ingredients of a solution

The object of the planned Directive should be to permit free movement of services between the Member States of the Community. It will, therefore, have to cater for those cases in which a cable company established in one Member State wishes to transmit by cable, either in its home country or in another Member State, a programme beamed by a broadcasting organization in another Member State.

However, if the cable company and the broadcasting organization are established in the same Member State, the cross-frontier supply of services will not normally be affected. Until such time, moreover, as a common market characterized by conditions similar to those obtaining on a domestic market also becomes an objective (something that will have to be discussed), there is no reason to introduce rules for purely national transmissions by cable.

The situation is different, though, if the cable network operated by the cable company that is established in the same Member State as the broadcasting organization reaches beyond an internal Community frontier into one or more other Member States. In this case too, cable transmission must be permitted in so far as it crosses an internal Community frontier.

Another possibility is that the broadcasting organization established in the same Member State as the cable company will transmit a programme only to one or more other Member States, and not within its country of establishment. In such a case, steps must be taken to enable the cable company also to "re-import" the programme across the internal Community frontier in question into its country of establishment and to disseminate it there.

By contrast, the Directive need not cover transmissions sent by a broadcasting organization established outside the Community, nor is there any need to ensure that cable transmissions can be broadcast in areas outside the Community.

Provided the rules set out in the Directive are applied in the manner described above, it should be of no consequence whether the transmission can also be received direct or whether the receiver is located in the broadcaster's service area. If receivability were the criterion, application of the rules would depend, in individual cases, on fortuitous factors associated with reception conditions and the technical development of receiving equipment and on other imponderables, and this would detract unreasonably from legal certainty. Thus, it would be unacceptable for, say, a cable company in a particular Member State to be exempt from the requirement to seek permission from the holders of the copyrights and the performers' rights where geographical areas with poor direct reception were concerned but not to enjoy such exemption in the case of areas with better reception. For the rest, the local re-broadcasting of programmes should not be afforded preferential treatment under copyright law, to the detriment of the long-distance transfer of programmes.

It should also be immaterial whether the cable company receives the signals transmitted by the broadcaster direct, via a microwave link handling a wireless satellite signal intended for the general public, or via cable. Nor should it matter whether the signals are picked up from a primary or a relay transmission. The rules should also apply to cases in which the cable operator is located at some distance from his receiving aerial, with the signals being sent from the aerial to the cable station as a wireless transmission, and in particular using a microwave link, or as a line transmission.

There is no way of identifying as yet the detailed technical developments that will take place. As a rule, what matters is that the signals should come from one Member State and be broadcast in another; the manner in which the signals cross the internal frontier is irrelevant. As explained above, the only exception should concern the "tapping" of a point-to-point satellite transmission not intended for direct reception by the general public, such "tapping" being prohibited under the Satellite Agreement; this exception should not be regarded as constituting a restriction on free broadcasting.

It is doubtful whether the Directive should attempt to define more closely the concept of cable company and/or cable (or line) transmission. Neither the Revised Berne Convention nor the Rome Convention nor the European Agreement on the Protection of Television Broadcasts contains any such definition. The member countries above all approach differently the questions as to how community antenna stations, which are irrelevant as regards the right to broadcast, are to be distinguished from cable companies and whether, in practice, the activities of cable companies within a broadcaster's reception area are to be equated with those of community antenna stations.

The latter question is of no consequnce for the Directive, which should, in any event, apply to the cases of cross-frontier transmission listed there, regardless of whether the signal could, at the same time, be received direct. The question as to the distinction between cable companies and community antenna stations need not be resolved in the Directive either but can be left to national legislatures. This is because the area which the relevant national legislation allocates to cable transmission (line broadcasting) will be liberalized under the Directive. The area allocated to community antenna stations is a priori exempt from copyright law since the right to broadcast is not affected as we are concerned here with reception rather than with its necessary corollary, transmission. As a result, the difference between

Community antenna stations and cable companies in the individual Member States is simply whether or not a fee is payable. It can be accepted that, to this extent, the dividing line will not be altogether uniform.

For the rest, the Directive should apply to both radio and television transmissions.

Rules aimed at liberalization might well be needed only in respect of simultaneous cable transmission as the main activity in practice of cable companies. Where programmes are recorded by a cable company for transmission at a later date, the right of exploitation is affected in not only its non-physical but also its physical form (reproduction); film distribution and the market in cassettes and records may also be affected. If a cable company wishes to record foreign transmissions with a view to broadcasting them at a later date, it can reasonably be expected to obtain the consent of the holder of the right.

This is not to overlook the fact that this solution will make it more difficult to adapt foreign transmissions (synchronization, sub-titles in the receiving country's language, reduction in length, inclusion of advertising spots, etc.). However, such interventions will a priori clash with the prohibition under copyright law on amendments to the work and with the author right to adapt the work and will, in many cases, justify objections based on the author's moral rights. As provided for in the second sentence of Article 11bis(2) of the Berne Convention, however, the moral rights of the author must, in no circumstances, be prejudiced.

All the above reasons provide justification for restricting the scope of the Directive to simultaneous cable transmission. After all, the purpose of the Directive is to enable the inhabitants of each Member State to receive the same transmissions as are broadcast at any given moment in other Member States. It should be as if each broadcaster were supplying the entire common market with its transmissions. However, the Directive's immediate objective cannot be to make the programmes so interchangeable that the cable companies are able to put together their own programmes as they wish and on the basis of their own schedule. If they wish to use recorded parts of foreign programmes for their own programmes, they must obtain the approval of the holder of the right to the extent that they do not benefit from special rules on ephemeral recordings.

By contrast, the partially simultaneous adoption of a programme, that is to say the adoption of individual, self-contained transmissions, should not be excluded.

A statutory licence might be recommended as the most effective means of achieving liberalization. Accordingly, the Directive would oblige Member States to amend their relevant laws by an appropriate date, e.g. within two years after the Directive's entry into force, in such a way that the right of prohibition enjoyed by copyright holders and, where appropriate, by holders of related rights, in so far as these confer rights of prohibition, in connection with cable transmission by radio and television organizations is repealed under the conditions described above although it must still be possible to invoke the author's moral rights. Each Member State can be free to decide whether it would also like to liberalize the transmission by cable of national or third-country programmes.

Action is also needed with regard to the related rights of television companies in those Member States in which the European Convention on the Protection of Television Broadcasts is still in force and has not been undermined by exceptions for cable transmissions. The Directive would require such countries to denounce the Convention as provided for in Article 14 so that its provisions no longer apply to them, and at the latest by the time limit set for the adaptation of their laws.

The interests of authors and holders of related rights should be protected by granting a right to equitable remuneration. The Directive should lay down criteria for determining such remuneration, with particular attention being paid to the following:

- the usual level of comparable contractual licence fees for cable transmission;

- the usual remuneration paid for the first broadcast;

- the number of receivers linked to the cable network and the level of the fees paid by them;

- the likelihood and extent of any impairment of other marketing opportunities, such as the showing of films.

To the extent that national laws that benefit, say, holders of related rights as yet provide for a claim to remuneration only, and not for a right of prohibition, such claims to remuneration should also be covered by the rules set out in the Directive.

The claim to equitable remuneration pursuant to the Directive should, in order to facilitate settlement, be enforceable only through collecting societies. This would help to aggregate claims and would protect cable companies from a host of individual claimants.

