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PLURALISM AND MEDIA CONCENTRATION

IN THE INTERNAL MARKET

An assessment of the need for Community action

Commission Green Paper

NOTICE TO THE READER.

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

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

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

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

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

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S U M M A R Y

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION 1

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

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

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

QUESTION 2

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

QUESTION 3

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

QUESTION 4

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

QUESTION 5

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

QUESTION 6

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

QUESTION 7

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

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

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

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

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

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

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

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

2 Resolution on media concentration and diversity of opinions, Resolution A3-0153/92/corr.

3 Paragraph 27.

4 COM(90) 78 final.

5 "Study on pluralism and concentration in media - economic evaluation", Booz-Allen & Hamilton; February 1992; This study will be made available by the Commission on request by fax or mail to the following address: Commission of the European Communities, DG III/F-5, Media and Data Protection Unit, N-9, 6/11; 200, rue de la Loi, B - 1049 Brussels, Belgium; Fax: 32-2-295 02 81.

Part One

OUTLINE OF THE ISSUE

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

I. THE CONCEPT OF PLURALISM

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

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

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

7 The French Law of 30 September 1986.

8 Italy, Law of 6 August 1990; Spain, Law of 3 May 1990; Luxembourg, Law of 27 July 1991, Portugal, Law of 7 September 1990.

9 Luxembourg, Law of 27 July 1991.

10 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

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

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

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

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

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

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

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

¹¹ In particular in France and Germany (see Annex). In the United States of America too, the Supreme Court has ruled that the right of viewers takes precedence over the right of broadcasters, and that the diversity of opinion on the airwaves serves First Amendment values. In Red Lion Broadcasting v the Federal Communications Commission (FCC) (1969), the Court made the explicit point, with regard to the First Amendment, that "it is the right of the viewers and listeners, not the right of broadcasters, which is paramount" (a concept which is close to the "rights of others" in the European Convention on Human Rights) and, since frequencies are limited, "no one has a First Amendment right to a licence". In Metro Broadcasting v FCC (27 June 1990), concerning the FCC's policy of promoting the racial and ethnic pluralism of programmes by increasing the diversity of radio broadcasting ownership through "minority ownership policies", the Supreme Court ruled that "the diversity of views and information on the airwaves serves important First Amendment values". Lastly, in Post Company National Citizens Committee for Broadcasting (12 June 1978) concerning a cross-media ownership rule of the FCC's (radio-TV/daily news in a same community), the Court held that the rule "did not violate First and Fifth Amendment rights of newspaper owners". As regards the cross-ownership rule which it drew up in 1975, the FCC explained that "the premise is that a democratic society cannot function without the clash of divergent views. (...) If our democratic society is to function, nothing can be more important than ensuring that there is a free flow of information from as many divergent sources as possible" (50 FCC 2nd, Par. 111).

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

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

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

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

¹³ Thus, entertainment programmes could cause real problems of diversity of information if the only fictional works which the public could watch were ones in which the villains were always played by coloured actors.

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

CONCLUSION

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

II. PLURALISM AND CONCENTRATION

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

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

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

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

¹⁴ It would indeed be necessary to take account of all the editorial characteristics of the medium in question (such as type of medium, type of programme or column, editorial opinions, frequency and duration of broadcast or circulation, etc.) and also to see whether the consumer, given actual media consumption patterns, genuinely benefits from such diversity (Does he have access to it? Is the diversity of opinions in society and among consumers reflected? etc.).

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

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

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

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

¹⁵ In Spain, for example, Fininvest, Javier la Rosa and BOCE each have a 25% holding in Telecinco. In France, the Hachette Group and Reteitalia (Berlusconi) each had a 25% holding in La Cinq.

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

CONCLUSION

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