When it comes to deciding on the claim for remuneration, an attempt should first be made to bring about an amicable settlement between the collecting societies and the cable companies (or their representative associations). If no such settlement is forthcoming within a reasonable period, each of the parties concerned should be able, in accordance with the second sentence of Article 11 bis (2) of the Berne Convention, to appeal to an arbitration body to be set up for this purpose. The arbitration body would fix the level of remuneration and should have central responsibility for the Community as a whole in order to guarantee the necessary uniformity of the remuneration criteria and to prevent distortions of competition. Independent experts should sit on the arbitration body alongside representatives of the interests concerned.

COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 14th June 1984

TELEVISION WITHOUT FRONTIERS

GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON MARKET FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE

(Communication from the Commission to the Council)

Annex

Pages 332-367

Annexes

Number of radio and television sets in the Community as at 31 December 1982

	I Radio	II Television	III Combined radio/television[1]
Belgium[4]	4 596 365	1 020 044 1 943 082[3]	
Denmark	115 800		1 886 300
Germany	2 926 935		21 835 778
France	18 260 000[2]	7 187 474 9 771 758[3]	
Greece[2]	3 250 000	1 700 000[1]	
Ireland	1 315 000[2]	276 875 419 951[3]	
Italy	390 000		13 760 000
Luxembourg[2]	225 000	91 000[1]	
Netherlands	181 652		4 366 921
United Kingdom	41 000 000[2]	4 122 230 14 795 024[3]	

NB. Aggregation of columns 1 and III and of columns II and III gives respectively:
- the total number of radio sets: 98 463 451, and
- the total number of reported television sets: 83 176 437.

[1] Including colour television.
[2] Estimates (no reporting requirement).
[3] Colour television (not included in the figure on the previous line).
[4] As at 1 January 1982.

Source: EBU Review, No 2, March 1983, p. 60.

Annex 2

Present TV overspill in Europe

Austria	German, Swiss, Italian.
Belgium	RTL, German, Dutch, French. British on the coast. All boosted by CATV operators.
Denmark	Southern third covered by German, Northern half by Swedish and some Norwegian.
Finland	Swedish, Russian, and Norwegian in Northern parts. (STL taken on cable).
France	RTL, Belgian in the North; TMC and Italian in the South; German in East.
Germany	In frontier regions only, RTL, French, Belgian, Danish, Austrian and East German.
Greece	–
Iceland	–
Ireland	British and Northern Irish.
Italy	Border areas only, Swiss, Austrian, TMC and French.
Luxembourg	Total penetration, Belgian, French and German.
Netherlands	Belgian, German, French, Danish. British on the coast. CATV not allowed to boost broadcasts from one area to another.
Norway	Swedish, Danish in the Southern part (STL taken on cable).
Portugal	Spanish in frontier regions.
Spain	French and Portuguese in frontier regions only.
Sweden	Norwegian, Finnish; Danish in South.
Switzerland	German, French, Italian (STL taken on cable).
United Kingdom	Irish in Ulster and Wales.

Source: New Communications Developments, A manual by The European Association of Advertising Agencies, Brussels, November 1983, p. 17 (Annex 6).

Origin of films shown on television 1981

Country of showing	Country of origin													
	Belgium		France		Germany		Italy		United Kingdom		USA		Other	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%
Belgium RTBF			160	48,8	15	4,3	24	6,8	12	3,4	107	30	17	4,9
BRT			11	6.25	7	3,98	4	2,28	24	13,64	104	59.10	26	14,77
France[1]	-	-			4	2,29	8	4,59	12	6,89	140	80,45	10	5,74
Germany[2]	-	-	48	11.79			15	3,68	26	6,38	221	54,29	93	22,85
United Kingdom[3]	-	-	6	1.14	2	0.38	6	1,14			491	93,70	20	3,81

[1] TF 1, FR 3; figures broken down by country of origin not available for A2.
[2] ARD, ZDF; the ZDF figures include the first half of 1982; co-productions classified according to the first-named country of origin.
[3] BBC only.

Source: Working Group 3 of the European Conference on Audio-visual Cooperation, 1983.

Number of persons employed on a permanent basis by broadcasting organizations in 1981

BRT	2 617
RTBF	2 562
BRF	35
DR	3 113
ARD	18 000
ZDF	3 500
TF 1	1 219[1]
A 2	Not available
FR 3	Not available
ERT 1	2 078
ERT 2	Not available
RTE	2 300
RAI	13 531[2]
RTL	1 820[1]
NOS + other Broadcasting organizations	5 724
BBC	27 942
ITV	18 350

[1] This figure does not include the 138 individuals working for the joint services of TF 1, A 2, SFP, INA, etc.

[2] Including those employed at the external offices in Belgium, Germany and France.

Operating results of broadcasting and television organizations in 1981 or 1982

	National currency	ECU
Belgium	BFR 9,25 m	202 m
Denmark	DKR 1,34 m	184 m
Germany	ARD: DM 3,9 m ZDF: DM 1,2 m	1 719 m 529 m
France	FF 7,8 m of which TF1: FF 1,6 m	1 145 m
Greece	DR 6 000 m	80 m
Ireland	IRL 50 m	69 m
Italy	RAI: LIT 1 143.100 m	850 m
Luxembourg	CLT: LFR 8.280 m[1]	180 m
Netherlands	HFL 768 m	302 m
United Kingdom	BBC: UKL 602 m ITV: UKL 680 m	1 032 m 1 166 m
Total	-	7 438 m

[1] Results for 1982.

Radio and television licence fees in the Community in 1983

(a) In national currency

		Annual licence fees per household			
	Radio	Television		Combined licence fee	
		Black/white	Colour	Black/white	Colour
Belgium (BFR)	708	2 688	4 200		3 625[2]
Denmark (DKR)	154			640	1 080
Germany (DM)[1]	61.00		134.00		195
France (FF)	-	311	471		
Greece (DR)	No broadcasting licence fee, but extra charge included on electricity bill				
Ireland (IRL)	-	27	45		
Italy (LIT)[1]	3 630			42 680	78 910
Luxembourg (LFR)	No broadcasting licence fee				
Netherlands (HFL)	45				153
United Kingdom (UKL)[3]	-	15	46		

[1] Since 1 July 1983.
[2] Average combined fee for cable radio and television; independent of the broadcasting licence fee.
[3] As at 31 December 1982.

(b) In European Currency Units (ECU)

	Annual licence fees per household				
	Radio	Television		Combined licence fee	
		Black/white	Colour	Black/white	Colour
Belgium	15.47	58.74	91.78		79.22
Denmark	18.91			78.58	132.61
Germany					85.97
France	-	45.65	69.13		
Greece	No broadcasting licence fee, but extra charge included on electricity bill				
Ireland	-	37.48	62.47		
Italy	2.7			31.74	58.68
Luxembourg	No broadcasting licence fee				
Netherlands	17.7				60.21
United Kingdom	-	25.71	78.84		

(c) Total licence fee for radio and colour television

	National currency	ECU
Belgium	4 908 BFR	107.25
Denmark	1 080 DKR	132.61
Germany	195 DM	85.97
France	471 FF	69.13
Greece	Extra charge included on electricity bill	
Ireland	45 IRL	62.47
Italy	78 910 LIT	58.68
Luxembourg	-	
Netherlands	153 HFL	60.21
United Kingdom	46 UKL	78.84
Average I[1]	-	81.9
Average II[2]	-	77.33

[1] Total cost of licence fees divided by number of countries surveyed.
[2] Average weighted by number of sets (Annex 1).

Advertising expenditure in Europe in US$ million

Countries	Total Ad.Exp. (1982)	% of GNP (1982)	TV Ad. Expenditure (1981)	Households with TV (million) (1981)
Austria	312	0.40	88	2.6
Belgium	415	0.69	(36)**	2.7
Denmark	567	1.00	——	2.0
Finland	768	1.82	63	1.3
France	3,620	0.85	460	15.0
Germany	5,224	0.83	515	22.0
Greece	119	0.32	61	2.6
Iceland	18	0.96	3.3	0.07
Ireland	145	0.83	36	0.7
Italy	1,333	0.40	428	17.6
Luxembourg	80	0.25	***	——
Netherlands	1,839	1.30	104	4.8
Norway	467*	0.80	——	1.3
Portugal	70*	0.30	40	2.7
Spain	1,346	1.00	381	9.8
Sweden	1,165	1.50	——	3.2
Switzerland	1261	1.30	113	1.9
United Kingdom	4,696	1.34*	1,452	18.0

*1981 figures
**Estimated expenditure on Luxembourg's RTL
*** See Belgium

Source: New Communications Developments, A manual by The European Association of Advertising Agencies, Brussels, November 1983, p. 14 (Annex 3).

Note some countries do not include press production and other expenditure of a similar type in their figures.

Annex 8

European broadcasting bodies taking commercials

Countries	TV		Radio	
	National	Regional	National	Regional
Austria	yes	—	yes	yes
Belgium	—	no[1]	—	no	—
Denmark	—	no	—	no	—
Finland	yes	—	—	no	—
France	yes	yes[2]		no	
Germany	yes	yes[3]	–	yes[5]
Greece	yes	—	yes	yes
Iceland	yes	—	yes	—
Ireland	yes	—	yes	yes[6]
Italy	yes	yes	yes	yes
Luxembourg	yes	—	yes	—
Netherlands	yes	—	yes	no[7]
Norway	—	no	—	—	no	—
Portugal	yes	—	yes	?
Spain	yes	yes	yes	yes
Sweden	—	no	—	—	no	—
Switzerland		yes[4]		no[8]	
United Kingdom	yes	yes	no	yes

1. Enabling legislation was passed in July 1983 to permit RTBF, the French-speaking TV channel, to carry 'non-commercial' advertising.
2. FR3 is regional but does not receive regional advertisements as yet. RTL provides regional coverage of the North, and TMC of the South of France.
3. ARD II, the wholly regional broadcaster, does not carry advertisements, but ARD I provides regional advertising during its scheduling.
4. Switzerland has national broadcasts in the three official languages therefore providing regional coverage.
5. Except for the radio station serving Cologne.
6. Pirate radio stations (about 50).
7. Advertising on local radio planned.
8. Advertising on local radio to be introduced soon.

Source: New Communications Developments, A manual by The European Association of Advertising Agencies, Brussels, November 1983, p. 15 (Annex 4).

TV advertising in Europe

Source: New Communications Developments, A manual by The European Association of Advertising Agencies, Brussels, November 1983, p. 16 (Annex 5), and information obtained from broadcasting corporations.

Countries	TV Channels	Maximum Ad. Air-time per day in minutes	Ad. Revenue as % of broadcasting income (1981 figures)
Austria	ORF I ORF II	20	42%
Belgium	RTBF I & II	'Non-commercial' advertising began January 1984	
	BRT I & II	None	
Denmark	Radio Denmark	None	
Finland	MTV/YLE I	16	80%
	MTV/YLE II	9	80%
France (1)	TFI	24	61%
	A2	24	53%
	FR3	10	13%
Germany (2)	ZDF	20	40%
	ARD I	20	30%
	ARD II	(regional, no ads)	-
Greece	ERT 1	30	22%
	ERT 2	45	25%
Iceland	Rikisutvarpid-Sjonvarp	16.4 (average)	33.7%
Ireland	RTE I	58	48%
	RTE II	25	
Italy	RAI I	28	23.8%
	RAI II	28	23.8%
	RAI III	-	-
	Private Broadcasting Stations	15% per hour	100%
Luxembourg	RTL (French) (covers north of France and Belgium)	68	100%
	RTL-Plus (German)	68	100%
Netherlands (3)	Channel I	18	25% (1981) (Air-time to increase)
	Channel II	18	
Norway	NRK	None	
Portugal	RTP I	90	43%
	RTP II	45	43%
Spain	TVE I	57	74%
	TVE II	42	74%
	Regional channels with advertising for Catalonia and the Basque country introduced 1983.		
Sweden	STV I	None	
	STV II	None	
Switzerland	SRG (German)	20	35%
	SRG (French)	20	35%
	SRG (Italian)	20	35%
United Kingdom	BBC I & II	None	-
	ITV	90	100%
	Channel 4	50	100%

(1) 1983
(2) 1982
(3) 1984

Broadcasting: Advertising expenditure in 1981

	National currency	ECU
Belgium	BFR 1651 m	36.1 m
Denmark	-	-
Germany (1982)[1]	DM 2 201.6 m	970.6 m
France (1980)	FF 1 678 m	246.3 m
Greece	DR 2 436 m	32.3 m
Ireland (1979)[2]	IRL 41.2 m	46.2 m
Italy	LIT 577 000 m	429.1 m
Luxembourg	-	-
Netherlands	HFL 276 m	108.6 m
United Kingdom	UKL 823 m	1440.6 m
Community	-	3279.3 m

Source: Journal of Advertising 1983, Vol. 2, pp. 73-91.

[1] Edition ZAW, Werbung '83, pp. 167 and 172.
[2] Starch Inra Hooper, World Advertising Expenditures, 1980 Edition, pp.43-44.

Advertising expenditure in Member States and in the USA and shares accounted for by various advertising media, 1970-1981

Sources:

1. David S. Dunbar, J. Walter Thompson Company Ltd., Trends in Total Advertising Expenditure in 16 Countries, 1970-1981, Journal of Advertising 1983, Vol. 2, pp. 73-91.

2. J. Walter Thompson Company Ltd., Unilever, International Co-ordination Group, Trends in Total Advertising Expenditure in 29 countries, 1970-1980, Journal of Advertising 1982, Vol. 1, pp. 57-88.

BELGIUM

It should be noted that these figures are a discontinuous series; since 1977 they include production costs, so that, to make comparisons, the pre-1976 figures need to be increased by +/- 10 per cent.

In 1981, total estimated advertising expenditure recorded its smallest increase in money terms (0.5 per cent), and its largest fall in constant media prices (- 6 per cent) in the last 11 years. The trend was, however, almost in line with the behaviour of GNP, so that, as a percentage of GNP, the figure was only slightly down from 1980.
In 1981, the press overall accounted for 73 per cent of total; down by 2 points compared with the preceding year, all of the loss occurred in magazines. It seems that television, after growing very slowly over the years, may at last be making an impact, with a 1.5 point gain in 1981. All of this is placed with RTL (Radio Television Luxembourg), a peripheral Station which does not give full coverage of the Belgian market. The possible introduction of Belgian commercial channels in 1983 is likely to accelerate television's growth.

Outdoor advertising in Belgium has the highest share of the total advertising budget of any European country. Over the last few years its importance has been declining slowly, but in 1981 it recovered somewhat.

Notes

(a) Figures include agency commissions.
(b) Production costs are excluded for 1970-1976, included for 1977-1979.

	Total expenditure in million Francs			Distribution of total expenditure by media: % of total						Index of media rates
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	(11)
1970	6150	0.60	NA	45.7	30.2	0.1	1.3	1.6	21.1	NA
1971	6430	0.58	NA	44.0	31.3	0.2	1.4	1.7	21.5	NA
1972	6970	0.55	NA	42.3	33.0	0.3	1.1	2.4	20.8	NA
1973	7280	0.50	7280	41.7	32.6	0.5	1.2	2.3	21.6	100
1974	7670	0.45	6670	43.8	30.7	1.4	1.0	2.1	20.9	115
1975	7720	0.41	5320	43.7	30.1	2.3	0.2	2.2	21.4	145
1976	8650	0.41	5805	43.4	29.1	3.6	0.3	2.4	21.1	149
1977	11890	0.51	6680	44.8	31.6	6.7	0.3	1.4	15.1	178
1978	13050	0.53	7290	45.0	30.4	7.3	0.3	1.6	15.4	179
1979	15140	0.57	7650	45.2	30.0	7.6	0.3	1.3	14.7	198
1980	16430	0.59	7570	42.6	32.5	8.2	0.3	1.8	14.6	217
1981	16507	0.57	7115	42.5	30.3	9.8	0.2	1.6	15.6	232

Sources 1970-1976 — Credop; 1977 — Advertising Audit Services; Column 11 — CACP.

DENMARK

It should be noted that the next five-yearly inquiry will not be carried out until 1982, with results published in 1983.

Information for Denmark is extremely limited (see notes). Total expenditure in money terms in 1978 was twice as high as in 1973; it had also risen as a percentage of GNP. (At constant consumer prices, the increase in 1978 was 18 per cent.)

In the absence of television and radio advertising, the media situation is very stable, with only minor variations between 1973 and 1978. Newspapers are the dominant medium. (The five-yearly surveys show that the 'classic' media — press, cinema and outdoor — accounted for 59 per cent of total advertising expenditure in 1973 and 63 per cent in 1978; the remainder is attributed mainly to direct mail, as well as to exhibitions, other minor media, agency commissions, production costs and administration.)

Notes

(a) Figures *exclude* agency commissions and production costs.
(b) Surveys of expenditure are carried out every five years only. No index of media rates is produced.
(c) Television and radio are not available for advertising.

	Total expenditure in million Dkr			Distribution of total expenditure by media: % of total						Index of media rates (11)
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	
1973	1193	0.68	NA	71.8	24.1	–	–	1.6	2.5	NA
1978	2377	0.77	NA	72.8	23.2	–	–	1.3	2.7	NA

Sources. Copenhagen School of Economics and Business Administration; Danish Advertising Association.

FEDERAL REPUBLIC OF GERMANY

Total estimated advertising expenditure in 1981 was virtually static; with media rates increasing by just under 4 per cent, expenditure at constant media prices fell (for the first time since 1975) by the same amount. This compares with the substantial gains made in 1980.

The media picture in 1981 remained essentially static. Both television and radio continued their slow upward trend of the last three years, due mainly to rate increases. Newspapers and magazines both lost share marginally.

Notes
Figures *exclude* agency commission and production costs.

	Total expenditure in million DM			Distribution of total expenditure by media: % of total						Index of media rates
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	
1970	4170	0.62	4170	53.3	23.6	12.6	3.8	1.4	6.3	100
1971	4515	0.60	4220	51.6	23.8	13.9	3.7	1.3	5.7	107
1972	5030	0.61	4660	53.8	23.5	12.6	3.6	1.2	5.3	108
1973	5430	0.59	4600	53.9	22.4	13.6	3.9	1.1	5.1	118
1974	5245	0.53	4260	55.8	19.8	14.0	4.1	1.1	5.2	123
1975	5470	0.54	4175	56.7	18.5	15.5	3.7	1.1	4.5	131
1976	6380	0.57	4870	57.7	20.1	13.5	3.2	1.0	4.5	131
1977	7225	0.61	5430	56.3	22.6	12.3	3.5	0.9	4.4	133
1978	8155	0.63	5780	56.9	21.9	12.2	3.7	0.9	4.4	141
1979	9050	0.64	5730	57.5	21.9	11.4	3.9	1.0	4.3	158
1980	9650	0.64	6030	57.7	21.2	11.6	4.1	1.0	4.4	160
1981	9635	0.62	5800	56.9	20.9	12.1	4.7	1.2	4.2	166

Sources. ZAW, except col. 11 from Gruner & Jahr.

FRANCE

Total expenditure in money terms in 1980 was nearly 3.5 times the 1970 level. As a percentage of GNP, the figure was rising slowly up to 1973; after a short drop, it returned to previous levels in 1976 and has been very stable since then. 1980's total was 17 per cent up on 1979, ahead of the rate of inflation.

The media structure is largely influenced by television. Although its availability is strictly regulated, its share has grown steadily in the last 10 years, and has now stabilized; most of this growth has been through rate increases above the average for other media. The press has suffered most over the years, newspapers most of all; while magazines' share of the total fell in earlier years, it has now stabilized. Radio, with fewer restrictions than television, has gained; outdoor has also benefited from the development of new presentations for posters.

Notes

(a) Figures *include* agency commission and production costs.

(b) No index of media rates is available.

	Total expenditure in million francs			Distribution of total expenditure by media: % of total						Index of media rates (11)
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	
1970	3 630	0.50	–	67.5	12.0	8.0	1.5	11.0		–
1971	4 100	0.51	–	65.0	14.0	9.0	1.0	11.0		–
1972	NA	NA	–	–	–	–	–	–		–
1973	5 200	0.52	–	63.0	15.0	9.0	2.0	11.0		–
1974	NA	NA	–	–	–	–	–	–		–
1975	6 100	0.49	–	58.5	15.7	10.3	1.9	13.6		–
1976	7 275	0.51	–	57.0	16.0	11.0	2.0	14.0		–
1977	8 350	0.51	–	56.5	16.0	11.0	2.0	14.5		–
1978	9 190	0.50	–	56.0	16.5	11.0	2.0	14.5		–
1979	10 650	0.51	–	55.0	17.0	11.5	2.0	14.5		–
1980	12 430	0.51	–	55.0	16.5	11.5	2.0	15.0		–

Source: IRLP.

GREECE

Total expenditure has grown very fast; in 1980 it was over six times as large as in 1971. Although media rates have risen rapidly in the last five years, much of the growth in total expenditure is seen to be real, with an increase of one-third since 1975, at constant prices. As a percentage of GNP, expenditure is still at the low end of the scale; after dropping in 1974-1975, it took a strong upward trend, but fell back somewhat in the last two years.

The change from a military government in 1974 undoubtedly stimulated the economy and the advertising business. The media picture has been subject to fairly sudden changes in the past; a degree of stability was evident in 1977 to 1979, but 1980 saw a strong recovery in television's share, at the expense of both newspapers and magazines.

Notes

(a) Figures *include* agency commissions and *exclude* production costs.

(b) No reliable figures are available for cinema and outdoor advertising; they are omitted from the total, although they are used as advertising media.

	Total expenditure in million drachmas			Distribution of total expenditure by media: % of total						Index of media rates (11)
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	
1970		NA		-	-	-	-	NA		-
1971	710	0.24	-	26.9	26.6	31.0	15.5	NA		-
1972	860	0.25	-	25.2	23.3	39.7	11.8	NA		-
1973	1020	0.23	-	19.5	22.0	50.7	7.8	NA		-
1974	1090	0.20	-	23.7	20.8	47.5	8.0	NA		-
1975	1290	0.20	1290	23.9	18.0	51.4	6.7	NA		100
1976	1710	0.25	1430	23.2	18.1	52.6	6.1	NA		120
1977	2320	0.29	1560	29.6	21.8	43.3	5.3	NA		149
1978	3160	0.34	1620	29.4	20.3	46.4	3.9	NA		195
1979	3690	0.30	1600	28.2	20.2	46.9	4.7	NA		230
1980	4350	0.28	1740	25.9	18.1	49.6	6.4	NA		250

Sources: Odigos Demosiottos, A. C. Nielsen, Metrix and PRC/EMRB Hellas.

ITALY

In 1981, while GDP rose by 17.6 per cent in current terms, and fell by 1.6 per cent in real terms, total estimated advertising expenditure rose by 29 per cent in current terms, and by 9 per cent in real terms. As a percentage of GDP, advertising expenditure in 1981 stood higher than in any year since 1971.

Medium and small firms who have started advertising for the first time have been largely responsible for the increase; larger advertisers tend to maintain budgets in line with media costs.

From a media point of view, much of the increase was due to Private Television's success. By grouping local stations, four private networks with national coverage started in 1981; by May 1982 the four networks were reaching 90 per cent of the 9 million Private TV prime-time audience. (This compares with RAI's 8.8m-audience to Channel 1, and 3.5m to Channel 2.) In 1981, it is reliably estimated that Private TV attracted 225 billion lire of advertising, as against 144bn in 1980, and RAI's 218bn in 1981.

Print media in general were most affected by Private TV's success; this situation will worsen in 1982 as a whole, because of Private TV's continued gains in audience and because of a number of printing strikes.

In 1982, total expenditure is expected to rise again in real terms. In television, expenditure should be around 700bn lire (280 on State TV and 420 on Private TV), accounting for some 36 per cent of the total.

Notes

(a) Figures *include* agency commissions, *except* for national radio and television, and exclude production costs.

(b) Figures of expenditure in certain media — private television and radio stations and outdoor — are only estimates.

	Total expenditure in thousand million lire			Distribution of total expenditure by media: % of total						Index of media rates (12)
	At current prices (1)	As % of GDP at mkt prices (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	
1970	266	0.42	266	30.0	34.9	12.5	8.3	6.4	7.9	100
1971	272	0.40	259	30.4	33.9	12.7	8.6	6.3	8.1	104.8
1972	286	0.38	267	29.1	35.7	12.2	9.1	6.0	7.9	102.1
1973	338	0.38	274	27.1	37.6	13.7	9.2	5.0	7.4	123.4
1974	366	0.33	250	29.2	34.9	15.4	8.8	4.4	7.3	146.8
1975	396	0.32	241	30.3	31.4	16.1	9.5	4.4	8.3	164.2
1976	476	0.33	273	32.4	31.8	15.4	8.5	3.9	8.0	174.4
1977	583	0.35	289	32.4	30.1	15.9	8.4	3.3	7.9	201.8
1978	698	0.35	292	31.5	29.6	15.6	8.8	3.8	7.7	246.8
1979	881	0.33	313	31.3	31.0	15.3	7.5	3.3	7.6	282.6
1980	1226	0.36	336	27.7	31.4	16.1	6.7	2.9	6.5	342.9
1981	1581	0.42	360	26.3	29.5	17.8	5.7	3.4	6.3	414.0

Sources: P. Res, industry estimates. J. Walter Thompson SPA, Milan.

NETHERLANDS

The extent of the economic recession caused for the first time a decline in actual advertising expenditure in 1981. Some clients advertised anti-cyclically, but more cut their budgets. Newspapers were particularly badly affected, with a decline in personnel and housing classified as well as in brand advertising. They would have been in a much worse position had it not been for the great increase in retail advertising triggered off by a grocery price war.

The government controlling body for broadcast advertising, the STER, has already increased the available transmission time on radio by 60 per cent in 1982. Advertising time on TV will also be doubled over the next seven years in gradual steps (beginning in 1984).

The outlook for 1982 is gloomy: a further decline is expected, at current as well as constant prices.

Notes

(a) Figures *include* agency commission *and* production costs from 1975; up to 1974 production costs were *excluded* for the *press* figures only, but *included* for other media.

(b) Press figures *exclude* trade press.

(c) The index of media rates includes press, television and radio only.

	Total expenditure in million Florins			Distribution of total expenditure by media: % of total						Index of media rates
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	(11)
1970	1026	0.97	1026	61.1	18.4	11.6	3.4	0.5	5.0	100
1971	1084	0.91	1042	61.6	18.5	11.8	2.7	0.6	4.8	104
1972	1127	0.83	1044	61.5	19.3	11.7	2.1	0.6	4.8	108
1973	1264	0.82	1062	62.3	18.8	11.0	1.9	0.6	5.4	119
1974	1463	0.86	1084	65.6	16.7	11.0	1.2	0.6	4.9	135
1975	1932	1.04	1323	69.9	15.4	8.3	0.9	0.6	4.9	146
1976	2079	0.95	1333	68.0	16.1	7.8	1.0	0.6	6.5	[illegible]
1977	2512	1.06	1486	66.3	17.2	7.2	0.9	0.6	7.8	[illegible]
1978	2857	1.12	1528	66.8	17.2	6.9	1.0	0.7	7.4	[illegible]
1979	3096	1.14	1580	66.7	17.0	6.9	1.0	0.6	7.8	[illegible]
1980	3266	0.99	1552	65.5	17.2	7.2	1.0	0.6	8.5	[illegible]
1981	3302	NA	1379	64.0	17.6	7.8	1.1	0.6	8.9	[illegible]

Sources: Admedia to 1980; BBC and VEA from 1981.

UNITED KINGDOM

Total expenditure in money terms rose by 10.3 per cent in 1981. However, at constant media prices (rates having risen by around 17 per cent in the year), 'real' expenditure fell by 7 per cent, the largest fall since the oil-crisis years of 1974-1975. As a percentage of GNP, on the other hand, expenditure again rose fractionally (GNP fell quite sharply in the year).

Retail advertising expenditure rose by 12 per cent over 1980, compared with a below-average increase of 9 per cent for manufacturers' consumer advertising. This was probably a major factor in keeping up the growth in national newspaper display advertising, up by 12 per cent, compared with only 4 per cent for magazines. On the other hand, classified advertising continued to lag behind (+ 5 per cent only), and actually fell in national newspapers: employment advertising was heavily down on 1980.

Television increased its share of the total again, reaching its highest level yet. The increase was real, with expenditure rising by 17 per cent, and rates by a comparatively modest 14 per cent. Press rates rose by 20 per cent, with particularly high increases in national and regional newspapers; as a result, there was a real volume loss in press advertising.

Note
Figures *include* agency commissions and production costs.

	Total expenditure in £ millions			Distribution of total expenditure by media: % of total						Index of media rates
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	(11)
1970	554	1.27	554	49.5	22.7	22.6	0.2	1.1	4.0	100
1971	591	1.20	544	48.5	22.2	24.2	0.2	1.0	3.9	109
1972	708	1.25	608	49.3	21.0	24.9	0.1	1.0	3.7	116
1973	874	1.36	716	51.4	20.0	24.0	0.2	0.8	3.5	122
1974	900	1.21	667	52.1	20.0	22.6	0.7	0.9	3.8	135
1975	967	1.03	565	49.6	20.6	24.4	1.0	0.7	3.6	171
1976	1188	1.07	567	47.6	20.5	25.8	1.5	0.7	3.6	209
1977	1499	1.19	604	46.5	21.0	26.6	1.7	0.6	3.6	248
1978	1834	1.27	645	46.0	21.4	26.3	1.9	0.7	3.7	284
1979	2137	1.30	651	47.8	22.6	22.0	2.4	0.8	4.4	328
1980	2555	1.32	628	45.2	20.7	27.1	2.1	0.7	4.2	409
1981	2818	1.34	589	44.5	20.0	28.7	2.1	0.6	4.1	481

Sources: The Advertising Association, London

UNITED STATES OF AMERICA

Note: there have been substantial revisions to columns 2, 3 and 11 since the last publication.

Total expenditure in 1981 was $40.5 billion, 12 per cent higher than 1980 expenditure. This growth in advertising revenue outpaced the growth in GNP, which was 11.3 per cent. 1981 inflation increased by over 9 per cent. Escalating media rates kept advertising growth to +2.4 per cent in real dollars.

Expansions and contractions in the economy culminated in a slump during the second half of 1981. Auto and retail sales were poor, the unemployment rate was high, and interest rates were extremely volatile. Politically, 1981 saw the beginning of a new administration under Ronald Reagan and his Republican Party. This administration is committed to cutting the federal deficit by means of an austerity programme. The President also pushed through a three-year, 25 per cent tax cut; the 5 per cent cut in October 1981, however, had little influence on consumer spending.

Surprisingly, the advertising industry was not adversely affected in 1981. Although expenditure increased, distribution among the various media was close to that of 1980. The outlook for 1982 is not clear. If the recession continues, advertising expenditure will probably be flat. An economic upturn in mid-summer, perhaps fuelled by the 1 July 10 per cent tax cut, would contribute to renewed expansion in advertising activity later in the year. Meanwhile, inflation should continue to slow down, preventing the upward spiralling of media costs that has characterized the industry in recent years.

Notes

(a) Figures *include* both agency commissions and production costs.

(b) The data reported here differ from the usual method of presenting USA figures, primarily in excluding Direct Mail and a 'Miscellaneous' category which includes cinema and transport advertising.

	Total expenditure in million US $			Distribution of total expenditure by media: % of total						Index of media rates (11)
	At current prices (1)	As % of GNP (2)	At constant prices (3)	Press Newspapers (5)	Press Magazines* (6)	Television (7)	Radio (8)	Cinema (9)	Outdoor/ transport (10)	
1970	12 940	1.30	12 940	44.1	16.2	27.8	10.1	NA	1.8	100
1971	13 580	1.26	13 580	45.6	15.8	26.9	10.6	NA	1.9	100
1972	15 280	1.29	14 280	45.9	14.9	26.8	10.5	NA	1.8	107
1973	16 360	1.24	14 190	46.1	14.4	27.1	10.5	NA	1.9	116
1974	17 480	1.22	13 960	45.8	14.2	27.8	10.5	NA	1.8	125
1975	18 470	1.19	13 580	45.2	13.3	28.5	10.7	NA	1.6	136
1976	22 250	1.30	14 670	44.5	13.1	30.2	10.5	NA	1.7	152
1977	25 270	1.32	14 670	43.1	13.7	29.1	10.4	NA	1.7	173
1978	29 190	1.35	15 670	42.5	14.0	29.8	10.1	NA	1.6	186
1979	33 080	1.27	16 150	42.8	14.2	30.7	9.9	NA	1.6	205
1980	36 130	1.28	15 920	42.6	13.7	31.4	10.3	NA	1.6	227
1981	40 450	1.28	16 300	43.1	13.6	31.3	10.4	NA	1.6	248

Sources: Column 2: *Economic Report of the President*, 1982. Columns 3-9: Robert J. Coen (McCann-Erickson Inc.). Column 10: *1981 Cost Trends Report*, L. Walter Thompson USA, Inc.

*Includes magazines, 'farm publications' and 'business publications'.

Growth in advertising recorded by advertising media, 1975-1981

Growth in advertising / Advertising medium	B		DK		D		F (1)		GR (1)		I		NL		UK	
	BFR m	%	DKR m	%	DM m	%	FF m	%	DR m	%	LIT '000m	%	HFL m	%	UKL m	%
Newspapers	3 642	108	874	102	2 381	77	3 268	92	818	265	296	247	635	47	774	161
Magazines	2 678	115	264	92	1 002	99	1 093	114	555	239	342	275	248	83	364	183
Television	1 440	811	-	-	318	38	801	127	1 495	225	423	664	82	51	573	243
Radio	18	114	-	-	250	124	133	114	192	222	52	140	17	96	50	512
Cinema	94	56	12	62	55	92	1 035	125			5	27	7	61	10	150
Outdoor/transport	923	56	34	115	158	64					67	203	181	192	81	232
Total growth in advertising 1979-1981	8 795	114	1 184	99	4 163	76	6 330	104	3 060	237	1 185	299	1 170	61	1 852	192

(1) Period 1975-1980.

Sources: 1. David S. Dunbar, J. Walter Thompson Company Ltd., Trends in Total Advertising Expenditure in 16 Countries, 1970 - 1981, Journal of Advertising 1983, Vol. 2, pp. 73-91.

2. J. Walter Thompson Company Ltd., Unilever, International Co-ordination Group, Trends in Total Advertising Expenditure in 29 Countries, 1970 - 1980, Journal of Advertising 1982, Vol. 1, pp. 57-88.

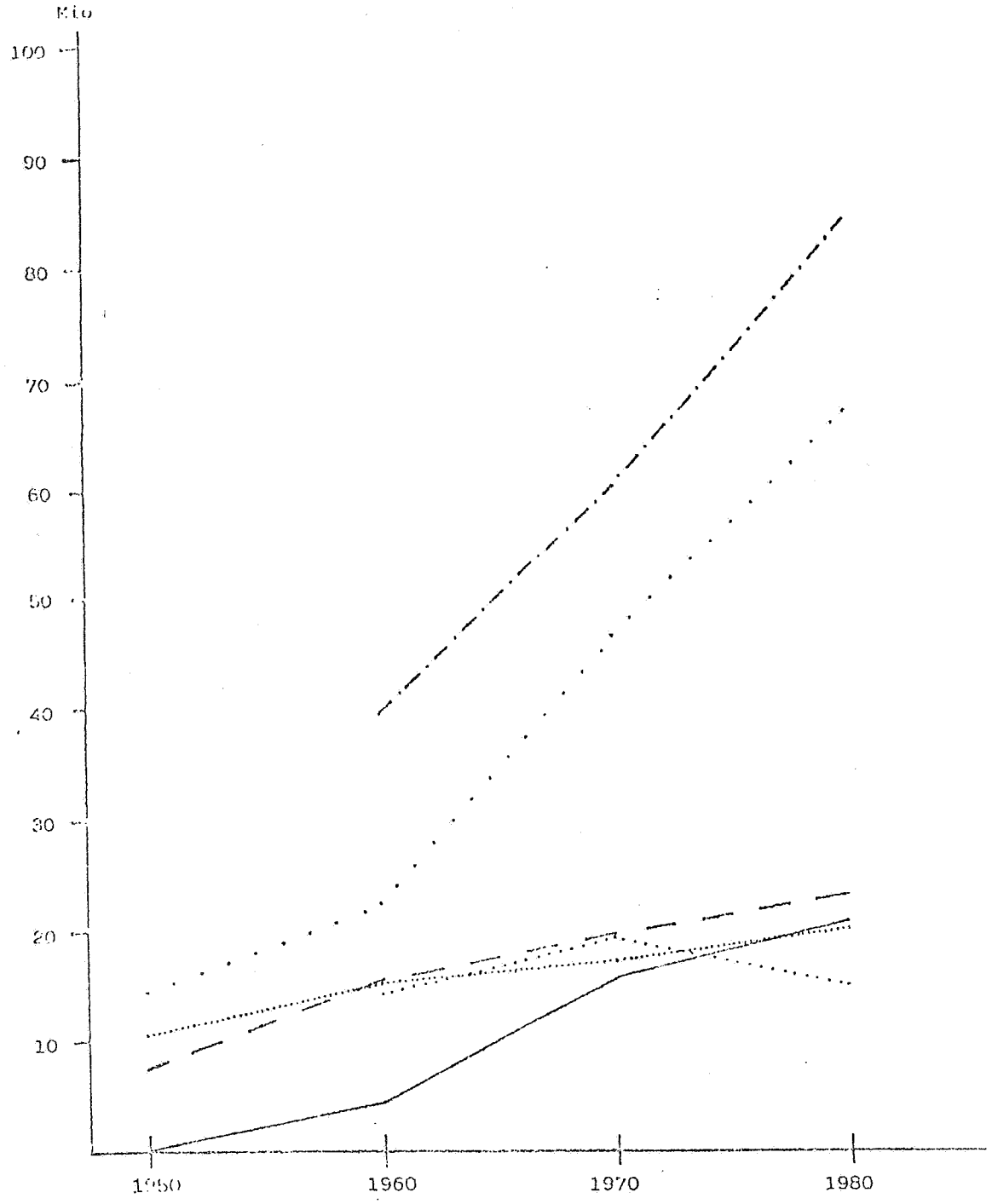
Annex 13

Media development in the Federal Republic of Germany

	1950	1960	1970	1980
Daily newspapers (m)	11,1	15,5	17,3	20,4
Large circulation periodicals (m)	-	39,1	60,3	84,6
Specialist periodicals (m)	-	14,1	19,3	15,0
Cinema visits (m)	487	605	160	144
Radios (m)	7,7	15,9	19,8	23,3
Television sets (m)	-	4,6	16,7	21,2
Book titles (new)(thousands)	14,1*	22,5	47,1	67,2

*1951

Source: Gerhard Naeher, Stirbt das gedruckte Wort?, Ulm 1982, pp. 141-142, 113.



Television (licences)
Radio (licences)
Daily newspapers (circulation)
Specialist periodicals (circulation)
Large circulation periodicals (circulation)
Books (new publications) - in thousands of titles

Annex 14

Britain

Press and television advertising revenue

1952 - 82

Source: New Communications Developments, A manual by The European Association of Advertising Agencies, Brussels, November 1983, p. 21 d.

Britain

Media	1952	1956*	1960	1964	1968
National Newspapers	20	38	64 (19.8%)	86 (20.7%)	99 (19.7%)
Regional Newspapers	38	58	77 (23.8%)	98 (23.6%)	121 (24.1%)
Magazines & periodicals	23	32	40 (12.4%)	46 (11.1%)	50 (9.9%)
Trade & Technical journals	20	22	31 (9.6%)	37 (8.9%)	46 (9.1%)
Directories	1	2	2 (0.6%)	3 (0.7%)	8 (1.6%)
Total press	**72**	**118**	**214**	**270**	**324**
Television	—	11	72 (22.3%)	102 (24.5%)	126 (25.6%)
Poster & transport	10	15	16 (5.0%)	18 (4.3%)	20 (4.0%)
Cinema	3	4	5 (1.5%)	6 (1.4%)	6 (1.2%)
Radio	1	1	1 (0.3%)	2 (0.5%)	1 (0.2%)
Total	**123**	**197**	**308**	**398**	**480**

Media	1972	1976**	1978	1980	1981
National Newspapers	130 (19.4%	197 (16.6%)	295 (16.7%)	426 (16.7%)	1,564 (44.5%)
Regional Newspapers	188 (26.5%)	331 (27.9%)	483 (26.3%)	640 (25%)	1,564 (44.5%)
Magazines & periodicals	60 (8.5%)	92 (7.7%)	143 (7.8%)	192 (7.5%)	564 (20%)
Trade & Technical journals	61 (8.6%)	103 (8.7%)	169 (9.2%)	214 (8.4%)	564 (20%)
Directories	15 (2.1%)	31 (2.6%)	50 (2.7%)	82 (3.2%)	564 (20%)
Total press	**454**	**754**	**1,140**	**1,554**	**1,676**
Television	176 (24.9%)	307 (25.8%)	482 (26.3%)	692 (27.1%)	809 (28.7%)
Poster & transport	26 (3.7%)	43 (3.6%)	68 (3.7%)	107 (4.0%)	115 (4.1%)
Cinema	7 (1.0%)	8 (0.7%)	13 (0.7%)	18 (0.7%)	17 (0.6%)
Radio	1 (0.1%)	(1.5%)	35 (1.9%)	54 (2.1%)	59 (2.1%)
Total	**664**	**1,130**	**1,747**	**2,425**	**2,818**

£ million Figures exclude press production costs.
* Introduction of advertising on television.
** Introduction of advertising on radio (all prior figures for expenditure on radio relate to RTL or pirate radio).
Figures in brackets express percentage. Other media not covered bring percentage to 100% in each year.

Source: AA and IPA.

France

Press and television advertising revenue

1967 - 82

Source: New Communications Developments, A manual by The European Association of Advertising Agencies, Brussels, November 1983, p. 21 c.

Table (a) France

	Press (million francs)	% of total advertising	Television (million francs)	% total advertising
1967	2,280	78	—	—
1968	2,369	77	67	2
1970	2,901	71	436	11
1972	3,400	69	601	12
1974	3,897	66.5	715	12
1976	4,730	62	1,075	14
1978	5,960	61	1,400	14.5
1980	8,010	59.5	1,905	14.5
1982	10,310	58.5	2,886	16

Note: This table appears to show a steady erosion of potential press revenue by television advertising, although in real terms press has kept increasing above inflation. The second example below shows the increase in press revenue which provides a concrete example of a healthy revenue potential. The source is AACP and IREP Le Marché Publicitaire Français.

Table (b) France
Press advertising revenue 1974-82

	1974	1976	1978	1980	1982
Parisian Daily Press	664 (– 5%)	720 (+ 9%)	835 (+ 6.5%)	1,050 (+15%)	1,290 (+14%)
Regional Daily Press	1,183 (+10%)	1,560 (+10%)	1,890 (+10%)	2,560 (+20%)	3,100 (+12%)
Magazines	995 (– 0.5%)	1,170 (+20%)	1,555 (+11%)	2,220 (+19%)	3,160 (+17%)
Other forms of press	1,055 (+ 6%)	1,280 (+16%)	1,640 (+10%)	2,180 (+20%)	2,769 (+14%)
Total (million F. Francs)	**3,897 (+ 4%)**	**4,730 (+14%)**	**5,920 (+10%)**	**8,010 (+19%)**	**10,310 (+14.5%)**

Italy

Advertising expenditure

Market shares of advertising media

Rates of increase in market share

1980-1983

Source: Birgid Rauen, Platz für zwei Networks:
Medienkonzentration in Italien,
Media Perspektiven 1984, p. 161 (pp. 167-168)

Table 1

Advertising expenditure of the Italian advertising industry in thousand million lire

Medium	1980	1981	1982	1983
Newspapers	347	446	1 065,3	1 213,4
Periodicals	356	349		
RAI-TV	149,5	215	285,2	357
Private TV	144	230	465,3	555
RAI radio	43	48	60,5	75
Private radio	26	27	40,2	45,2
Foreign TV	27	16	139,6	141,8
Foreign radio	6	7		
Cinema advertising	23	26		
Poster advertising	80	98		
Total	1 201,5	1 497	2 056,1	2 387,4

Table 2

Percentage market shares of Italian advertising media

Medium	1980	1981	1982	1983
Newspapers	28,9	29,8	51,8	50,9
Periodicals	29,6	26,5		
RAI-TV	12,4	14,3	13,9	15
Private TV	12	16	22,6	23,2
RAI radio	3,5	3,2	2,9	3,1
Private radio	2,1	1,8	2,0	1,9
Foreign TV	2,2	1,0	6,8	5,9
Foreign radio	0,5	0,4		
Cinema advertising	1,9	1,8		
Poster advertising	6,7	5,5		
Total	100,0	100,0	100,0	100,0

Table 3

Percentage increases in market share of advertising media

Medium	1981	1982	1983
Press (newspapers, periodicals)	+ 22,7	+ 21,0	+ 14,0
RAI-TV	+ 46,2	+ 30,6	+ 25,2
Private TV	+ 77,1	+ 82,5	+ 19,3
RAI radio	+ 8,3	+ 28,2	+ 24,0
Private radio	+ 9,1	+ 11,7	+ 12,4
Other (cinema, poster advertising, foreign broadcasters)	+ 1,4	./. 4,1	+ 16,1
Total	+ 28,5	+ 29,9	+ 16,1

Permitted television advertising time as a percentage of daily transmission time

Country/television organization	Television advertising time as a percentage of daily transmission time		
	Broadcaster mainly financed by		
	Advertising	Licence fees	Licence fees and advertising
BELGIUM RTBF 1 + 2		No advertising time	
BRT 1 + 2		No advertising time	
DENMARK Danmarks Radio		No advertising time	
GERMANY ARD I. Programm			17.4% (1)(b)(c) 3.1% (2)(b)(c)
ZDF 2. Programm			16.7% (3)(b)(c) 3.2% (4)(b)(c)
III. Programme (BR, HR, WDR, NDR/RB/SFB, SR/SDR/SWF)			
Baden-Wurttemberg	5% (a)		
Bavaria Draft law on trials of the media	20% (a)		
Basic agreement on the Munich cable pilot project	Unlimited		
Berlin Draft law on cable pilot project	15% (a)		

(a) Maximum percentage, or minutes of advertising time per hour of transmission time expressed as a percentage.

(b) Other maximum limit, expressed as a percentage of transmission time.

(c) Actual advertising transmission time.

Country/television organization	Television advertising time as a percentage of daily transmission time Broadcaster mainly financed by		
	Advertising	Licence fees	Licence fees and advertising
GERMANY (cont'd)			
Lower Saxony Draft Land broadcasting law	20% (a)		
Rhineland-Palatinate Land law concerning an experiment with broad band cable	20% (a)		
Schleswig-Holstein Draft Land broadcasting law	20% (a) and a maximum of 25% per hour		
Saarland Draft Land broadcasting law	20% (a) and a maximum of 25% per hour		
FRANCE			
TF 1			9.2% (5)(b)(c) 3.25% (6)(b)(c)
A 2			9.2% (5)(b)(c) 3.4% (6)(b)(c)
FR 3			2.75% (6)(b)(c)
GREECE			
ERT 1			7% (a)
ERT 2			7% (a)

(a) Maximum percentage, or minutes of advertising time per hour of transmission time expressed as a percentage.

(b) Other maximum limit, expressed as a percentage of transmission time.

(c) Actual advertising transmission time.

Country/television organization	Television advertising time as a percentage of daily transmission time		
	Broadcaster mainly financed by		
	Advertising	Licence fees	Licence fees and advertising
IRELAND RTE 1 RTE 2			10% (a) and a maximum of 12.5% per hour 10% (7)(c) and a maximum of 12.5% per hour
ITALY RAI Rete 1 Rete 2 Rete 3 Private television stations	Unlimited		5% (a) 5%(a)
LUXEMBOURG RTL RTL - Plus	Unlimited, but self-imposed restriction of 20% Unlimited, but self-imposed restriction of 20%		
NETHERLANDS Nederland 1 Nederland 2			4.3% (8)(b) 5.0% (8)(b)
UNITED KINGDOM BBC 1 BBC 2 ITV Channel 4	10% (9)(a) and a maximum of 11.67% per hour 10% (9)(a) and a maximum of 11.67% per hour	No advertizing time No advertising time	

(a) Maximum percentage or minutes of advertising time per hour of transmission time expressed as a percentage.

(b) Other maximum limit, expressed as a percentage of transmission time.

(c) Actual advertising transmission time.

Notes and comments

(1) As a proportion of programmes between 18.00 and 20.00, the only period within which advertising is broadcast. ARD, Jahrbuch 1983, Hamburg 1983, p. 389.

(2) As a proportion of all programmes (total daily transmission time) including advertisement-free times before 18.00 and after 20.00. Apart from programmes between 18.00 and 20.00, the only period within which advertising is broadcast, the average daily transmission time of the Erstes Programm, excluding morning broadcasts, amounted to 8 hours 55 minutes in 1982, ARD Jahrbuch, loc. cit. p. 381.

(3) As a proportion of programmes between 17.30 and 19.30, the only period within which advertising is broadcast. ZDF, Jahrbuch 1982, Mainz 1983, p. 113, and our own calculations.

(4) As a proportion of all programmes (total daily transmission time), including advertisement-free times before 17.30 and after 19.30. The average transmission time, excluding morning broadcasts, amounted to 10 hours 28 minutes in 1982, ZDF Jahrbuch 1982, loc. cit. p. 103.

(5) As a proportion of the periods ("creneaux") between 12.15 and 13.30 and between 19.00 and 22.45. Advertising broadcast at other times is not subject to the maximum limit of 24 minutes per day.

(6) As a proportion of all programmes (total daily transmission time). Annual transmission time in 1983 was as follows:

TF 1: 4 264 hours
A 2: 4 480 hours
FR 3: 1 868 hours (nationally).

In the same year, annual advertising transmission time was as follows:

TF 1: 8 318 minutes 50 seconds (of which 772 minutes 43 seconds was collective advertising)
A 2: 9 057 minutes (of which 854 minutes was collective advertising)
FR 3: 3 082 minutes 21 seconds (of which 371 minutes 14 seconds was collective advertising).

(7) RTE, Annual Report 1981, Dublin 1981, statistics, no page number.

(8) As a proportion of all programmes (total daily transmission time). Annual transmission time in 1981 was as follows:

Nederland 1: 2 556 hours, 7 minutes
Nederland 2: 2 168 hours, 44 minutes
NOS, Jaarsverslag, 1981, Hilversum 1982, p. 60. The daily advertising transmission time is 18 minutes each for Nederland I and Nederland 2.

(9) No figures laid down by law. The IBA stipulates the maximum amounts on the basis of qualitative criteria contained in the Broadcasting Act 1981 (Section 9(5)).